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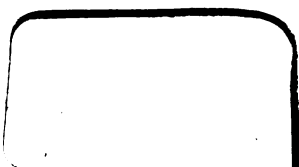


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# The Encyclopedic Digest of Virginia and West Vir- ginia Reports

BEING A COMPLETE

Encyclopedia and Digest of all the Virginia and West Vir-  
ginia Case Law up to and including Vol. 103  
Virginia Reports and Vol. 55 West  
Virginia Reports

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UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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0

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## **XI. View by Jury, 64.**

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#### CROSS REFERENCES.

See the titles AGREED CASE, vol. 1, p. 283; APPEAL AND ERROR, vol. 1, p. 418; ARBITRATION AND AWARD, vol. 1, p. 687; ARGUMENTS OF COUNSEL, vol. 1, p. 713; AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181; CASE CERTIFIED OR RESERVED, vol. 2, p. 728; CHANGE OF VENUE, vol. 2, p. 780; COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1; CONSTITUTIONAL LAW, vol. 3, p. 140; CONTEMPT, vol. 3, p. 236; CORONERS, vol. 3, p. 508; CRIMINAL LAW, vol. 4 p. 1; DAMAGES, vol. 4, p. 162; DEMURRER TO THE EVIDENCE, vol. 4, p. 514; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 683; EMINENT DOMAIN, vol. 5, p. 66; GRAND JURY, vol. 6, p. 742; HABEAS CORPUS, vol. 7, p. 1; IMPROVEMENTS, vol. 7, p. 317; INSPECTION AND PHYSICAL EXAMINATION, vol. 7, p. 701; INQUESTS AND INQUIRIES, vol. 7, p. 656; ISSUES TO THE JURY, vol. 8, p. 43; JUSTICES OF THE PEACE; NEW TRIALS; OATH; OBSTRUCTING JUSTICE; OPEN AND CLOSE; QUESTIONS OF LAW AND FACT; SECOND TRIAL; VERDICT.

### I. Definition.

A common-law jury, *ex vi termini*, is a body of twelve competent men, selected in the mode prescribed by law to determine, on oath and in a legal tribunal, the facts in a case from the evidence presented to them. *Barlow v. Daniels*, 25 W. Va. 512.

## II. Constitution of Jury.

### A. IN GENERAL.

A jury for the prosecution of a person under W. Va. Code, ch. 149, §§ 16, 17, relative to "Sabbath breaking," should be formed in the manner in which juries in civil suits are formed under the statute. *State v. Baltimore*, etc., R. Co., 15 W. Va. 362.

### B. NUMBER OF JURORS.

#### 1. In General.

Where the constitutional provision of a state is that a party shall be tried by a jury of twelve men, a trial by a jury composed of thirteen men is erroneous, and their verdict should be set aside. But a verdict rendered by eleven, instead of twelve jurors, is

valid, where it appears that the parties consented in open court to a trial by eleven. *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228; *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367.

"In case of a trial by the petit jury it can be by no more nor less than twelve, and all assenting to the verdict." *Lovings v. Norfolk*, etc., R. Co., 47 W. Va. 582, 35 S. E. 962, quoting 2 Hale P. C. 161.

#### 2. In Justice's Court.

Under the provisions of § 2023 of the West Virginia Code relating to jury trial in a justice's court, a trial by six jurors is allowed if demanded.

#### 3. In Circuit Court.

On the trial of an appeal, in the circuit court, from the judgment of a justice, where the amount in controversy exceeds \$20, if required by either party, a jury of twelve men shall be selected and impaneled to try the case in like manner as other juries are selected and impaneled in the circuit court. *Lovings v. Norfolk*, etc., R. Co., 47 W. Va. 582, 35 S. E. 962.

Section 169, ch. 50, of the Code of West Virginia, in so far only as it authorizes a jury of six men to try in the circuit court appeals from judgments of justices, is unconstitutional and void. *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 382, 35 S. E. 962. See the title APPEAL AND ERROR, vol. 1, pp. 418, 465.

#### 4. Trial Where Property Escheated.

See generally, the title ESCHEAT, vol. 5, p. 142.

Prior to the act of 1794, upon an inquest of office, respecting property escheated or forfeited to the commonwealth, the jury might have been composed of twelve jurors, or of a greater or smaller number. *Bennet v. Com.*, 2 Wash. 154. See also, Va. Code, 1887, § 2376.

#### C. MIXED JURIES.

In *Ex parte Virginia*, 100 U. S. 313 (1880), where the construction of the Virginia laws relative to race discrimination in composing juries, presented itself to the supreme court of the United States, the plaintiff in the case being a negro, who had demanded in the state court that he be tried by a jury composed of one-third or other portion of his own color, which was refused, Justice Strong, rendering the opinion of the court, declared that the denial of the motion for a mixed jury, was not a denial of a right secured to the defendant by any law providing for equal civil rights of the citizens of the United States, or by any statute, or by the fourteenth amendment; a mixed jury in a case not being essential to the equal protection of the laws. And, while it is a right to which any colored man is entitled, in the selection of jurors to pass upon his life, liberty or property, that there shall be no exclusion of his race, or discrimination against them because of their color, yet such right is a different thing from the right claimed, and denied in the state court, viz., a right to have the jury composed in part of colored men.

Thus declaring, in the opinion of the supreme court of the United States, that the constitution and laws of Virginia neither discriminate against nor exclude colored men from service on juries—and that the right to demand a jury trial does not also include the absolute right to demand a mixed jury. See also, *Lawrence v. Com.*, 81 Va. 464; *Mitchell's Case*, 33 Gratt. 845; *Virginia v. Rives*, 100 U. S. 338.

But the West Virginia act of 1872-73, p. 102, provided as follows: "All white male persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors, except as herein provided." In construing this statute, Justice Strong of the United States supreme court said: "The statute of West Virginia, which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law as jurors, because of color, though qualified in all other respects, is, practically, a brand upon them affixed by the law, and is a discrimination against that race, forbidden by the 14th amendment of the United States Constitution. It is a denial of the protection of the law to the race thus excluded, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of the jury is a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds." *Strauder v. State of West Virginia*, 100 U. S. 303.

A county court in overruling a motion to quash a writ because the jury were composed of colored men, assigned as a reason that both the prosecutrix and the prisoner were colored, and that the jury was composed of intelligent colored men qualified as jurors. Held, that this was not proof that the court intentionally summoned those persons because they were col-

ored, and the motion was properly overruled. *Coleman v. Com.*, 84 Va. 1, 3 S. E. 878.

In exercising such discretion the court may properly refuse to summon a jury from another county because of local prejudice, until an effort to obtain an impartial jury has failed. *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512.

#### D. JURY FROM FOREIGN JURISDICTION.

See generally, the titles CHANGE OF VENUE, vol. 2, p. 780; NEW TRIALS.

**Right in General.**—The court before which the prisoner is arraigned for trial, if qualified jurors not exempt from serving can not be conveniently found in the county or corporation, may send to another county or corporation for such jurors. *Craft v. Com.*, 24 Gratt. 602; *Lawrence v. Com.*, 81 Va. 484; *Page v. Com.*, 27 Gratt. 954; *Chahoon v. Com.*, 21 Gratt. 822.

**How Summoned.**—In directing jurors to be summoned from another county, the court may make an order directing its officers to summon them, or may direct the clerk to issue a venire facias, requiring the officer to summon them. *Craft v. Com.*, 24 Gratt. 602; *Lawrence v. Com.*, 81 Va. 484.

**What Constitutes a Foreign Jurisdiction.**—In the sense of the law all parts of the adjoining county, outside of the limits of the corporation, is remote from the place where the offense is alleged to have been committed, if it is alleged to have been committed within the limits of a corporation. *Craft v. Com.*, 24 Gratt. 602; *Lawrence v. Com.*, 81 Va. 484.

**On What Issues Allowed.**—Under Va. Code of 1873, ch. 202, § 10, the court may direct jurors to be summoned from another county or corporation for the trial of a prisoner upon the issue of the plea of autrefois acquit, as well as on the general issue. *Page v. Com.*, 27 Gratt. 954.

#### Matter of Discretion with Court.

When acting in such case the court must have large discretion; and the question as to whether the jury should be summoned from abroad, is for the trial court to determine. *Chahoon v. Com.*, 21 Gratt. 822; *Page v. Com.*, 27 Gratt. 954. And the appellate court will presume that the trial court acted rightly in the matter, unless the contrary plainly appears. *Page v. Com.*, 27 Gratt. 954.

**Necessity of Second Venire Facias before Order Summoning.**—The regular term of the court having been spent, and only one of the veniremen summoned to try a prisoner, having been found free from exception, the court discharged him, and being of opinion that jurors qualified to serve could not be gotten in the county, made an order directing the sheriff to summon thirty persons from each of two corporations, to attend as jurors for the trial of the prisoner at a special term of the court appointed to be held, and to which the court adjourned. Held, that it was not necessary to have another venire facias for summoning jurors from the county, returnable to the special term, before making the order to summon jurors from abroad; and there was no error in directing jurors to be summoned from two counties or corporations at the same time. *Wormeley v. Com.*, 10 Gratt. 658.

**Motion.**—In making a motion to obtain a jury from another county it should always precede a motion for a change of venue. *Waller v. Com.*, 84 Va. 492, 5 S. E. 364.

#### E. JURIES DE MEDIETATE LINGUÆ.

**History of Statute.**—The statute of 1788, ch. 67, for establishing district courts and regulating the general court, provided, that juries de medietate linguæ might be directed by the district courts. 12 Hen. Stat. at large, p. 746. At the revisal of 1792, the provision

was made general; the statute concerning juries providing, that "juries de medietate linguæ may be directed by the courts respectively." Rev. Code of 1792, Pleasant's Ed. of 1803, ch. 73, § 13, p. 101. And the revised statute of 1819, concerning juries, reenacted the provision in the same words. 1 Rev. Code of 1819, ch. 75, § 13, p. 266. See note to *Richards v. Com.*, 11 Leigh 690.

**Direction Discretionary.**—The statute, 1 Rev. Code, ch. 75, § 13, that "juries de medietate linguæ may be directed by the courts respectively," is not imperative that the courts shall direct such a jury in cases, even of a criminal nature, in which aliens are parties, but confers a discretionary power on the courts to direct such jury, if to them it appears proper. *Richards v. Com.*, 11 Leigh 690; *Brown v. Com.*, 11 Leigh 711. See also, *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

Thus in a prosecution for murder, the mere circumstance of the prisoner being an alien and ignorant of the language, is not sufficient to require the court, in the exercise of a sound discretion, to direct such a jury. *Brown v. Com.*, 11 Leigh 711.

### III. Right to Trial by Jury.

#### A. GENERAL CONSIDERATION.

##### 1. Nature of the Right.

Trial by the jury is a sacred right and should be sedulously guarded. The jury should not only be kept from all extraneous influences in reaching their verdict, but the court itself should be careful not to trench upon their province. They should not be coerced, by threat or otherwise, into finding a verdict; for a verdict resulting from coercion could not be allowed to stand. The verdict should be the untrammelled expression of the concurrence of individual judgments. But a reasonable time, to be determined by the circumstances of the case, should be allowed

the jury for the performance of their duty, and they should be kept together until the trial court is satisfied that they have made an honest effort to agree, and can not, from a conscientious difference of judgment. Great latitude is allowed the trial court as to the length of time the jury shall be kept together, and, unless it is a clear case of abuse of such discretion, the verdict will not be disturbed on the ground of coercion. But it is a safer and better practice for the trial court to refrain from any expression of opinion, which may be claimed to savor of threat or coercion, as to the time the jury will be kept together if a verdict is not sooner rendered. *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830.

The provisions of the constitution that the right of trial by jury in suits at common law, if required by either party, shall be preserved, was intended to preserve a jury trial, if asked, in all cases; that is, in all matters of such nature as would support a demand for a jury by the law in force at the time of the constitution. It was not designed to extend the right to new matters of a nature not then supporting a demand for a jury. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

"By common law they meant what the constitution denominated in the third article 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Barlow v. Daniels*, 25 W. Va. 512, quoting *Story, J.*, in *Parsons v. Bedford*, 3 Pet. 446.

"The phrase 'common law,' found in the seventh amendment (to the constitution of the United States) is used in contradistinction to equity and admiralty jurisprudence." *Barlow v. Daniels*, 25 W. Va. 512, quoting *Story, J.*, in *Parsons v. Bedford*, 3 Pet. 446.

### 2. May Be Had in Justice's Court.

Under the special provisions of the statute a jury may be had in a justice's court. W. Va. Code (1906), § 2023.

### 3. In Appellate Court.

See post, "Jury Trial in Appellate Court," III, C, 3, b.

### 4. Necessity of Demand.

Under the provisions of § 2023 of the West Virginia Code (1906) a trial by a jury of six may be had in certain specified cases if demanded.

"Our constitution, as will be seen, declares in express terms that 'the right of trial by jury, if required by either party, shall be preserved.' This right, in nearly the same language as that employed in the constitution, and used in the common law as it existed in this state at the time our constitution was adopted, is enforced by our statute." *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296, 4 S. E. 654.

### 5. Conditioned upon Deposit of Jury Fees.

The constitutionality of § 19 of the act providing for depositing jury fees before a jury could be had, can not be raised in a case where a jury was waived. *Rutter v. Sullivan*, 25 W. Va. 427.

## B. CONSTITUTIONAL AND STATUTORY GUARANTIES.

### 1. Virginia Constitution, Art. 1, § 11.

The constitution of Virginia, art. 1, § 11, provides that in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.

### 2. West Virginia Constitution, Art. 2, § 13.

In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to

the rules of the common law. West Virginia Const., Anno. (1906), art. 3, § 13.

### 3. West Virginia Code (1906), § 2023.

Either party to a civil action before a justice, when the value in controversy or the damages claimed exceed twenty dollars, or the possession of real estate is in controversy, shall be entitled, under the regulations prescribed in the Code, to a trial by six jurors, if demanded. W. Va. Code (1906), § 2023.

### 4. Federal Distinguished from State Courts.

Section 3, art. 3, of the constitution of the United States, declaring that the trial of crimes shall be held in the state where they shall have been committed, and amendment 6 to the same instrument, providing that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, apply only to offenses against the United States, and to proceedings in its courts, and not to an offense against the state and to a prosecution therefor in the state courts. *Ex parte McNeely*, 36 W. Va. 84, 14 S. E. 436; *Brown v. Epps*, 91 Va. 726, 21 S. E. 119; *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

But the articles of the Virginia and West Virginia constitutions which provide that a man has a right to a speedy trial by an impartial jury means that he has a legal claim to a trial by jury—that a jury trial is his privilege. But the presence of a jury is not made a jurisdictional fact, without which a court is not duly organized for the trial of criminals as is the case in all of the United States courts. *Brown v. Epps*, 91 Va. 726, 21 S. E. 119; *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

### 5. Construction of Constitutional Provisions.

See generally, the titles CONSTI-

TUTIONAL LAW, vol. 3, p. 140; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 856.

A constitutional provision which guarantees the right of a trial by jury must be read in the light of the circumstances under which it is adopted. If the right did not then exist, the constitution does not confer it, unless it be expressly so provided, or necessarily implied. *P'llow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32.

### C. SCOPE AND MEANING OF RIGHT.

#### 1. In General.

"In what does the right of trial by jury consist? The constitution furnishes no answer. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind. It was unnecessary to define this great right. It there stood as the representative of an idea as certain and definite as any other in the whole range of legal learning. \* \* \* By the common law the number of jurors must be twelve. They must be impartially selected, and must unanimously concur in the verdict." *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962.

"Trial by jury in the primary and usual sense of the term at the common law and in the American constitutions is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts, and, except upon acquittal upon a criminal charge, to set aside their verdict if, in his opinion, it is against the law or the evidence." *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35 S. E. 962.

"What constitutes the jury, the right of trial by which is so sacredly preserved? It means and can only mean the common-law jury of 'twelve good and lawful men.'" *Lovings v. Norfolk, etc., R. Co.*, 47 W. Va. 582, 35

S. E. 962. See ante, "Number of Jurors," II, B.

#### 2. In Civil Proceedings.

##### a. Issues, Motions and Actions, Legal or Equitable.

##### (1) Issues Determinable by Inspection of Record.

An issue to be determined by inspection of the record must be tried by the court, not by a jury. *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

##### (2) Submission of Issues Discretionary.

Submitting to the jury under the West Virginia Code, § 5, ch. 131, "particular questions of fact" is within the discretion of the trial court subject to review, but it is not erroneous to refuse to permit such questions to be propounded when they are immaterial or irrelevant, and unless the answers thereto, if contrary to the general verdict, would control the same, and be conclusive of the issue. *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009, affirmed in *Wheeling, etc., Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 10 Supreme Court 301, 34 Law Ed. 967.

Where under § 24 of ch. 106 of the West Virginia Code, a claimant of the property files a petition, unless the petition and the accompanying exhibits show a legal or equitable claim to the property, the court does not err in refusing to impanel a jury to inquire into the claim. *Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 324.

##### (3) Application of Right to Equity Causes.

**General Consideration.**—See the title ISSUES TO THE JURY, vol. 8, pp. 43, 63.

The clause of the constitution providing that the right of trial by jury of suits at common law, if required by either party shall be preserved, does not apply to suits in equity in matters involving equitable jurisdiction, whatever the nature or amount of the demand, except where the same is prescribed by law. Va. Const. (1902), art.

1, § 11; *W. Va. Const.*, art. 2, § 13; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Pillow v. Southwest Virginia, etc., Co.*, 92 Va. 144, 23 S. E. 32; *New York Life Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. 941; *Broderick v. Broderick*, 28 W. Va. 379.

When there is a ground of equitable jurisdiction, as fraud or other grounds, then chancery can try without a jury any matter, though it be of a legal nature, and such as would call for it if it stood alone, and not incidental to relief in a suit properly brought in equity. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

But if there be no ground of equitable relief the legislature can not enact that a matter giving the right to have a jury under the law at the adoption of the constitution may be taken cognizance of by a court of equity or any other court not using a jury and thus deprive the party of trial by jury against his protest. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Barlow v. Daniels*, 25 W. Va. 512; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557.

As the guarantee does not extend the jury to subjects not calling for it at the date of the adoption of the constitution, it follows that if, at that date, a court of equity, under the then existing law, exercised jurisdiction upon a given matter its continued exercise of jurisdiction does not infringe upon the right under the constitution. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216. See post, "Denial or Infringement of Right," III, D.

**Changing Form of Action.**—Section 1, ch. 106, of the West Virginia Code, 1887, providing that an attachment may be sued out in equity for the recovery of damages for a wrong, is not unconstitutional on the ground that it contravenes art. 3, § 13, of the constitution, which declares that "in suits at common law, \* \* \* the right of trial by jury, if required by either party, shall be preserved," since such

suit is not a suit at common law but a suit in equity. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

"But assuming that the legislature has not the power to deprive a party of the right of trial by jury, by simply changing the form of action, and giving a court of equity jurisdiction over a purely legal demand, the question still remains, does this statute necessarily deprive a party of a trial by jury? We have a statute which provides for a trial by jury in any chancery case, when there is a conflict of evidence 'or an injury of damages.' Sections 4, 5, ch. 131, Code, 1887. In this case, therefore, the appellants, or either of them, if they had required it, could have a trial by jury, but none of them asked for such trial. I do not think, therefore, that the aforesaid statute is unconstitutional." *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

**When Right to Demand Jury Optional with Party.**—Where a statute provides that an attachment may be sued out in a court of equity for a debt or claim, legal or equitable, arising out of contract, or to recover damages for any wrong, and another statute provides for a trial by jury in any chancery case, when there is a conflict of evidence, or an inquiry of damages, the former statute can not be deemed unconstitutional as contravening art. 3, § 13, of the constitution, declaring that in suits at common law, the right of trial by jury, if required by either party, shall be preserved, as the parties, if they shall require it, can have a trial by jury. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55. See also, *W. Va. Code*, 1887, § 1, ch. 106; *W. Va. Code*, 1887, ch. 131, §§ 4, 5.

**Trial of Adverse Claims to Freehold.**—The trial of adverse claims to freehold calls for a jury trial, and therefore it is plain that no legislature can, after the adoption of the constitution giving such jury right, vest in chancery, for trial without jury, the decision of adverse claims to the land,

if, at its adoption, the law gave it that right; but if at that date, it does not call for a jury trial, it is different. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

Hence, when the Virginia constitutions of 1851 and 1869, and the constitutions of West Virginia of 1863 and 1872, were adopted, the statutes, Va. Code, 1887, § 2562, and W. Va. Code, 1891, ch. 79, § 1, authorizing a court of equity in a partition suit to settle all questions of law which may arise in the case, were a part of the Codes, and under the principles stated it would seem plain this power to try adverse claims to land in a partition suit would be consistent with the constitution, on the theory that the law involved in such suit was on the statute books when all of the above-mentioned constitutions were adopted, and had not been adjudged unconstitutional, but had been recognized as valid law. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32. See also, *Curran v. Sprauell*, 10 Gratt. 145; *Cosgray v. Core*, 2 W. Va. 353; *Hudson v. Putney*, 14 W. Va. 561.

It was contended in argument, but ruled to the contrary, that the statute did not authorize such suit where a defendant to the suit in possession of the land asserts an adverse claim, and denies the right of the claimants to partition. *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144, 23 S. E. 32.

**Operation of Rule When an Insurance Company Is a Party.**—When an insurance company is a proper party to a suit, and is properly before the court, any issue or issues raised by its pleadings as to its liability on the policies must be tried according to the principle and rule governing courts of equity in such cases. *Beverley v. Walden*, 20 Gratt. 147; *Walters v. Farmers' Bank*, 76 Va. 12; *New York Life Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. 941. An insurance company it not entitled to a jury trial as a matter of right, but, like other parties to suits

in equity, it is entitled to have a jury trial if the case made shows that such a trial is proper. *New York Life Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. 941.

**Suit by Officer for Salary Withheld—Act of November 24th, 1884.**—The act of assembly passed November 24th, 1884, acts (extra session) 1884, p. 90, requiring the auditor to withhold the salary of any officer who is indebted to the estate for money collected by him, or improperly drawn by him during his term of office, until the default is made good, and on petition therefor the suit shall be tried as one in chancery, is unconstitutional and void, so far as it affects constitutional officers, as it contravenes § 13, art. 1, of the constitution. *Blair v. Marye*, 80 Va. 485.

**Motion in Nature of Equitable Proceedings.**—A party has no absolute right to a trial by jury of an issue joined in a motion under ch. 115, Va. Code, 1873, it being in the nature of an equitable remedy, and the statute (ch. 163, § 8, Va. Code, 1873) not applying to motions which partake of the nature of an equitable proceeding to enforce a charge on real estate. *Pairo v. Bethell*, 75 Va. 825.

#### (4) Proceedings to Sell Forfeited Land.

Trial by jury is a matter of right, under W. Va. Code, 1899, ch. 105, § 18, in a proceeding by the state to sell forfeited land, when conflicting titles to land are to be tried, if there is a controversy of fact dependent on oral evidence, but not where there is no controversy depends entirely on documentary evidence. *State v. Jackson* (W. Va.), 49 S. E. 465, 473.

#### (5) Issues Raised by Pleadings in Action on Insurance Policy.

See ante, "Application of Right to Equity Causes," III, C, 2, a, (3).

#### (6) When Non Est Factum Pleaded to Action on Bond.

See the title FORTHCOMING AND DELIVERY BONDS, vol. 6, pp. 411, 436.



Where *non est factum* is pleaded to a motion on a forthcoming bond, the court may render judgment without the intervention of a jury; or they may impanel a jury to try the issue, at their discretion. *Burke v. Levy*, 1 Rand. 1; *Watson v. Alexander*, 1 Wash. 340.

**(7) When Relief Dependent on Matters of Fact.**

If, on a motion to quash an execution, or enter a judgment satisfied, the relief of the party depends on matters of fact, the court has a discretion to direct a jury to try the facts. *Smock v. Dade*, 5 Rand. 639.

**(8) Trial by Jury on Review of Justice's Judgment.**

See the title **APPEAL AND ERROR**, vol. 1, pp. 418, 655.

**(9) Motions.**

On motion, in Virginia, when an issue of fact is joined and either party desires it, or, when in the opinion of the court, it is proper, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than \$20, exclusive of interest. Va. Code, 1887, § 3213; *Clafin v. Steenbock*, 18 Gratt. 842; *Burke v. Levy*, 1 Rand. 1; *McKinster v. Garrott*, 3 Rand. 554. However, in a proceeding by motion to recover money under § 3211 of the Virginia Code, 1887, in order that the defendant may be entitled to a trial by jury, as provided by § 3212 of the Virginia Code, 1887, an issue must be made up. This issue may be tendered by a plea, or by an informal statement in writing of the grounds of defense. *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. 486.

**b. In Proceedings Other than Actions.**

**(1) Trial of Issues on Exception to Report on Guardian's Account.**

See generally, the title **GUARDIAN AND WARD**, vol. 6, p. 782.

The accounts of a guardian are, under the provisions of chapter 234, acts, 1872-73, settled before a commissioner of the county court, who reports a

balance due from the guardian to his ward, the guardian excepts to the report, and the questions raised by the exceptions are submitted by the court to a jury, which finds against the exceptor; the court approves said finding, confirms the report, and orders the same to be recorded by its clerk. Held, that the verdict of the jury in such proceeding does not come within the purview and protection of § 13, art. 3, of the constitution of this state. *Haught v. Parks*, 30 W. Va. 242, 4 S. E. 276.

**(2) Proceedings to Remove from Public Office.**

See generally, the titles **MANDAMUS**; **QUO WARRANTO**.

Under the provisions of ch. 48 of the West Virginia acts of 1897, providing that, on satisfactory proof of the charges made in writing, the court having jurisdiction shall remove any officer from the discharge of the duties of his office, the officer is not entitled to a jury trial. *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274.

**(3) Attachment Proceedings.**

See generally, the title **ATTACHMENT AND GARNISHMENT**, vol. 2, pp. 70, 115, et seq.

**(4) Appropriation of Land.**

See generally, the title **EMINENT DOMAIN**, vol. 5, pp. 66, 109, et seq.

**(5) Proceedings to Ascertain Losses in Impressment Cases.**

Where a petition was filed under the act of 1781 authorizing the county court to examine into impressments by executives and to certify the value of the losses, the proper mode of ascertaining the amount of the losses was held, to be by an issue triable by a jury. *Com. v. Cunningham*, 4 Call 331.

**(6) Judgment by Default—Writ of Inquiry of Damages.**

See generally, the title **JUDGMENTS AND DECREES**, vol. 8, p. 161.

According to the common law, as

recognized and settled in this state, there can be no final judgment by default in any action at law sounding in damages, in the absence of a writ of inquiry, either in the circuit court or before a justice, when the value in controversy or the damages claimed exceeds \$20, and the right of either party, if he demands it, to have such writ executed by a jury, is guarantied by our constitution. *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296, 4 S. E. 654.

### 3. In Criminal Prosecutions.

See ante, "Constitutional and Statutory Guaranties," III, B.

#### a. Constitutional and Statutory Provisions.

##### (1) Va. Constitution (1902), Art. 1, § 8.

In all criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he can not be found guilty; provided, however, that in any criminal case, upon a plea of guilty, tendered in person by the accused, and with the consent of the attorney for the commonwealth, entered of record, the court shall, and in a prosecution for an offense not punishable by death, or confinement in the penitentiary, upon a plea of not guilty, with the consent of the accused, given in person, and of the attorney for the commonwealth, both entered of record, the court, in its discretion, may hear and determine the case, without the intervention of a jury; and, that the general assembly may provide for the trial of offenses not punishable by death, or confinement in the penitentiary, by a justice of the peace, without a jury, preserving in all such cases, the right of the accused to an appeal to and trial by jury in the circuit or corporation court; and may also provide for juries consisting of less than twelve,

but not less than five, for the trial of offenses not punishable by death, or confinement in the penitentiary, and may classify such cases, and prescribe the number of jurors for each class. Va. Const. (1902), art. 1, § 8.

**Construction.**—Article 1, § 10, of the constitution of Virginia, declaring "that a man hath a right to a speedy trial by an impartial jury" means that he has a legal claim to a trial by a jury; that a jury trial is his privilege. But the presence of a jury is not made a jurisdictional fact, without which a court is not duly organized for the trial of criminals as is the case in all courts of the United States. "Speedy," as used in the constitution, is not "immediate," but "without undue delay." *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, explaining and distinguishing *Callan v. Wilson*, 127 U. S. 540.

##### (2) W. Va. Constitution, Art. 3, § 14.

Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense; and there shall be awarded to him compulsory process for obtaining witnesses in his favor. W. Va. Const., art. 3, § 14.

**Construction.**—See post, "Substitution of Court in Lieu of Jury," III, E, 3, a.

##### (3) Federal Constitution.

See ante, "Federal Distinguished from State Courts," III, B, 4.

#### b. Jury Trial in Appellate Court.

Though a charge or matter in the municipal or justice's court be one in respect of which a party is entitled by

the bill of rights to a trial by jury, yet if by an appeal clogged by no unreasonable restriction, he can have such a trial as a matter of right in the appellate court, this is sufficient and his constitutional right to trial by jury is not invaded by the summary proceeding in the first instance. *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, overruling *Miller v. Com.*, 88 Va. 618, 14 S. E. 161; *Jelly v. Dils*, 27 W. Va. 267; *Moundsville v. Fountain*, 27 W. Va. 182; *Beasley v. Beckley*, 28 W. Va. 81.

**c. Sabbath Breaking.**

And the constitutional right to trial by jury does not extend to a warrant before a justice for Sabbath breaking where the fine which can be imposed is only two dollars. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See also, *State v. Griggs*, 34 W. Va. 78, 11 S. E. 74.

**d. Permitting Slaves to Go at Large.**

Whether a master, charged, under the statute, 1 Rev. Va. Code, ch. 111, § 81, with having permitted his slave to go at large and hire himself out contrary to law, was entitled to demand that the fact should be tried by a jury was left a query in *Abrahams v. Com.*, 1 Rob. 676. But whether he had such right or not, yet if he appeared in court and made defense without demanding a trial by jury, and a judgment was thereupon rendered against him, he could not object in the appellate court that such trial was not awarded.

**e. Contempt Cases.**

See generally, the title CONTEMPT, vol. 3, p. 236.

The power of courts to punish for contempt is inherent, and a statute providing for a jury trial in case of contempt is unconstitutional. *Carter v. Com.*, 96 Va. 791, 32 S. E. 780; *Com. v. Deskins*, 4 Leigh 685; *Wells v. Com.*, 21 Gratt. 500; *State v. Frew*, 24 W. Va. 416. See also, *Dandridge's Case*, 2 Va. Cas. 408.

**f. Petit Larceny.**

See generally, the title LARCENY.

When a person is tried by a justice of the peace for a petit larceny, and convicted, he has an absolute right of appeal to the county court; and in that court the cause is to be heard de novo upon the evidence; and the accused is entitled to be tried by a jury as in like cases originating in that court. *Read v. Com.*, 24 Gratt. 618.

**g. Proceedings to Revoke Liquor License.**

See generally, the titles INTOXICATING LIQUORS, vol. 8, p. 1; LICENSES.

In proceedings to revoke liquor license, under § 106, ch. 206, acts of assembly 1874-75, p. 244, the defendant is not entitled to a trial by jury. The object is not punishment, but the revocation of privilege. It is a bar to the proceedings that it is founded on some act or offense wherefor the defendant has been formerly convicted. *Davis v. Com.*, 75 Va. 944; *Cherry v. Com.*, 78 Va. 375.

**h. Unlawful Gaming.**

See generally, the title GAMING, vol. 6, p. 692.

A defendant, presented for unlawful gaming, is entitled to trial by jury, although the superior court has tried the issue and given judgment for twenty dollars, the penalty prescribed by law. *Com. v. Horton*, 1 Va. Cas. 335.

**i. Trial by Separate Jury.**

Where several persons are proceeded against jointly for a felony before an examining court, and are sent on to the superior court for trial, the clerk of the county court should issue a separate venire facias for summoning a venire for the trial of each of them separately. *M'Whirt's Case*, 3 Gratt. 594.

**D. DENIAL OR INFRINGEMENT OF RIGHT.**

**1. Re-Examination Otherwise than by Rules of Common Law.**

Where the facts involved in the issue in a cause have been tried by a jury they can not otherwise be re-ex-

amined than according to the rules of the common law. If tried otherwise it would be a denial of the right of jury trial. *W. Va. Const. (1872), art. 3, § 13; Ensign Mfg. Co. v. McGinnis, 30 W. Va. 532, 4 S. E. 782; Barlow v. Daniels, 25 W. Va. 512; Hickman v. Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 654; Fouse v. Vandevort, 30 W. Va. 327, 4 S. E. 298.*

This provision was evidently taken from the seventh amendment to the constitution of the United States which was adopted in 1791, and is still in force as a part of the constitution. West Virginia is one of the few states, if not the only one, having this provision in its constitution. *Barlow v. Daniels, 25 W. Va. 512.*

## 2. General Legislative Power.

The legislature can not enact that a matter giving the right to have a jury under the law at the adoption of the constitution may be tried without a jury, or give jurisdiction of it to a court of equity or other courts not using a jury, unless there be some equitable ground of relief. *Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; Barlow v. Daniels, 25 W. Va. 512.*

**Changing Form of Action.**—It seems that the legislature has not the power to deprive a party of the right of trial by jury, by simply changing the form of action, and giving a court of equity jurisdiction over a purely legal demand. *McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55.*

## 3. Taking Away Right by Implication.

"The constitution declares, 'that the trial by jury is preferable to all others, and ought to be held sacred.' To go no farther, it may be affirmed, that this mode of trial is never to be taken away by implication, or without positive words in an act of assembly." *Watson v. Alexander, 1 Wash. 340, 356.*

## 4. Summary Proceedings When Right Given in Appellate Court.

See ante, "Jury Trial in Appellate Court," III, C, 3, b.

By the statute law of West Virginia the town of Moundsville is authorized to require a license of any person selling spirituous liquors in the town, and to pass an ordinance forbidding the sale of spirituous liquors in the town without such license having been obtained, and for a violation of such ordinance to impose a reasonable fine and imprisonment not exceeding thirty days; and this punishment may be imposed by the mayor of the town by a summary proceeding, but from his judgment an appeal lies to the circuit court, where the case may be tried de novo before a jury. Held, that the provisions of the statute law conferring these powers on the town of Moundsville do not violate any of the provisions of the constitution. *Moundsville v. Fountain, 27 W. Va. 182.*

## 5. Infringement by Court in Disturbing Verdict.

See generally, the title VERDICT.

When the injury sued for is alleged to have been caused by the defendant's negligent use of its corporate property, or in the discharge or omission to discharge a ministerial duty, the burden of proving negligence is on the plaintiff; and if the jury, by its determination, finds that the facts are not sufficient to sustain the charge of negligence, the court can not disturb the verdict, even though it be of a different opinion. To do so would be a denial of the right of trial by jury guaranteed by the constitution of this state. *Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447.*

## 6. Deprivation by Nonsuit.

See generally, the title DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 4, p. 683.

The court may deprive a party of his right to trial by jury, by ordering a nonsuit, but the plaintiff may refuse to suffer a nonsuit, and thus leave the whole to the jury. *Ross v. Gill, 1 Wash. 87; Thweat v. Finch, 1 Wash. 217, 219.*

### 7. Ascertainment by Court of Damages Where Jury Not Demanded.

Section 7, ch. 131, of the West Virginia Code, providing that the court when neither party requires a jury, may ascertain the amount that the plaintiff is entitled to recover in the action, and render judgment accordingly, is not repealed by § 35, ch. 47, of the acts of 1872-73, providing that parties may waive the right to have a jury. *King v. Burdett*, 12 W. Va. 688.

### 8. Right Preserved if Jury Trial Optional.

See ante, "Application of Right to Equity Causes," III, C, 2, a, (3).

It seems that where it is optional with a party to have a jury that the right is fully accorded, although such party does not ask for a jury. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

### 9. Trial by Justice.

See generally, the title JUSTICES OF THE PEACE.

In 1877, S. was indebted to J. \$126.73, and executed to him three bonds each for one-third thereof, payable at two, three and four months, respectively. When all were due, a justice rendered three separate judgments thereon, and issued fi. fa.'s, and placed them in the hands of constable C., who collected part, and was proceeding to collect remainder, when S. applied to circuit court for a writ of prohibition, which was awarded. Held, that by the plain terms of the law the jurisdiction of the justice was limited to \$50, but by the creditor's methods, in fraudem legis, the justice usurped jurisdiction of a debt, which, though severed into divers sums, was still \$126.73. in defiance of the law, and the writ of prohibition was properly awarded to check such usurpation, and infringement of the right to jury trial. *James v. Stokes*, 77 Va. 225, *Richardson, J.*, dissenting.

By the United States Constitution, in suits at common law where the value in controversy exceeds \$20, the right of

trial by jury is preserved. By the Virginia constitution, in controversies respecting property, such mode of trial is declared preferable and sacred. Though by law in this state the jurisdiction of justices has at various times been enlarged, yet experience has taught the wisdom of adhering to fundamental principles and of returning to the old limits. *James v. Stokes*, 77 Va. 225.

The requirement that any one convicted before a mayor of a city, town or village, under ch. 47 of the Code, of a violation of an ordinance thereof, and sentenced to imprisonment or a fine of \$10 or more, shall be allowed an appeal as a matter of right upon entering into a recognizance before the justice for his appearance before the circuit court on the first day of next term thereof to answer for the offense, with which he stands charged, and not to depart thence without the leave of the court, is no greater restriction upon his liberty, than what is required in every other case, where a party charged with any misdemeanor is examined therefor before a justice, whose duty requires him, if there is probable ground to believe the accused guilty of the offense, with which he is charged, to compel him to enter into a recognizance to appear at the next term of the circuit court, to answer an indictment, if one be found against him. This requirement is reasonable and just and is necessary to the peace and security of the community. This right to appeal is not thereby impaired or restricted by unreasonable conditions; and when he avails himself of this right, he becomes entitled to a trial by a jury of twelve men in the circuit court with the right to appeal upon a proper case made to this court. His conditional right to a trial by a jury thus secured to him has not been invaded or impaired by the summary proceedings instituted against him in the first instance before the mayor. *Beasley v. Beckley*, 28 W. Va. 81, 88.

See also, *Jelly v. Dils*, 27 W. Va. 267; *Moundsville v. Fountain*, 27 W. Va. 182.

"In our opinion the limitations of the law fixing and limiting the jurisdiction of the justice are eminently wise and proper, and founded on the soundest principles of public policy; and whether that be so or not, the provisions of the law can not be disregarded; and no manipulation of a debt can alter or affect the jurisdiction as prescribed by law for that tribunal." *James v. Stokes*, 77 Va. 225.

## E. WAIVER.

As to the distinction between and right in civil and criminal cases, see post, "Civil Proceedings," III, E, 3; "In Criminal Cases," E, 4.

### 1. Right in General.

That a jury may be waived is beyond doubt. *King v. Burdett*, 12 W. Va. 688; *Ramsburg v. Erb*, 16 W. Va. 777; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *Lipscomb v. Condon* (W. Va.), 49 S. E. 392, 403.

### 2. Formal Requisites.

Waiver of the right of trial by jury must be by consent entered of record. It can not be merely inferred from the fact that the court tried the case without objection. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392.

The legislature has seen fit to prescribe the manner in which such waiver shall be shown, namely, by consent of the parties or their counsel entered of record. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392; *King v. Burdett*, 12 W. Va. 688; *Ramsburg v. Erb*, 16 W. Va. 777; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

None of the decisions seem to countenance any authority in the court to try civil and misdemeanor cases except when the record shows a waiver by consent. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392; *King v. Burdett*, 12 W. Va. 688; *Ramsburg v. Erb*, 16 W. Va. 777; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

**Presumption of Waiver When Record Silent.**—In some jurisdictions there is no presumption of waiver when the record is silent on the subject; but, where the mode of waiver is prescribed by statute, that mode is generally held to be exclusive. *Lipscomb v. Condon* (W. Va.), 49 S. E. 392.

**What Amounts to Consent Entered of Record.**—Where the record shows "that neither party required a jury, and the court is substituted in lieu of a jury to try the case," and the case is tried by the court, this is "consent entered of record" within the meaning of § 35, ch. 47, W. Va. Acts of 1872-73. *King v. Burdett*, 12 W. Va. 688; *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740.

### 3. Civil Proceedings.

#### a. Substitution of Court in Lieu of Jury.

See the titles AGREED CASE, vol. 1, p. 286; EXCEPTIONS, BILL OF, vol. 5, p. 397; ISSUES TO THE JURY, vol. 8, p. 43.

Under the Va. Code, 1887, § 3166 (1849, § 9), in an action at law, the parties can waive a trial by jury and submit the whole matter of law and fact to the judgment of the court. *Pryor v. Kuhn*, 12 Gratt. 615; *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296; *Webster Wagon Co. v. Home Ins. Co.*, 27 W. Va. 314. See also, post, "In Misdemeanor Cases," III, E, 4, c.

On a motion to abate an attachment on the ground that it was issued on false suggestions and without sufficient cause, the plaintiff declining to express any wish for a jury, and the defendant expressing a wish that a jury might be dispensed with, and that the court should hear and decide the case, the court should hear and decide it without a jury. *Clafin v. Steenbock*, 18 Gratt. 842.

Where a case is tried by the court in lieu of a jury, it is not error in the court to hear illegal testimony, as the court is fully competent to discard the illegal evidence. *Nutter v. Syden-*

stricker, 11 W. Va. 535. And whether the record of the judgment recites the fact or not, where a case is submitted to the court, upon its merits, it is presumed that the prerequisites necessary to the making of the judgment were complied with by the court. *Phelps v. Smith*, 16 W. Va. 522.

**b. Specific Issues Controlled by Statutory Enactment.**

See the title ISSUES TO THE JURY, vol. 8, p. 43.

As a general rule special issues required to be submitted to the jury by a court of equity under statutory enactments may be waived by the litigants, and the issues submitted to the court in lieu of a jury; and in such case neither party can afterwards complain that such special issue was not directed. *Bank v. Hamilton*, 43 W. Va. 75, 27 S. E. 296.

**c. Consent to Trial by Less than Full Jury.**

Where the record shows that the parties in ejectment consented in open court to a trial to eleven jurors instead of twelve, their verdict is lawful. *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228.

**d. Failure to Make Request.**

Where a statute provides that an attachment may be sued out in a court of equity for a debt or claim, legal or equitable, arising out of contract, or to recover damages for any wrong, and another statute provides for a trial by jury in any chancery case, when there is a conflict of evidence or inquiry of damages, and a party, if he should require it, may have a trial by jury, but he does not ask for such trial, it seems that such refusal amounts to a waiver. *McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55.

**e. Failure or Refusal to Plead.**

Under Va. Code, 1887, § 3211, providing for the judgment on fifteen days' notice in an action by a person entitled to recover money, the defendant is not entitled to a jury trial, on failure or

refusal to plead. *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. 486.

**4. In Criminal Cases.**

**a. In General.**

In the absence of a statute authorizing it, the defendant in a criminal prosecution can not waive trial by jury. Va. Const., art. 1, § 10; *Mays v. Com.*, 11 Va. Law J. 88 (Supreme Court of Appeals, 1886); *Ford v. Com.*, 82 Va. 553.

**b. Felony Cases.**

The bill of rights of West Virginia, § 14, declares that "trial of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men." *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428.

**c. Misdemeanor Cases.**

The legislature may provide for the trial of misdemeanors by the court in lieu of a jury with the consent of a defendant. *State v. Snider*, 34 W. Va. 83, 11 S. E. 742. See also, *State v. Denoon*, 34 W. Va. 139, 11 S. E. 1003.

And in *State v. Alderson*, 50 W. Va. 101, 40 S. E. 350, it is held, that the accused may move to exclude the evidence, or in a misdemeanor case by agreement or consent a jury may be waived, and the facts submitted to the court for determination.

But as to whether the bill of rights of West Virginia, § 14, declaring that "trial of crimes and misdemeanors, unless herein otherwise provided shall be by a jury of twelve men," not only secures to persons accused of crimes and misdemeanors the right to have an issue of not guilty to the charge in the indictment tried by a jury, but whether it inhibits the trial of such issues by the court in lieu of a jury, the court equally divided in the case of *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428.

And as to whether the bill of rights of West Virginia, § 14, declaring that "trial of crimes and misdemeanors, unless herein otherwise provided shall be by a jury of twelve men," not only

secures to persons accused of crimes and misdemeanors the right to have an issue of not guilty to the charge in the indictment tried by the jury but in an issue in a misdemeanor case can be tried by the court in lieu of a jury, even by consent of the defendant, the court equally divided in the case of *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428.

**W. Va. Code, ch. 161, § 29.**—The W. Va. Code, ch. 116, § 29, which provides for the trial of misdemeanors by the court instead of a jury when defendant consents thereto, is constitutional. *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740; *State v. Snider*, 34 W. Va. 83, 11 S. E. 742.

But as to whether § 29, ch. 116, of the Code of West Virginia, so far as it provides for the trial of misdemeanor cases by the court in lieu of a jury, by consent of the defendant, is unconstitutional, the court equally divided in the case of *State v. Cottrill*, 31 W. Va. 162, 6 S. E. 428.

#### **IV. Qualifications, Liability to Service and Exemptions Therefrom.**

##### **A. IN GENERAL.**

The object of the law is, in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused, or for or against either party in civil cases. *State v. Hatfield*, 48 W. Va. 575, 561, 37 S. E. 626.

##### **B. AGE, SEX AND CITIZENSHIP.**

**Va. Code (1887), § 3139.**—Regarding the qualifications of those who shall compose the juries of this state, the statute, Va. Code, 1902, § 3139, declares that all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office, under the constitution and laws of this state, shall be liable to serve

as jurors, except as otherwise specially provided.

**W. Va. Code (1906), § 3701.**—All male persons who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided. W. Va. Code (1906), § 2028; W. Va. Code (1906), § 3701. *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

Although persons be over the age of sixty, and therefore exempt, if they choose, from service, yet they are not ipso facto, disqualified. *Booth's Case*, 16 Gratt. 519.

As to general disqualifications by reason of nonresidence, idiocy, lunacy or crime, see Va. Code (1902), § 3139.

##### **C. COLOR.**

The constitution and laws of Virginia do not exclude colored citizens from service on juries. *Ex parte Virginia*, 100 U. S. 313 (1880).

##### **D. HOLDING OFFICIAL POSITION.**

See post, "Persons Exempted," IV, G.

Being the treasurer or councilman of a city does not disqualify a juror in a criminal case in the hustings court. *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304.

##### **E. PHYSICAL DISABILITY.**

And though competent in all other respects, the court may of its own motion, excuse or set aside a juror, who is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like cause, which will render him unfit to perform the duties of a juror properly. *Montague v. Com.*, 10 Gratt. 767.

A juror on his examination said that "he was afflicted; had been shot, and had to use morphine and had used morphine that day and the day before; sometimes suffered a great deal of pain, and when there was too much



pain he generally used morphine. Did not know whether or not he would be physically able to serve on a jury that was liable to be kept in confinement several days; might be. The court directed said (X) to stand aside, and refused to swear him as one of the jurymen in the case." *State v. Hatfield*, 48 W. Va. 575, 561, 37 S. E. 626.

#### **F. CLAIM AGAINST PERSON SUED FOR DAMAGES.**

In an action against a railroad company for personal injuries, a juror is not disqualified by reason of the fact that he has a claim against the company for personal injuries, which he intends to prosecute. *Southern R. Co. v. Oliver (Va.)*, 47 S. E. 862.

#### **G. PERSONS EXEMPTED.**

For enumeration of persons exempt from service on jury, see the general statutory provisions, Va. Code (1906), §§ 3140, 3140a, 3141; W. Va. Code (1906), §§ 2038, 3702.

**Members of Volunteer Military Companies.**—Where, under § 16 of the act approved March 17th, 1884, to provide for the government of Virginia volunteers, acts, 1883-84, p. 615, a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses. *Miller v. Com.*, 80 Va. 33. See also, W. Va. Code, 1906, § 3702.

**No Person Liable to Serve as Juror More than Once during Same Year.**—See Va. Code (1902), § 3149.

**Effect of Exemption as Exempting from Summons.**—A person exempt by law from service on a jury, is in like manner exempt from being summoned to serve on a jury. *Miller v. Com.*, 80 Va. 33.

#### **H. VOTING QUALIFICATIONS.**

If a person has the constitutional qualifications of a voter, though he has not been registered and has not voted, he is a qualified juror. *Craft v. Com.*,

24 Gratt. 602, 603. See also, Va. Code (1902), § 3139.

#### **I. OATH AS TO QUALIFICATION OF LOYALTY.**

It is not error for the circuit court to require jurors to declare upon oath their qualifications as to loyalty, according to the act of the legislature passed November 4, 1863, § 5; the act not being unconstitutional. *Lively v. Ballard*, 2 W. Va. 496.

### **V. Selecting, Drawing and Summoning.**

#### **A. IN GENERAL.**

The jurors must be persons who stand impartial between the plaintiff and the defendant and are not related to either party or interested in the action. W. Va. Code (1906), § 2029.

All jurors required for the trial of cases in any circuit court, including cases of felony, shall be selected by ordinary ballots from the box in the manner prescribed by ch. 116 of the W. Va. Code (1906), and the persons whose names are written on the ballots so drawn shall be returned to serve as jurors. W. Va. Code (1906), § 3706. See also, Va. Code (1902), § 3145.

#### **B. JURY COMMISSIONERS.**

##### **1. By Whom Appointed.**

The two jury commissioners selected for each county shall be appointed by the circuit court or the judge thereof in vacation of their respective counties. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

##### **2. Term of Office.**

The term of office of jury commissioners shall be four years, and shall commence on the first day of June next after their appointment, but the first two shall be appointed, one for two years and the other for four years, and thereafter, alternately, for the full term of four years. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

Under the jury law, and professing to act in pursuance thereof, the circuit court of Cabell county appointed jury commissioners on the 10th of June, 1891, but the order specifically set out that the terms of the respective appointees should correspond with the unexpired terms commencing June 1, 1891. Held, that this appointment would be construed as intended to fill a vacancy, and as in conformity to, and fully authorized by, the jury act; and the commissioners so appointed were legitimately in office during the unexpired terms, and their acts entitled to full faith and credit. *State v. Scott*, 36 W. Va. 704, 15 S. E. 405.

### 3. Qualifications.

The two jury commissioners selected for each county shall be of opposite politics, citizens of good standing, resident in the county for which they are appointed, and well known members of the principal political parties thereof. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

### 4. Number.

There shall be two jury commissioners of the circuit court for each county. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

### 5. Duties.

The jury commissioners of each county shall, at the levy term of the county court thereof, annually, and at any other time when required by the circuit court of such county, without reference to party affiliations, prepare a list of such inhabitants of the county, not exempted from jury service, as they shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception, which list shall include at least twenty persons for every thousand inhabitants in such county, but in no case shall such list include a less number than one hundred persons. But the name of no person shall be put on such list, who may have requested the jury com-

missioners, or either of them, by himself, or another person, to have his name placed on such list. *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

### 6. Record of Proceedings.

The jury commissioners shall keep in a well-bound book, a record of the proceedings to be preserved by the clerk of the circuit court in such office. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

### 7. Compensation.

Jury commissioners shall receive two dollars per day for each day necessarily employed as such jury commissioners, payable out of the county treasury, upon the order of the circuit court. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

### 8. Filling Vacancies.

**Meaning of Vacancy.**—The word "vacancy," where used in a statute, does not necessarily presuppose a former incumbent of an office. It fitly and aptly describes the condition of an office newly created, and never filled by any previous incumbent. *State v. Scott*, 36 W. Va. 704, 15 S. E. 405.

**Statutory Provisions.**—Vacancies caused by death, resignation, or otherwise, of jury commissioners, shall be filled for the unexpired term in the same manner as the original appointments. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

### 9. Removal.

Jury commissioners may be removed from office by the court or judge having the power of appointment, for official misconduct, incompetency, habitual drunkenness, neglect of duty or gross immorality. W. Va. Code (1906), § 3703; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407.

## C. JURY LIST.

See ante, "Duties," V, B, 5.

**Necessity.**—Where necessary to complete the panel a court may have a

venire facias directed to the sheriff of another county to summon a jury, without a list being furnished. *Va. Code* (1887), §§ 4019, 4024; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440; *Waller's Case*, 84 Va. 492, 5 S. E. 364.

**Drawing Ballots from Last Annual List.**—Regarding jury lists, it is held in West Virginia that the list of persons for jury services, and the ballots of the names thereon, prepared by the jury commissioners annually, at the levy term of the county court, pursuant to *W. Va. Code* of 1891, ch. 116, take the place of and supplant lists and ballots made prior thereto, and ballots belonging to a former list are not to be mingled in the box used for keeping jury ballots, from which jurors are drawn with ballots belonging to the latter lists. Hence, the jury made up of jurors drawn from such boxes, containing exclusively ballots belonging to the last annual list is proper and valid. This does not refer to a list made subsequently to the making of such annual list in any year under order of court. *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

Relative to the annual preparation of annual lists out of which jurors are to be selected, see general provisions, *Va. Code* (1902), § 3142-50.

**How Signed.**—The list does not have to be signed by the judge. *Williams v. Com.*, 85 Va. 607, 8 S. E. 470.

## D. HOW PANEL MADE UP.

### 1. In General.

**Interpretation of Statutory Provisions.**—The statutory provisions under §§ 3, 4, ch. 17, of acts of assembly, 1877-78, are imperative and essential. The accused is entitled to demand strict compliance with them. Omission of such compliance is error. *Hall v. Com.*, 80 Va. 555; *Whitehead v. Com.*, 19 Gratt. 640; *Richard's Case*, 81 Va. 110; *Wash. v. Com.*, 16 Gratt. 530.

### 2. Regular Panel.

#### a. Felony Cases in General.

A person charged by indictment with

felony is entitled under the law to a panel of twenty jurors. *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665; *Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364.

The provision under *Va. Code*, 1887, § 4018, for obtaining the original panel is that the venire facias shall issue for the summons of twenty persons selected from a list to be furnished by the court. *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73.

Under *Va. Code* of 1887, § 4018, providing that the writ of venire facias in felony cases shall command the officer to summon twenty persons "to be taken from the list to be furnished by the court," it is not improper for the number of persons contained in such list to exceed twenty. *Hall v. Com.*, 80 Va. 555; *Richards' Case*, 81 Va. 110; *Drier v. Com.*, 89 Va. 529, 16 S. E. 672; *Sands' Case*, 21 Gratt. 871; *Mitchell's Case*, 33 Gratt. 845. In the case of *Drier v. Com.*, 89 Va. 529, 16 S. E. 672, the court distinguished the case of *Vawter v. Com.*, 87 Va. 245, 12 S. E. 339, in which latter case, § 4018, *Va. Code* of 1887 was construed. And the court declared in *Drier v. Com.*, 89 Va. 529, 16 S. E. 672, that the language used in *Vawter's Case* warranted the inference that, in the opinion of the court it was irregular for the list to contain more than the specific number designated by the statute, yet this language was used unguardedly; and, besides, it was not necessary to the decision of the case. Therefore the court declined to be bound by the decision in *Vawter's Case*, 87 Va. 245, 12 S. E. 339. See also, *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238.

#### b. Where Punishment Can Not Be Death.

The statute relating to the summoning and selecting of jurors in cases of felony, as enacted in the *Virginia Code* of 1860, ch. 208, was amended by acts 1877-78, which provided that: "The writ of venire facias, in a case of fel-

ony, other than where the punishment may be death, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation to be taken from a list to be furnished him by the judge of his county or corporation, residing remote from the place where the offense is charged to have been committed, and qualified in other respects to serve as jurors, to attend the court wherein the accused is to be tried, on the first day of the next term thereof, or at such other time as the court or judge may direct." *Hall v. Com.*, 80 Va. 555, 560.

**Selection of Panel.**—"From the panel summoned, the accused shall have the peremptory right to strike off four persons. In all cases where the punishment may be death, there shall be selected from the persons summoned a panel of sixteen persons, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury; or if the accused does not strike them off, twelve of the panel shall be selected by lot, who shall constitute the jury." *Hall v. Com.*, 80 Va. 555, 561.

**c. Where Punishment May Be Death.**

In a case where the punishment may be death, the writ of venire facias shall require the officer to summon twenty-four persons of the county or corporation, residing remote from the place where the offense is charged to have been committed and shall be in other respects qualified to serve as jurors. *Hall v. Com.*, 80 Va. 555, 560; *Richards' Case*, 81 Va. 110; *Bristow v. Com.*, 15 Gratt. 634; Acts, 1877-78, p. 340, § 4.

Where on a trial for murder a writ of venire facias is issued by the county court for the summoning of the jury, returnable to the circuit court, and the twenty men selected by the county court are summoned to the circuit court and on the motion of the prisoner this venire is quashed by the circuit court, and that court directs another venire of twenty to be summoned, and names the twenty sum-

moned, on the first venire, the directing the same twenty men to be summoned is not error. *Mitchell's Case*, 33 Gratt. 845.

**3. Talesmen or Additional Jurors.**

**a. Grounds for Ordering.**

**(1) Where Whole Panel Not Present.**

In *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73, it was held, that of the twenty persons directed to be summoned from the list furnished by the judge to serve as jurors the appearance of sixteen is sufficient in felony cases. Additional persons may be summoned from the bystanders.

**(2) Where Persons Proceeded against Jointly.**

Where several persons are proceeded against jointly for a felony before an examining court, and are sent on to the superior court for trial, the clerk of the county court should issue a separate venire facias for summoning a venire for the trial of each of them separately. *M'Whirt's Case*, 3 Gratt. 594.

**(3) Exhaustion of Original Panel.**

**(a) Summoning Bystanders.**

If the original venire be exhausted, without completing the panel, the court may order any number of persons to be summoned from the bystanders it may think necessary; and if the sheriff for want of time or other cause, fails to summon the whole number, his return is valid for as many as are summoned. *Wormeley v. Com.*, 10 Gratt. 658; *State v. Mills*, 33 W. Va. 455, 10 S. E. 808; *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627; *Com. v. Jones*, 1 Leigh 598; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440. See also, Va. Code (1902), § 3153.

In any case of felony, where a sufficient number of jurors for the trial of the case can not be had from those summoned and in attendance, the court may direct another venire facias, and cause to be summoned from the bystanders, or from a list to be furnished by the court, so many persons as may

be deemed necessary to complete the jury. *Hall v. Com.*, 80 Va. 555, 560; *Richard's Case*, 81 Va. 110; *Bristow v. Com.*, 15 Gratt. 634; Acts, 1877-78, p. 340, § 4.

**Furnishing List.**—And it is not necessary to furnish a list of the bystanders from whom the required number shall be summoned. *Waller's Case*, 84 Va. 492, 5 S. E. 364; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440.

**What Constitutes Attendance in Statutory Sense.**—However, a person summoned as one of a panel of sixteen free from exception, who at the time of selecting the jury is serving on the grand jury, is not "in attendance," in the sense of Va. Code, 1887, § 4019, providing for the summoning of a certain number from the bystanders, necessary to complete the panel, and it is not error to refuse to place him on the panel, or examine him on his voir dire. *Short v. Com.*, 90 Va. 96, 17 S. E. 786.

#### (b) Others than Bystanders.

If a jury can not be formed from the original panel, nor from the bystanders, in consequence of the prisoner's challenges, the court may award a venire facias commanding the sheriff to summon a specified number to attend the court then in session; and upon the return of the process the prisoner may be compelled to elect a jury, saving his right of challenge. Such process may be awarded on the report of the sheriff that there are no other bystanders, nor will the court at a subsequent term hear proof that there were other qualified bystanders who had not been called. *Gibson v. Com.*, 2 Va. Cas. 111, 121.

In a criminal prosecution for felonious stabbing with intent to kill, the first venire facias and return thereon having been exhausted, without getting a jury, it is not error to insert in the second venire facias a direction that persons be summoned who reside remote from the place where the felony

was committed. *Baccigalupo v. Com.*, 33 Gratt. 807.

### E. CONTROL OF COURT OVER JURORS.

#### 1. General Consideration.

The authority of a judge who presides at a criminal trial, extends over the jury not only during the day whilst they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a juror in the temporary absence of the sheriff to whom the jury has been committed. *Philips v. Com.*, 19 Gratt. 485.

#### 2. Procuring Attendance.

##### a. In General.

The act of February 24th, 1846, changing the mode of summoning and making up juries in trials for felony, was held to apply to all cases tried after the act, though the offense was committed, or even the examining court had passed upon the case, before the passage of the act. *Perry v. Com.*, 3 Gratt. 632.

##### b. The Writ.

#### (1) Character of Writ.

A venire facias is now the proper process to summon a petit jury. *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73.

#### (2) Necessity.

A venire facias is an indispensable process to authorize the sheriff to summons a jury in a felony case, though the writ itself is not a part of the record unless made so by bill of exceptions or otherwise; nor does failure to object in the trial court to the want of such process waive the right of objection in this court. *Myers v. Com.*, 90 Va. 785, 20 S. E. 152; *Barker v. Com.*, 90 Va. 820, 20 S. E. 776; *Vawter's Case*, 87 Va. 245, 12 S. E. 339.

The Code of Virginia, § 3156, provides that in civil cases no irregularity in any writ of venire facias shall be sufficient to set aside a verdict unless the party making the objection was in-

jured thereby, or unless the objection was made before the swearing of the jury. By act, January 18, 1888, this provision is made to apply to felony cases. Held, that this does not apply where the record fails to show any venire in a felony case, and the omission of the writ is a fatal error. *Lewis v. Com.*, 1 Va. Dec. 737.

The failure of the record to show that fact is held to be reversible error. *Myers v. Com.*, 90 Va. 785, 20 S. E. 152; *Barker v. Com.*, 90 Va. 820, 20 S. E. 776.

### (3) Power to Issue.

By § 4020, Va. Code, 1887, any court wherein a person accused of felony is to be tried, may cause a venire facias to issue for his trial; and this section is the law of the case, no matter when the offense was committed. *Wilson v. Com.*, 86 Va. 666, 10 S. E. 1007, following *Jones v. Com.*, 86 Va. 661, 10 S. E. 1005.

By the law in force before May 1, 1888, the county court alone was empowered to issue the venire facias, though the indictment was to be tried in the circuit court. *Wilson v. Com.*, 86 Va. 666, 10 S. E. 1007.

### (4) Form.

The act, Va. Code, ch. 298, § 5, p. 836, and the act, Va. Code, ch. 103, § 14, p. 828, directing the issuance of a venire facias are merely directory to the officer, and a prisoner can not object to the writ because the acts have not been complied with. *Wash v. Com.*, 16 Gratt. 530, cited and approved in *Hall v. Com.*, 89 Va. 171, 173, 15 S. E. 517. See also, *Spurgeon v. Com.*, 86 Va. 652, 656, 10 S. E. 979.

Under the second and fourth sections of the schedule of the constitution, the act in force at the time of the adoption of the constitution regulating juries in criminal cases, not having been since altered, the venire facias for the trial of a prisoner for felony should be conformed to that act. *Sands v. Com.*, 20 Gratt. 800; *Chahoon v. Com.*, 20 Gratt. 733.

### (a) Time in General.

The statutory requirements respecting the time of issuing writs of venire facias for petit juries and summonses to jury commissioners to draw the jurors are directory, and substantial compliance therewith is sufficient. *State v. Clark*, 51 W. Va. 457, 41 S. E. 204.

### (b) During Term.

In *Prince v. Com.*, 89 Va. 330, 15 S. E. 863, it was held, a sufficient compliance with § 4018 of the Virginia Code, where a venire facias was issued for a jury for the trial, during the term, of each of three felony cases, including that of the defendant, and the defendant was tried by a jury composed of persons thus summoned.

### (c) In Justice's Court.

When either party demands a jury, it is error for the justice, without consent of parties, to issue a venire facias for such jury, before the summons to commence the suit has been served and returned, and the time fixed for the appearance of defendant has arrived. *Greer v. Wilson*, 38 W. Va. 100, 18 S. E. 380.

### (5) Execution.

A prisoner was examined before the hustings court of Richmond, and sent on to the circuit court of Henrico to be tried, and the venire facias was directed to the sergeant of the corporation, who executed it, and returned the panel for the trial of the prisoner. Held, that the venire facias was properly executed by the sergeant. *Smith v. Com.*, 6 Gratt. 696.

The proposition laid down in the first headnote of *Sands v. Com.*, 21 Gratt. 871, was approved and followed in *Drier v. Com.*, 89 Va. 529, 531, 16 S. E. 672, the court saying: "This statute (acts, 1870-71, p. 357) was construed in *Sands' Case*, 21 Gratt. 871. In that case there was a motion to quash the writ and the return, on the ground that the list furnished by the judge contained the names of only twenty-four persons, it being insisted that it

ought to have contained more than that number, so that the officer might have made a selection from the persons named in the list. But this court held, that while it would be better for the list to contain more than twenty-four names, and that the act no doubt contemplated it generally would contain more, yet that a list containing only that number did not invalidate the execution of the writ; and this ruling was reaffirmed in *Mitchell's Case*, 33 Gratt. 845." See also, *Honesty v. Com.*, 81 Va. 283; *Snodgrass v. Com.*, 89 Va. 679, 683, 17 S. E. 238; *Poindexter v. Com.*, 33 Gratt. 766; *Baccigalupo v. Com.*, 33 Gratt. 807, and note.

#### (6) Return.

Where the return to a process is signed only with the name of the deputy by whom it has been served and not with that of his principal also, such process and return should be quashed by the trial court. The positive mandate of the statute is that, where the service of process is by the deputy, such deputy shall subscribe to the return his own name as well as that of his principal. *Mitchell v. Com.*, 89 Va. 826, 17 S. E. 480; Va. Code, 1887, § 900.

The list given by the judge to the officer, from which the officer is to summon jurors for the trial of a prisoner for felony, contains but twenty-four names, and the officer returns the names of nineteen of them whom he has summoned, and of five as not found. Though it would be better for the judge to put more than twenty-four names on the list, it is not error to give but twenty-four, and the return of the officer that he has summoned less than the twenty-four, and the others were not found, is a valid return. *Sands v. Com.*, 21 Gratt. 871.

A writ of venire facias commanded the sheriff to summon twenty-four persons from a list to be furnished by a county judge, and to have "there this writ and the judge's list of said jurors,"

was followed in the record by "the list of venire referred to above," and signed, "W. S. Gooch," and was endorsed, "Executed by summoning the within mentioned parties," and signed by the sheriff. Held, the record conclusively shows that the persons were summoned from a list furnished and signed by the county judge. *Coleman v. Com.*, 84 Va. 1, 3 S. E. 878.

#### 3. Power to Excuse from Service.

A court can not of its own motion, where no challenge is made, without good cause, set aside a juror, except where he is disabled physically or mentally from properly performing the duties of a juror, or is disqualified by statute. And though in all cases great weight is justly due to the opinion of a court before whom the jurors are questioned and examined, yet, upon exception taken, the appellate court must judge from the facts therein stated, whether the reasons for setting aside a juror are good and sufficient, or the contrary. *Jackson v. Com.*, 23 Gratt. 919, 920; *Montague v. Com.*, 10 Gratt. 767.

On a trial for a felonious offense, the court of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve on the jury, touching any disability created by statute, such as infancy, want of freehold or property qualifications, or in a capital case regarding conscientious scruples on the subject of capital punishment; and upon any such disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party. *Montague v. Com.*, 10 Gratt. 767.

#### 4. Punishment for Failure to Attend.

Where, under § 16 of the act approved March 17th, 1884, to provide for the government of Virginia volunteers, acts, 1883-84, p. 615, a roll of a

volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses. Hence, a contributing member of a volunteer military company can not be punished for contempt where he fails to obey a summons executed upon him to appear and serve on a jury. *Miller v. Com.*, 80 Va. 33.

### 5. Exceptions and Objections.

See post, "Exceptions and Objections," V, G, 5.

#### a. Irregularity in Summoning.

**Error Apparent on Record.**—Omission of any statutory essential, apparent on the record, is error, and may be taken advantage of after verdict by motion in arrest of judgment, failure of accused to make the objection before jury sworn being no waiver. *Hall v. Com.*, 80 Va. 555.

The defect in the writ appearing on its face, a motion to quash is the proper mode of taking advantage of the defect. *Wash. v. Com.*, 16 Gratt. 530, 537, citing *McWhirt's Case*, 3 Gratt. 594.

Though writ of *venire facias* has been exhausted by the answers of the *veniremen*, yet it should be quashed for irregularity on its face, as such writ is, in legal intendment, no process at all. But where the quashing was done on prisoner's own motion, it was held, no ground for reversal. *Muscoe v. Com.*, 87 Va. 460, 12 S. E. 790.

**Sufficiency of Statement of Objection.**—A general objection to a writ of *venire facias* in a felony case, without stating cause, is sufficient to raise any objection apparent on the face of the writ. It is the duty of counsel, however, as officers of the court, when requested by the court to do so, to point out such errors and defects in the writ as they have knowledge of, but their failure to do so will not deprive the prisoner of the benefit of his ob-

jection on a writ of error. *Jones v. Com.*, 100 Va. 842, 41 S. E. 951.

**Nonprejudicial Errors.**—In *Vawter's Case*, 87 Va. 245, 12 S. E. 339, it was declared that irregularities in any writ of *venire facias* whereby the defendant is not injured, are not grounds for arresting the judgment, where no objection was made before the jury was sworn. See also, *Drier v. Com.*, 89 Va. 529, 16 S. E. 672, criticising the *Vawter Case*, 87 Va. 245, 12 S. E. 339.

**Omission of Writ.**—Omission to direct a new *venire facias* is error, and may be taken advantage of after verdict by motion in arrest of judgment. *Hall v. Com.*, 80 Va. 555.

The Virginia Code, § 3156, provides that in civil cases no irregularity in any writ of *venire facias* shall be sufficient to set aside a verdict unless the party making the objection was injured thereby, or unless the objection was made before the swearing of the jury. By act, January 18, 1888, this provision is made to apply to felony cases. Held, that this does not apply where the record fails to show any *venire* in a felony case, and the omission of the writ is a fatal error. *Lewis v. Com.*, 1 Va. Dec. 737.

Ordering persons to be summoned without a writ of *venire facias* is good ground for a motion in arrest of judgment, though the objection was not made before the jury was sworn. *Vawter's Case*, 87 Va. 245, 12 S. E. 339. But see *Drier v. Com.*, 89 Va. 529, 16 S. E. 672, criticising the *Vawter Case*, 87 Va. 245, 12 S. E. 339.

**Excusing Attendance.**—Where a panel of twenty jurors, free from exceptions, is completed from those in attendance for the trial of a criminal case, the objection that, previous to the making up of such panel, the court had excused from attendance certain jurors on the original *venire* for that term of the court, is not tenable. *State v. Emblem*, 46 W. Va. 326, 33 S. E. 223.



**Summoning Jurors Who Were Summoned or Served on Previous Panel.—**

Where, on the calling of a case for trial, the court below sustains the motion made by the defendant to quash the panel or array of jurors because they were not summoned according to law, and orders the sheriff to forthwith summon a sufficient number of qualified jurors for the trial of the case, and instructs him that, in summoning such jurors he is not bound to exclude any juror upon the ground that he had been one of the panel or array quashed, if there are no other objections to him as a juror, there is no error in such directions of the court to the sheriff, nor in summoning jurors who have been previously summoned on a panel or array for the term, which, on motion of the defendant, has been quashed. *Caper-ton v. Nickel*, 4 W. Va. 173.

**Use in Second Venire of Names Used in First.**—Where the trial judge quashed the writ of venire facias issued by another judge incompetent to try the case, it was held, not to be error to use the same names in the new writ issued by himself. *Waller's Case*, 84 Va. 492, 5 S. E. 364.

**Use of Words in Tales "Who Reside Remote," etc.**—If a jury is not obtained from the twenty persons summoned under the first venire facias, and a tales is issued directing the persons named by the judge to be summoned, "who reside remote from the place where the felony was committed," the introduction of these words into the tales, if not required by the statute, is in accordance with the law, and does not invalidate the venire. And in a venire facias sent to a distant city, the insertion of these words is immaterial. *Poindexter v. Com.*, 33 Gratt. 766. Likewise the venire is not invalidated, where, upon the indictment of a person for the murder of another, and before the jury is called, the prisoner moves the court to quash the venire facias and return thereon, when the only error assigned is that the act re-

quires the jurors to be summoned, etc. "remote from the place where the offense is charged to have been committed;" and the language of the venire facias is: "Where the felony was committed"—as the use of such language in the venire facias is not an error. *Poindexter v. Com.*, 33 Gratt. 766; *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512.

**Venire Contains Six Names.**—"The fourth assignment of error was that the trial court overruled the motion of the accused to quash the second venire facias, containing six names. The record shows no error in this action, and the counsel, at the hearing, admit that they can cite no authority and make no argument to support this assignment; and we perceive no error in this action of the trial court." *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238.

**Sixteen Summoned Instead of Twenty-Four—§ 4018.**—In the construction of § 4018, in *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. 979, *Lewis, J.*, held, that if the writ of venire facias commands the sheriff to summon sixteen instead of twenty-four jurors, or if the record does not show by whom the list was furnished, or that the writ was directed by the court, it is invalid. See also, *Drier v. Com.*, 89 Va. 529, 16 S. E. 672; *Sands' Case*, 21 Gratt. 871; *Mitchell's Case*, 33 Gratt. 845, for converse proposition, where more than twenty are named in the writ.

**b. Presumption as to Regularity.**

"The evidence in the record sufficiently shows that the original lists furnished by the judge of the trial court contained the names of the sixteen persons found free from exceptions by the court, and that the venire which tried the prisoner was taken from this panel. While these facts are not expressly stated in the record, it is a proper inference to be drawn from all that does appear in the record that all things were properly done in the summoning and select-

ing the jury, and that is sufficient." *Litton v. Com.*, 101 Va. 833, 44 S. E. 923.

The record conclusively shows that the persons were summoned from a list furnished by the county judge, when a writ of venire facias commands the sheriff to summon twenty persons from a list to be furnished by the county judge, and to have "there this writ, and the judge's list of said jurors;" and is followed in the record by the list of venire referred to above, and signed, and is endorsed "executed by summoning the within mentioned parties;" and signed by the sheriff. *Coleman v. Com.*, 84 Va. 1, 3 S. E. 878.

There are two modes in West Virginia of obtaining juries for the trial of felonies—one under § 3, ch. 47, acts 1872-73; the other under the sixth and succeeding sections of the said act. If the record shows that the jury was summoned in the second of these modes, the appellate court will not reverse a judgment of the lower court refusing to quash the venire facias or the panel of the jury, because it does not appear that all provisions of the statute, other than those to be performed by the circuit court or its officers, have been complied with; it not appearing affirmatively that any of the provisions of the act have not been complied with. *State v. Strauder*, 11 W. Va. 745.

In a trial for a felony the record says that the defendant, being arraigned, plead not guilty to the charges against him in said indictment alleged; and a panel of sixteen jurors summoned by the sheriff was examined by the court and found free from all legal exceptions, and qualified to serve as such jurors according to law. Whereupon, the prisoner erased from the panel four of the jurors, and the remaining twelve constituted the jury for the trial of the accused, to whom there was no objection, to wit, etc. Held, that it was to be inferred that the

jurors were properly summoned. *Lawrence v. Com.*, 30 Gratt. 845.

But in *Jones' Case*, 87 Va. 63, the court expressly overrules *Lawrence v. Com.*, 30 Gratt. 845, in so far as it holds that a venire facias may be presumed to have regularly issued from the recital of the record. The court says: "It has been repeatedly decided by this court that a venire is an indispensable process, both at common law and under the statute and, therefore, that the omission to direct a venire when required is an error apparent on the record, of which advantage may be taken on motion in arrest of judgment, or for the first time on a writ of error in the appellate court. *Hall's Case*, 80 Va. 555; *Richards' Case*, 81 Va. 110." *Lawrence v. Com.*, 30 Gratt. 845.

### c. Time for Making Objection.

By the Code (1873), ch. 138, § 20; Code, 1887, § 3155, it is provided that "no exception shall be allowed against any juror after he is sworn upon the jury on account of his age, or other legal disability, unless by leave of the court. The principle of this section is applicable alike to civil and criminal cases." *Ilite v. Com.*, 96 Va. 489, 31 S. E. 895. And now is it so by statute. *Pollard's Supplement to Va. Code*, § 408.

Objection, after verdict, to irregularity, not prejudicial to the prisoner, in the venire facias ordered in vacation for forty persons to be summoned from the list presented by the judge, for the trial of prisoner and others not jointly indicted. Held, too late, under acts, 1887-88, p. 18. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

And where there is any objection to the mode of selecting the jury it must be made at the time the jury is chosen, and the prisoner can not avail himself of it afterwards. *Bristow v. Com.*, 15 Gratt. 634. As is held, in *Short v. Com.*, 90 Va. 96, 17 S. E. 786, the prisoner can not for the first time object in an appellate court that a person

served on the jury without being selected by the court or summoned by the sheriff.

An objection to the regularity of the manner of summoning and constituting a jury comes too late after verdict, where it does not appear that the party making the objection was injured by the irregularity. *Charlottesville v. Failes*, 103 Va. 53, 48 S. E. 511.

#### **d. Waiver.**

**By Appearance.**—When the defendant in a justice's court appears and has the case continued, and the jury is adjourned to the time set for trial, he will be held to have waived any irregularity in the writ of *venire facias* summoning them to the first trial, if it appears that he was not injured thereby. *Greer v. Wilson*, 38 W. Va. 100, 18 S. E. 380.

The failure to object in the trial court to the want of a *venire facias* does not waive the right of objection in the appellate court. And in a given case prior to the passage of the act of 1893-94, p. 494, amending the Virginia Code, 1887, § 3156, it was held, that the case was not affected by the amendment, as such amendment was not intended to be retrospective in its action, statutes being always to be construed to operate in futuro, unless the retrospective effect be clearly intended. *Myers v. Com.*, 90 Va. 785, 20 S. E. 152.

Omission to direct a new *venire facias* may be taken advantage of after verdict by motion in arrest of judgment, and a failure of the accused to make the objection, before the jury is sworn, is no waiver. *Hall v. Com.*, 80 Va. 555.

The right to make available after verdict the omission of a statutory essential is not waived by the failure of the accused to make the objection before the jury was sworn. *Hall v. Com.*, 80 Va. 555.

#### **e. Operation and Effect.**

If the prisoner objects to a juror, on

the ground that the *venire facias* was illegally executed, and the court sustains the objection, it is proper to set aside the whole return, and direct another *venire facias*. *Epes' Case*, 3 Gratt. 676.

It is not incumbent on a prisoner to show that he has been injured in consequence of an error apparent on the face of a writ of *venire facias* when he has made objection thereto in due time. *Jones v. Com.*, 100 Va. 842, 41 S. E. 951.

#### **F. TERM OF SERVICE AND COMPENSATION.**

Va. Code, 1887, §§ 3160, 4049, gives to every juror sitting in a criminal case compensation at one dollar for each day he attends on such jury. See *Souther v. Com.*, 7 Gratt. 673.

#### **G. DRAWING THE JURY.**

##### **1. General Consideration.**

All jurors required for the trial of cases in any circuit court, including cases of felony, shall be selected by drawing ballots from the said box in the manner prescribed in this chapter, and the persons whose names are written on the ballots so drawn shall be returned to serve as jurors. West Virginia Code (1906), § 3706.

A person charged by indictment with felony is entitled under the law to a panel of twenty jurors, each and all of whom shall be free from exception, from which panel the jury for the trial of the case is to be selected under § 3, ch. 159, of the Code. *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665.

From the number summoned shall be selected a panel of sixteen, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury. See acts, 1887-88, p. 340, § 4; *Richard's Case*, 81 Va. 110; *Bristow v. Com.*, 15 Gratt. 634; *Hall v. Com.*, 80 Va. 555.

##### **2. Record Must Show Time and Mode of Selection.**

The record in a felony case must

show when and how the jury was selected, tried and sworn. *Younger v. State*, 2 W. Va. 579.

### 3. Placing Names in Box and Drawing.

In *State v. Hall*, 31 W. Va. 505, 7 S. E. 422, it was held, that when a jury is to be impaneled in a felony case, it is not necessary to put the names of those summoned into a box and draw from such box the names of jurors.

### 4. Selection by Sheriff.

The law is satisfied as to the mode of drawing the jury if the sheriff selects them. *Younger v. State*, 2 W. Va. 579. See also, *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

### 5. Exceptions and Objections.

See ante, "Exceptions and Objections," V, F, 5.

In a given case it appeared that twenty-four persons—qualified jurors—had been summoned, as required by law, and were in attendance, and the court proceeded to select a panel of sixteen therefrom. On examination, two of the number were found by the court disqualified by having previously formed and expressed opinions as to the guilt or innocence of the prisoner and were set aside; then two others of the said twenty-four persons were examined by the court and found to be duly qualified and free from exception; and the court, without examining any others of the twenty-four, directed the panel of sixteen to be handed to the prisoner that he might strike four therefrom, and that the remaining twelve should constitute the jury for the trial of the cause; and to this mode of selecting the jury the prisoner objected and moved the court not to proceed to select a panel of sixteen as aforesaid until twenty-four persons, duly qualified to act as jurors, and free from exception, and not disqualified by reason of opinions previously formed and expressed as to the guilt or innocence of the prisoner, should be ob-

tained and be present, claiming that from said twenty-four a panel of sixteen persons free from exception should be selected by lot, and that from the panel of sixteen so selected the prisoner might strike four, and that the remaining twelve should constitute the jury. Held, that an objection to the mode of selecting the jury was without merit. *Honesty v. Com.*, 81 Va. 283.

"The third bill of exceptions is taken to the method of impaneling the jury. The court proceeded to examine the veniremen summoned under the several successive writs of venire facias, until (after the examination of over nine hundred) sixteen persons, free from exception and qualified by law, had been selected and directed to take their places upon the panel; and the list of these sixteen was submitted to the accused in order that he might strike off four names, the remaining twelve to constitute the jury for his trial. It was insisted by the accused, that the court should proceed with the examination of the veniremen, upon their vior dire, until twenty-four persons, free from exception, had been obtained; that sixteen should be selected, in some manner, from the twenty-four, and then the list of sixteen thus obtained submitted to the accused." Held, that, "in this exception there (was) no merit (as the) court proceeded in strict conformity with the law, as it has been clearly expounded and decided by this court in the recent cases of *Hall v. Com.*, 80 Va. 555; *Richard's Case*, 81 Va. 110; *Honesty's Case*, 81 Va. 283." *Cluverius v. Com.*, 81 Va. 787, 799.

## VI. Challenge.

### A. TO THE ARRAY AND MOTION TO QUASH VENIRE.

See ante, "Exceptions and Objections," V, F, 5.

**When Allowed.**—No challenge is allowed to the commonwealth except for

cause. *Montague's Case*, 10 Gratt. 767; *Clore's Case*, 8 Gratt. 606; Va. Code (1887), § 4022.

**Grounds in General.**—A challenge to the array of the jury must be based on some irregularity affecting the whole panel, such as a failure to select or summon them as required by the statute, or where there is partiality, relationship or default in the officer who makes the return. *State v. Cartright*, 20 W. Va. 32.

**Not Summoned According to Law.**—On the calling of a case for trial, the court below sustained a motion made by the defendant, to quash the panel or array of jurors, because they were not summoned according to law, and ordered the sheriff to forthwith summon a sufficient number of qualified jurors for the trial of the case, and instructed him that, in summoning such jurors, he was not bound to exclude any juror upon the ground that he had been one of the panel or array quashed, if there were no other objections to him as a juror. Held, that there was no error in the directions of the court to the sheriff, nor in summoning the jurors who had been previously summoned as the panel or array for the term, which, on motion of the defendant, had been quashed. *Caperton v. Nickel*, 4 W. Va. 173.

**Residing at Place Crime Committed.**—A juror's residing at the place of the alleged commission of the offense charged, can not be availed of by challenge to the array, but by objection to the individual juror. *Prince v. Com.*, 89 Va. 330, 15 S. E. 863; *Craft's Case*, 24 Gratt. 602; *Lawrence v. Com.*, 81 Va. 484.

Where jurors are directed to be summoned from an adjoining county, and it appears that one of the panel has been summoned by mistake or misapprehension of the law or otherwise, from a place near to instead of remote from the vicinage, the objection, if valid, instead of being made to the array of jurors, should be made to the

individual juror so summoned. *Craft v. Com.*, 24 Gratt. 602, 603.

**Separate Trial Where Jointly Indicted.**—Where several persons have been proceeded against jointly before an examining court, and have been sent on for trial to the superior court, and a single venire facias has been issued by the clerk of the county court, for summoning a venire for the trial of all of them, and after having been jointly indicted in the superior court, they elect to be tried separately, it is proper for the judge holding the court to quash the panel summoned under the venire facias issued by the clerk of the county court, and to direct a venire facias for summoning a venire for the trial of such of them separately, at the same court. *McWhirt's Case*, 3 Gratt. 594.

**Objection to Person Summoning.**—Where the venue is changed from one county to another the array of the jury can not be challenged because they were summoned by sheriff of the latter county. *Vance v. Com.*, 2 Va. Cas. 162.

## B. CHALLENGE FOR CAUSE.

### 1. Right to Challenge.

**Right of Commonwealth.**—No challenge of a juror is allowed to the commonwealth except for cause. When such challenge is made, the cause should be shown and should be a good and legal cause for the accusation of the juror. *Montague's Case*, 10 Gratt. 767; *Clore's Case*, 8 Gratt. 606; Va. Code (1887), § 4022.

**Prisoner's Right.**—An accused person has the right to challenge a juror for cause before he is sworn, and the court is bound to judge whether the cause is sufficient or not to sustain the objection. *Com. v. Jones*, 1 Leigh 598.

### 2. Grounds.

#### a. In General.

"As Lord Coke said centuries ago may be said now: 'The causes of favor are infinite.' No enumeration was ever

attempted of what causes might be alleged as grounds of challenges to the favor. It would be impossible to specify all that should be allowed in advance by a statute, for they depend upon each particular case, and the circumstances and parties to it. All concede that statutory disqualifications are not the only ones." *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

**b. Exemption from Jury Service.**

See ante, "Qualifications, Liability to Service and Exemptions Therefrom," IV.

**c. Interest in Case.**

A juror is not competent to sit in a case if he has any interest in the case. *Richardson v. Planters' Bank*, 94 Va. 131, 136, 26 S. E. 413. See also, Va. Code (1902), § 3165.

**d. Failure to Appear on Day Summoned.**

A juror, summoned for the trial of a prisoner, who fails to appear on the day to which he is summoned, but appears at another day under a rule to show cause why he shall not be fined for failing to appear, if in other respects qualified, may be put upon the panel; that not having been completed when he appears. *Wormeley v. Com.*, 10 Gratt. 658; *Hendrick v. Com.*, 5 Leigh 707.

**e. Prior Service as Juror.**

"The defendant's counsel was, therefore, obliged to admit, that there is no right of challenge to jurors called upon an inquest in a mill case; for, if it existed, it has been lost, in the present case, by the failure of the party to make the challenge before the inquisition was made. Why has not the law provided for a challenge in such a case? The reason may be found in the nature of the proceeding. It is not a proceeding inter partes; it is not final or definitively binding; it is only initiative. It is not (technically speaking) a trial, but only a precautionary measure, which the policy of the law requires, before the case, as it affects individual rights, can be subjected to

a judicial decision binding those rights. It has a much closer analogy to the inquest by a grand jury, than the trial by a venire; and my researches have been fruitless to find a single decision quashing, or even an attempt made to quash, an indictment, on the ground that some of the grand jurors had expressed an opinion on the matter of the indictment, or would have been liable to challenge, if they had been called on the venire, for one of the many causes of principal challenge that might affect their perfect indifference. There are cases in which, though no formal issue be joined, yet the finding of the jury, not being in its nature for information, or merely introductory of a litigation between individuals, but partaking more of the nature of a trial which may conclusively bind the rights of the parties, the law allows a challenge, as a writ to inquire of waste, or a propertiate probanda. *Harg. Co. Litt.* 158, b. note 3." *Hunter v. Matthews*, 12 Leigh 228, 238.

An issue on the plea of *autrefois acquit* had been found against a prisoner, and being on his trial on the plea of "not guilty," eight of the jurors who had tried the first issue were called and examined on their *voir dire*, when they stated that, during that trial they had heard X, in his testimony while speaking of the burning of the house, say that the prisoner had confessed; but as he used the last word he was interrupted, and told to say nothing about the confession; but that they believed they could give the prisoner a fair and impartial trial on the evidence, notwithstanding anything they had heard, having no impression on their minds of the question as to the guilt or innocence of the prisoner, which it would require evidence to remove. Held, that they were competent jurors. *Smart v. Com.*, 27 Gratt. 950.

**f. Intimate Friendship.**

The fact that jurors in a civil case are friends of the plaintiff, and that he

is their family physician, does not per se disqualify them from sitting in the case. The trial court must determine from all the facts before it whether or not a juror is competent. In the absence of other evidence, his statement on his voir dire that the relation would not influence his verdict is sufficient to warrant his acceptance. *Chesapeake, etc., R. Co. v. Smith*, 103 Va. 326, 49 S. E. 487.

**g. Member of Grand Jury That Found Indictment.**

It is also a principal cause of challenge to a juror that he was one of the grand jury which found the indictment. But if the objection is not taken until after the verdict, it will not be set aside on this ground, unless it appears from the whole case that the juror was biased against the prisoner; who therefore has not a fair and impartial trial. *Bristow v. Com.*, 15 Gratt. 634; *State v. McDonald*, 9 W. Va. 456.

And on a trial for a felony a member of the grand jury which found the indictment against the prisoner, is not a competent juror to try him. *Dilworth v. Com.*, 12 Gratt. 689.

**h. Relationship.**

It is the right of each party in any suit or prosecution to have the jury composed of persons not related to either party or the accused, who have neither formed nor expressed any opinion, who are free from bias or prejudice and stand indifferent in the cause. *Ingersoll v. Wilson*, 2 W. Va. 59.

Relationship, whether by blood or marriage, between a juror in a felony case and the prisoner, renders such juror incompetent. A juror if related to either party to the suit or action is incompetent to serve. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626; *Richardson v. Planters' Bank*, 94 Va. 131, 26 S. E. 413; *Jaques v. Com.*, 10 Gratt. 690.

**Nephew.**—Where a juror is called, who is a nephew of a person whose

house was burned, though his name does not appear of record in the prosecution, such relationship is a ground of challenge to the favor. *Jaques v. Com.*, 10 Gratt. 690.

**Uncle Remotely Connected with Kindred of Prosecutrix.**—But a juror is not disqualified from service in a criminal case simply because an uncle of the juror is remotely connected by marriage with kindred of the prosecutrix. *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925.

**i. Opposed to Capital Punishment.**

It is not error in the trial court to discharge a venireman, who had previously expressed his opinion repugnant to inflicting capital punishment on circumstantial evidence. *Cluverius v. Com.*, 81 Va. 787.

In impaneling a jury in a capital case, a proposed juror, examined on his voir dire, who, in answer to a question propounded by the court, says, he has conscientious scruples against inflicting the death penalty, is incompetent and is properly rejected by the court, although he says he will be governed by the law and the evidence. *State v. Greer*, 22 W. Va. 800. See also, Va. Code (1887), § 4022.

Where upon a trial for murder a venireman when called, states that he has conscientious scruples about the propriety of capital punishment, and is opposed to it; and being asked by the commonwealth's attorney, whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree, he would convict him of it, replies, I do not know—he is properly challenged for cause by the attorney, and set aside by the court. *Clore's Case*, 8 Gratt. 606.

**j. Citizen of County.**

See generally, the title EMINENT DOMAIN, vol. 5, pp. 66, 109.

A juror, in a condemnation proceeding, is not incompetent, because he is a citizen of the county, in which the

land is, and is liable to the county levies—even though the county may be interested in the suit. *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812, 813.

**k. Indebtedness to One of the Parties.**

The fact that a juror is indebted to one of the parties does not render him incompetent. *Richardson v. Planters' Bank*, 94 Va. 131, 26 S. E. 413.

The fact that a man is indebted to another is not a good cause of challenge to exclude the indebted party from sitting as a juror in a civil case where the creditor is a party to the suit. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

"I do not say that no case of indebtedness—one showing the debtor to be at the mercy and in the power of his creditor—might not exclude. I have, however, met with no case excluding, or of attempt to exclude, a juror for such cause, except one cited by counsel (*Bank v. Smith*, 19 Johns 115), where, because the juror was an indorser on a note held by a bank, he was held disqualified by the triers, not by the court—the court having allowed that fact to go before the triers as an item of evidence to show bias; and, as the court above said, it was a decision on the admissibility, not on the sufficiency, of the evidence to show bias; and the judge in the opinion pointedly says that he would not undertake to say that the single circumstance that one was indorser on a note to the bank would of itself support a challenge to the favor, yet it was easy to imagine that an indorser might have bias, as in case the maker was insolvent, and the indorser in great danger at the hands of the bank. No other case is cited. In this present case simply the fact of indebtedness is shown without any appearance of amounts or the relative pecuniary standing of the parties. We therefore think the jurors were improperly excluded." *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

**l. Wager upon Result.**

It is not error in the trial court to discharge a venireman who has made a bet on the result of the trial. *Cluverius v. Com.*, 81 Va. 787.

**m. Signer of Memorial to Legislature to Establish a Ferry.**

A person who signs a memorial to the legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury, in a case involving rights under the ferry franchise. *Somerville v. Wimbish*, 7 Gratt. 205.

Upon the return of the certificate of a jury, that, in their opinion, public convenience would result from the establishing of a proposed ferry, evidence was introduced of one of the jurors, who proved, that before he was sworn, he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed his opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for the said ferry; and that, at the time he was sworn, he was uninfluenced by the said opinion, and prepared to render an impartial verdict; and of another juror, who proved the like facts with regard to himself, and also that he had expressed his opinion. Another juror proved the same facts with regard to himself, and also that he had circulated a petition for the ferry. Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court. Held, that the judgment of the circuit court was right. *Muire v. Smith*, 2 Rob. 458.

**n. Freeholder.**

See the title EMINENT DOMAIN, vol. 5, pp. 66, 109.

Formerly the law was that the jury of twelve must be freeholders. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

Prior to the Virginia Code, 1860, one of the qualifications prescribed for a



juror was that he be a freeholder. See Va. Code, 1849, § 1, ch. 49, p. 628. And it was a good objection in a case of felony that the juror was not a freeholder. *Dowdy v. Com.*, 9 Gratt. 727 (1852). Under this provision it was necessary that the party called as a juror in a criminal case be a freeholder residing in the same county with the officer to whom the venire facias was directed. See acts, February 24th, 1846; *Day v. Com.*, 3 Gratt. 629; *Dowdy v. Com.*, 9 Gratt. 727.

The act, sess. acts, 1866-67, ch. 208, § 4, p. 932, directed that the writ of venire facias shall command the officers charged with its execution, to summon twenty-four persons, freeholders of his county or corporation, "residing remote from the place where the offense is charged to have been committed." Held, that this direction was mandatory, and the writ was defective and should be quashed if it was committed; and it was not in violation of the bill of rights. *Whitehead v. Com.*, 19 Gratt. 640.

But neither the statutes of Virginia nor West Virginia now prescribe the holding of property, real or personal, a requisite for qualification as a juror. Va. Code, 1887, § 3139; W. Va. Code, 1899, § 1, ch. 116, p. 822; *Wash v. Com.*, 16 Gratt. 530.

If the writ of venire facias requires the officers to summon jurors with this qualification, it will be quashed on motion of the prisoner. *Wash. v. Com.*, 16 Gratt. 530.

**Showing Fact by Record.**—Formerly, in the trial of a capital felony, it was necessary that it should be expressly stated in the record that the petty jurors were freeholders. *Com. v. Stephen*, 4 Leigh 679.

The order impaneling the jury had to show in some way that the twelve jurors selected, impaneled and sworn were freeholders, either expressly or by necessary implication. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

**Proceeding under West Virginia Code, 1891, Ch. 42, § 17.**—See generally, the title EMINENT DOMAIN, vol. 3, p. 66.

And where in a proceeding under West Virginia Code, 1891, ch. 42, § 17, to take land or material therefrom for public use, the record need not show in terms that the jury in such proceeding was composed of freeholders. Because if the record in such proceeding showed that the jurors were "drawn, elected, tried and sworn in the manner required by law," it will be presumed that they were freeholders. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

#### **o. Conviction of Crime.**

A person convicted of a felony, but pardoned by the executive in 1868, was not disqualified to serve on a jury, such offense being obliterated by pardon under the provisions of the constitution then in force. *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512. See also, Va. Code (1902), § 3139.

"The sixth exception is because the court overruled a motion in arrest of judgment because one of the jury in the case had been convicted of a felony. The juror had been so convicted, but he had been pardoned by the governor in 1868. This was before the present constitution of this state was adopted. The provision concerning the removal of political disabilities consequent upon conviction for offenses, to be found in the present constitution (art. 4, § 5) was not in the constitution then in force. The power to grant pardons was general and unrestricted as to offense in question, and the pardon not merely released the offender from the punishment prescribed for the offense, but obliterated, in legal contemplation, the offense itself. In the case of *Edwards v. Com.*, Lewis, P., considers this question, and cites the authorities bearing upon the subject, and no further reference to authority is deemed necessary here

upon this point. 78 Va. 43. But, where this is otherwise, the motion is claimed to have been made too late after verdict. Our statute provides 'that no exception shall be allowed against any juror, after he is sworn upon the jury, on account of age, or other legal disability, unless by leave of the court' (ch. 158, § 20, Va. Code); and in *Poindexter's Case* this court held that the objection to a juror for a disability created by the constitution came too late after verdict. 33 Gratt. 791. But, in the view we have taken of the effect of the pardon in this case, this question does not arise here." *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512.

#### **p. Formation or Expression of Opinion.**

##### **(1) General Consideration.**

No general rule can be laid down for the government of questions as the competency of a juror who has formed an opinion. The court must determine as best it may, whether the opinion be decided or substantial, or merely hypothetical. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

"The trend of recent decisions is in the discretion of limiting rather than extending the disqualification of jurors by reason of mere opinion." *McCue v. Com.*, 103 Va. 870, 988, 49 S. E. 623.

In general it may be stated that a juror is not competent to sit in a case if he has formed or expressed any opinion, or if he is sensible of any bias or prejudice. *Richardson v. Planters' Bank*, 94 Va. 131, 26 S. E. 413; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982.

Upon a question whether one called as a juror in a case of felony, and challenged for cause, stands indifferent or not, the general rule is, that one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on the evidence of witness whose testimony he has heard on a former trial,

or conversation with witnesses, or common report, is not an indifferent juror. And it is immaterial whether such opinion has been expressed or not. *Armistead v. Com.*, 11 Leigh 657.

Although a juror may suppose that after an opinion formed and expressed he will be regulated by the testimony, yet the law suspects him. *Sprouce v. Com.*, 2 Va. Cas. 375.

And if the person called as a juror has been so inconsiderate and unjust as, upon insufficient or no evidence, to have prejudged the prisoner's cause, much more is he unfit to be trusted with it as a juror. *Armistead v. Com.*, 11 Leigh 657.

To disqualify a juror, an opinion must be deliberate and decided. *Thompson v. Updegraff*, 3 W. Va. 629.

**Previous Opinion Formed as Grounds for Setting Aside Verdict.**—See the title VERDICT.

##### **(2) Nature of Opinion.**

**General Consideration.**—"The courts, therefore, while resolute in seeking that every man shall be tried by an impartial jury, inquire into the quality and degree of the opinion, and to that end search the conscience of the juror upon his voir dire, and look into the sources of the information upon which his opinion rests." *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

To constitute a good cause of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it must appear, that such preconceived opinion was a decided one. *Osiander v. Com.*, 3 Leigh 780.

In order that one who has formed or expressed an opinion as to the guilt or innocence of the accused may be accepted as a competent juror on such panel, his mind must be in condition to enable him to say on his voir dire, unequivocally and without hesitation, that such opinion will not affect his judgment in arriving at a just verdict from the evidence alone submitted to the jury on the trial of the case. *State*

*v. Johnson*, 49 W. Va. 684, 39 S. E. 665.

A person is not rendered incompetent as a juror in a criminal case, by the formation of a legal opinion upon facts previously presented to his mind, as he would be by the formation of previous convictions in respect to the facts themselves. *Heath v. Com.*, 1 Rob. 735.

A previously formed and expressed opinion of the guilt or innocence of the accused is not of itself sufficient to disqualify a proposed juror. If such a proposed juror shows to the satisfaction of the court in his examination on his voir dire, that notwithstanding a previously formed and expressed opinion of the guilt or innocence of the accused his mind is free from bias and prejudice, and the contrary is not shown, he is a competent juror, and ought not to be rejected. *State v. Schnelle*, 24 W. Va. 767, 768.

If a proposed juror on his voir dire admits that he has formed and expressed an opinion as to the guilt or innocence of the accused, and halts and hesitates as to his then condition of mind, and can not say, that his mind is free from prejudice, and can not say, that the previously formed opinion will not influence his verdict, he is an incompetent juror, and ought to be rejected. *State v. Schnelle*, 24 W. Va. 767, 768.

#### **Necessity of Expressing Opinion.—**

If a person called as a juror has formed a decided opinion of the case out of doors, is it necessary that he should have also expressed such opinion, to constitute it good cause of challenge to him as a juror? *Osiander v. Com.*, 3 Leigh 780.

It is immaterial whether such opinion has been expressed or not. *Armistead v. Com.*, 11 Leigh 657.

#### **(3) Source of Opinion.**

##### **(a) Rumors.**

When an opinion is formed on common rumor, the presumption is that

it is merely hypothetical, and it will be so considered in the absence of proof to the contrary. Yet the prisoner must be free from prejudice against the accused, whether his opinion be hypothetical or decided, whether founded upon rumor or upon evidence heard at the trial. Upon this point nothing should be left to inference, or in doubt. *Wright v. Com.*, 32 Gratt. 941.

If a venireman has formed an opinion of the guilt or innocence of the accused from mere rumor, the presumption, in the absence of evidence to the contrary, is, that such opinion is merely hypothetical; and will be so considered even though he speaks of it as a decided or substantial opinion, if he says he has no prejudice against the accused, and thinks he can give him a fair and impartial trial. Yet, if the court be satisfied, either from a venireman's statement or otherwise, that the opinion is in fact decided or substantial, he will be an incompetent juror. *Jackson v. Com.*, 23 Gratt. 919, 920.

"I concur with the other judges in the opinion that the judgment in this case should be reversed. But I do not entirely concur in the opinion which has been delivered by Judge Scott. It seems to me that some of the principles set fourth in that opinion, are in conflict with the decision of this court in *Maile's Case*, 9 Leigh 661. That case was decided by a very full court, after much debate and deliberation. I was one of the majority of the court which decided it; and I then thought that an opinion founded on mere rumor was a hypothetical opinion, and such as ought not of itself to disqualify a man from giving the prisoner a fair and impartial trial. I yet retain the same opinion. I am not willing to subscribe to principles that appear to me in conflict with the decision of *Maile's Case*." *Armistead v. Com.*, 11 Leigh 657, 664.

On the separate trial of a prisoner

jointly indicted with three others for murder, several persons called as jurors were examined on their voir dire touching their indifference. One juror stated, that he heard the reports in the county concerning the death of the deceased, and the prisoner implicated therein, and had formed some opinion thereon, dependent upon the truth and fullness of those reports; he believed them to be true at the time he heard them, and the opinion formed on them was decided, and yet rests upon his mind; but he is satisfied the opinion so formed would have no influence upon him in trying the prisoner, and that he could now try him according to the evidence, free from any leaning or bias from or against him, and decide the case as impartially as if he had previously heard nothing of it. Held, that such person was a good and impartial juror. *M'Cune v. Com.*, 2 Rob. 771.

Where a person, who is called as a juror in a case of felony, says, on his voir dire, "that he has expressed an opinion on the circumstances as he had heard them narrated in the country; but that he has not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties; and that he does not think the opinion so formed would have any influence on his mind in trying the case," he is an indifferent juror and his challenge for cause should be overruled. *Brown v. Com.*, 2 Leigh 769; *Osiander v. Com.*, 3 Leigh 780.

Where a venireman, when called, states "that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it; but from the rumor of the neighborhood he has formed an opinion which is at the time existing on his mind, and which he would stick to, unless the evidence should turn out to be different from what rumor had reported it to be; that he has no prejudice nor partiality for or against the

prisoner, and believes he could give him a fair and impartial trial according to the evidence that should be given in," he is a competent juror, and a challenge of him for cause by the prisoner, should be overruled. *Clore's Case*, 8 Gratt. 606.

A person called as a juror on a trial for a felony, swore upon his voir dire, that he had not formed an opinion as to the prisoner's guilt or innocence, and was challenged peremptorily by the prisoner; whereupon, on getting out of the courthouse, he remarked in a rather warm and excited manner: "It is well I was rejected, for if I were on the jury, I would send her the other side Boston." Afterwards the prisoner, to make up the jury, elected this person as a juror, not then being informed of his remark: Held, no ground for a new trial. *Com. v. Hailstock*, 2 Gratt. 564.

On the separate trial of a prisoner jointly indicted with three others for murder, several persons called as jurors, being examined on their voir dire touching their indifference, one of them stated that he had heard rumors and conversations in the country touching the case of the prisoner, and a representation of part of the evidence given on the trial of one of the parties indicted with him, and from these sources of information, if the same be true, he had made up an opinion of decided character, which he still entertained, and which would remain the same unless removed by evidence of a state of facts different from what he had heard; but he felt no prejudice or bias for or against the prisoner, and was satisfied that the opinion so formed and entertained would have no influence upon his mind in trying him, and that he could give him as impartial a trial upon the evidence as if he had heard nothing of his case. Held, that such person is a good and impartial juror. *M'Cune v. Com.*, 2 Rob. 771.

A juror stated "that he was not

present at the examining court; that he had heard the rumors in the country relating to the case, all of which were to the same effect; that he had heard the rumors from a very great number of persons, and that he had no reason to disbelieve them; that from what he had so heard, he had made up and expressed a decided opinion; that if it turned out that these statements were true, he had made up his mind firmly. But he thought, notwithstanding what he had heard, and the opinion he had formed and expressed, he would be governed by the evidence in the cause; and that he had no prejudice for or against the prisoner; and that he did not think the opinion he had formed was of that decided character that it would influence his mind in deciding upon the testimony which should be given in the cause upon the trial in the court; and that he felt that he was ready to give the prisoner a fair and impartial trial." Held, that he was a competent juror. *Epes' Case*, 5 Gratt. 676.

A person called as a juror in a trial for murder, says in answer to a question—I have expressed an opinion from what I have heard. What I have heard was not from any witness. My opinion was not a fixed one. I think I can give the prisoner a fair trial without reference to the opinion I have expressed. Held, that he was a competent juror. *Little v. Com.*, 25 Gratt. 921.

A witness testified that a juror, on the second day of a trial, told him, at recess at noon, that "Mr. T.," one of the parties to the trial, "would lose the trial." This the juror denied in his testimony. Another witness testified that the juror, some months before the trial, said in a conversation, that "they are going to break the Steenrod will;" that he thought it was right to break it; that they would break it, for T. had drawn it himself; that he had been informed that Mrs. T. (daughter of the testator and wife of T.) had

informed her father how to make the will, and that they would be able to prove that T. had drawn the will. Another witness testified that a few months before the trial, the juror said to witness, "it was no use for T. to sue for he would get beat; it was not Steenrod's will, it was Mr. T.'s will." The juror testified that he did not remember any of these conversations, though he might have had them, as the case was considerably talked of; that he had not made up or expressed any opinion before or at the time he was sworn as a juror, he knew nothing about the case that he could put confidence in until he heard the testimony; that he felt no bias at the time of the trial against the plaintiffs. Held, that the juror was not disqualified. *Thompson v. Updegraff*, 3 W. Va. 629, 630.

On a trial for murder, two jurors were severally examined on voir dire. One stated, that he was not present at the examination of the prisoner before the hustings court, and had heard no statement of the evidence from any person who was present; that he had heard the case spoken of in the town, and rumors in regard to its circumstances, upon which he had expressed no opinion, though he believed those rumors to be true, and if they should turn out upon the trial to be true, he had a decided opinion in regard to the case; but he felt no prejudice, and was satisfied he should be able to decide the case upon the evidence which might be given in, uninfluenced by the rumors he had heard; that the opinion he had formed was, that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. The other juror stated, that he had made up no decided opinion; that he had heard a part of the evidence of one witness, and formed an impression, and if the balance of the testimony should run in that way, that impression would be confirmed; that as far as the evidence

went, he had a decided opinion, if the rest should not run against it; but that he had no prejudice, had not expressed any opinion, and was prepared to decide the case according to the evidence which might be given in, uninfluenced by the portion of the evidence he had heard. Held, that both the jurors were competent. *Moran v. Com.*, 9 Leigh 651.

**(b) Newspaper Reports.**

Where a juror who has not heard the evidence in a criminal cause on a legal investigation, or from witnesses, but who has read in newspapers a report of the evidence given on a former trial, states that from this report he has formed a decided opinion as to the guilt or innocence of the accused, which it would require stronger evidence than he had read to remove; and who states upon his voir dire that he has no prejudice or bias against the prisoner, and that he would regard it a duty, as a juror, under his oath, to discard the opinion thus formed; and that he though he could discard it, and have his mind as a blank, ready to receive the testimony that should be given on the trial; and that, while he would as a citizen entertain this opinion, yet as a juror he would not, but could and would hear and consider the evidence, and render a fair and impartial verdict according to the evidence, uninfluenced by such opinion, he is a competent juror, if his statements satisfy the court of his fairness. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *Smith v. Com.*, 7 Gratt. 593.

A juror is incompetent who, upon his voir dire, says that he has formed and expressed an opinion as to the defendant's guilt, such opinion being based on rumor and newspaper accounts; and that his opinion is "right positive" and evidence would be required to remove it, but that he could give the defendant a fair trial. *Washington v. Com.*, 86 Va. 405, 10 S. E. 419.

And if a juror has made up and ex-

pressed a decided opinion as to the guilt or innocence of the accused, he is incompetent, whether the opinion be founded on conversation with the witnesses or upon mere hearsay or rumor. It is sufficient if the opinion is decided and has been expressed. *Wright v. Com.*, 32 Gratt. 941.

**(c) Conversations.**

A juror may be excused for incompetency who says that a talk he has had about the case made an impression on his mind as to the guilt or innocence of the prisoner; and that he is still of the same opinion as to such guilt or innocence; and when asked, "Do you feel that you could sit here as a sworn juror and decide the case according to the evidence adduced in open court, absolutely disregarding what you may have heard?" answered, "I possibly might, if the evidence proves entirely different from what I have heard." *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

Where, upon his voir dire, a juror states that when the alleged offense was committed he had heard some talk about it, and might have then had some opinion about it, but did not recollect; and has no opinion at the time, that he is impartial, and could give the prisoner a fair trial, there is no objection to him. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

**(d) Based on Evidence Heard upon Former Trial.**

And where a venireman has formed an opinion as to the guilt or innocence of the accused from having heard the evidence on a former trial or examination of the case, it would be difficult if not impossible to regard such opinion otherwise than as decided or substantial, within the meaning of the rule; and he would generally, if not always, be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial. Nevertheless, if his opinion is merely hypothetical, he is not

incompetent on that ground. *Jackson v. Com.*, 23 Gratt. 919. See also, *Lithgow v. Com.*, 2 Va. Cas. 297; *Armistead v. Com.*, 11 Leigh 657; *Dejarnette v. Com.*, 75 Va. 867.

Where persons who are called to serve as jurors in a criminal case, upon being examined on their voir dire, say, that they have heard part of the evidence on a former investigation, and have formed some opinion thereon, yet the opinion so formed would in nowise incline their minds, as jurors, for or against the prisoner, but that they could pass upon the prisoner's case, on the whole evidence, as impartially as if they had never heard of it, they are good and impartial jurors. *Hendrick v. Com.*, 5 Leigh 707.

**(e) Statement of Prosecuting Attorney.**

A person called as a juror stated that he had had a conversation with the prosecutor shortly after the alleged offense committed, and heard from him a general statement of the facts, though he did not know whether that statement mentioned all the facts; on that statement he had formed and expressed a decided opinion that the prisoner was guilty; he knew the prosecutor, and had entire confidence in his veracity; he had forgotten some of the circumstances by him related; and the opinion he had formed was not such but that it would yield to evidence; he would try the prisoner's cause by the evidence alone, and had no doubt he could give him a fair trial; he had no prejudice against him. Upon a challenge for cause, held, that such person was not indifferent, and the challenge should have been sustained. *Armistead v. Com.*, 11 Leigh 657.

**(f) Remarks of Witnesses.**

Where the issue on the plea of autrefois acquit having been found against the prisoner, he being on his trial on the plea of "not guilty"—eight of the jurors who tried the first issue are called and examined on their voir dire, and state that, during that trial, they

had heard witness, in his testimony while speaking of the burning of the house, say, that the prisoner had confessed; but as the prisoner used the last word he was interrupted, and told to say nothing about the confession; but that they believed they could give the prisoner a fair and impartial trial on the evidence, notwithstanding anything they had heard, having no impression on their minds on the question as to the guilt or innocence of the prisoner, which it would require evidence to remove—they were competent to serve as jurors. *Page v. Com.*, 27 Gratt. 954, 955.

A juror, who having heard the testimony of a witness in the cause, and then formed an opinion on it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable he had expressed it, but declared that at the time of the trial he had no prejudice against the prisoner or his cause, and that he could, as he believed, give the prisoner as fair a trial as if he had not said anything on the subject, is an impartial juror, and a challenge against him for cause ought to be overruled. *Pollard v. Com.*, 5 Rand. 659.

**(g) Reports of Circumstances of Case.**

On a trial for felony, if a juror, upon being examined on his voir dire, states that he was not present at the examining court, but has heard a report of some of the circumstances of the case; that he does not know that the report came from any one who heard the evidence at the examining court, nor does he believe it to be a full detail of all the circumstances, but he believes it to be true, and upon that belief has formed and expressed a decided opinion, which is still abiding in his mind; but he believes, that notwithstanding what he has heard, his mind is open to conviction, and he has no doubt that if the facts should turn out to be different from what they have

been represented to him, his opinion would be changed, he is nevertheless a competent juror. *Maile v. Com.*, 9 Leigh 661.

**(h) Evidence Heard in Trial of Associate.**

On the separate trial of a prisoner jointly indicted with three others for murder, several persons called as jurors are examined on voir dire touching their indifference. A juror states that he has heard no evidence in relation to the prisoner's case, nor formed any opinion on the question of his guilt or innocence; that he was present at the trial of another of the parties indicted, and heard a part of the evidence, from which he formed a decided opinion as to that party, and if he were now called to try him, he should be influenced thereby; but that opinion would have no influence upon his mind in trying this prisoner, as to whom he feels no prejudice or prepossession, and he thinks he could try him as fairly and impartially as if he had heard nothing about the transaction. Held, that such person is a good and impartial juror. *McCune v. Com.*, 2 Rob. 771.

**(i) Reading Report of Evidence on Trial of Prisoner's Associate.**

A juror is competent, who testifies that he had read the evidence on the trial of the prisoner's associate, and formed an opinion, but not a positive one, and could give the prisoner a fair trial on the evidence. *Williams v. Com.*, 85 Va. 607, 8 S. E. 470.

**(4) Opinions Requiring Evidence to Remove.**

On the examination on the voir dire, a juror answered that "at first he had formed a hypothetical opinion, but had afterwards heard other evidence which had tended to weaken the opinion then formed, and that he could not say now that he has such an opinion that evidence could not remove it, but that he preferred not to sit as a juror; and that he could give the prisoner a fair trial."

Held, the doubt expressed by the juror, as to whether or not the opinion formed by him would yield to the testimony adduced on the trial, rendered him incompetent. *Dejarnette v. Com.*, 75 Va. 867.

A juror answered "that he had formed and expressed a hypothetical opinion, but that said opinion could be changed by evidence; that he had formed it from reading newspapers and from what he had heard, but could give the prisoner a fair and impartial trial." And was then asked by the prisoner's counsel as follows: "Have you now a decided opinion on your mind as to the guilt or innocence of the prisoner, without evidence?" Answer. "I haven't a decided opinion, but rather a positive one." "Would it require evidence to remove the opinion you have now?" Answer. "It would." Held, the juror was incompetent. *Dejarnette v. Com.*, 75 Va. 867.

**3. Trial and Determination.**

**a. Power of Court to Examine.**

On a trial for a felonious offense, the court, of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury, touching any disability created by statute, such as infancy, want of freehold or property qualifications, or in a capital case, conscientious scruples on the subject of capital punishment; and upon any such disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party. *Montague v. Com.*, 10 Gratt. 767.

Whenever the trying court has a reasonable doubt as to whether a juror can give the accused a fair and impartial trial, that doubt should be resolved in favor of the prisoner. *Dejarnette v. Com.*, 75 Va. 867.



### b. Examination of Jurors.

A circuit court has the right and power, on the trial of an indictment for felony, to compel a venireman or bystander called to serve as a juror on the trial, to be sworn on his voir dire, and to answer proper questions touching his fitness as a juror in the particular case. *Com. v. Stockley*, 10 Leigh 618. But in an action against a corporation a juror can not be asked on his voir dire whether he is prejudiced against corporations. *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

And the proceeding and decisions of a court are erroneous, where, upon a person being called as a juror in a trial for a felony, and sworn to answer questions touching his competency, and having deposed that he has formed no opinion, nor come to any conclusion on the case, the prisoner's counsel desires to further interrogate him, and asks him if he has conversed much about the case? The court arrests the examination, and decides that no further question shall be put to the juror by prisoner's counsel, as he is a competent juror. *Heath v. Com.*, 1 Rob. 735.

#### After the Jury Has Been Sworn.—

After a jury has been sworn in a felony case, it is not error, at the instance of the state, for the court to examine a juror on oath to ascertain whether he is a citizen of the state. *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

#### Juror's Privilege in Answering Questions.—

In challenges to the favor, the juror is not obliged to answer any questions tending to fix infamy, or disgrace, on him; and it has been said in England, that he is not compelled to answer whether or not he has formed and delivered an opinion, because the disclosure tends to his disgrace. And it is questionable whether or not that is still the law in Virginia. But if the venireman refuses to answer that question, it is his privilege, and not the

commonwealth's; and if he does not claim it, but answers it on his voir dire, then the rights of the prisoner are exactly the same, as if he had proved the same fact on a principal challenge. *Sprouce v. Com.*, 2 Va. Cas. 375.

#### Discretion of Court in Correcting Jurors' Statements.—

And where a person is called to serve as a juror in a criminal case and upon being examined on his voir dire, first says that he is not a freeholder, but soon after the panel is complete, returns into court and says that he is mistaken, and that he has been reminded of his mistake by a friend, and that he is a freeholder, it is right for the court to permit such correction of the first mistaken statement, and to hold that the juror is a good and lawful one. *Hendrick v. Com.*, 5 Leigh 707.

#### Necessity of Proof of Allegations.—

Where the objection to a juror appears in the form of a principal challenge, the prisoner must prove his allegations by testimony; if it is a challenge to the favor, the prisoner appeals to the conscience of the juror on his voir dire. *Sprouce v. Com.*, 2 Va. Cas. 375.

#### Review.—

If, upon examination on his voir dire, a question is asked a juror which he is not permitted to answer, the action of the trial court will not be reviewed in the appellate court, unless the bill of exceptions shows what answer was excepted, or what the party proposed to prove by the juror. *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

### c. Rejection or Dismissal.

The court can not of its own motion, where no challenge is made, without a good cause, set aside a juror, except where he is disabled physically or mentally from properly performing the duties of a juror, or is disqualified by statute. *Montague v. Com.*, 10 Gratt. 767.

But on a trial for felony, the court, of its own motion, without the sug-

gestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like cause, from properly performing the duties of a juror. But the erroneous exercise of this power is a matter of exception by the prisoner, for which the judgment of the court may be reversed. *Montague v. Com.*, 10 Gratt. 767.

It is not error in a trial court to discharge a venireman, who has previously expressed opinions repugnant to inflicting capital punishment, on circumstantial evidence; or who has made a bet on the result of the trial. *Cluverius v. Com.*, 81 Va. 787.

It is within the sound discretion of the court, in the trial of a felony case, if a juror, at any time after he was sworn, and before verdict, becomes, from any cause, unable to discharge his duties as such juror, to discharge such juror and substitute another qualified juror in his place; and when such substitution is made, the trial shall proceed just as if it had been commenced before a new jury. And if after the greater part of the evidence has been heard in a felony case, the information is imparted to one of the jurors that his son has just died, and the court certified that it "appeared to the satisfaction of the court that the juror by reason of his affliction, is unable to discharge his duties as a juror," and discharge the juror at his request, such discharge is proper, as a necessity for the discharge of the juror exists. And if, after such discharge, another qualified juror is substituted and the trial proceeds de novo, and the prisoner is convicted, and moves for his discharge on that ground, which motion is overruled, and the prisoner is sentenced, this also is no ground for a new trial, as there is no error in the ruling. *State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

Under the circumstances in the case here there were no irregularities in the impaneling of the jury whereby the defendant was injured, and for the cause shown it was held, to be within the discretion of the trial court to reject the man drawn as juror. *Burch v. Hylton*, 89 Va. 441, 16 S. E. 342. See also, Va. Code, 1902, §§ 3152, 3156.

#### 4. Exceptions and Objections.

##### a. Time of Making Objections.

###### (1) Before Juror Sworn.

See ante, "Exceptions and Objections," V, E, 5.

As a general rule if there is any irregularity in forming a jury it must be objected to before the jury is sworn, unless the party is shown to have been injured by it. *Parsons v. Harper*, 16 Gratt. 64; *Suffolk v. Parker*, 79 Va. 660.

An objection to the mode of selecting the jury in a trial for murder must be made at the time the jury are chosen; and the prisoner can not avail himself of it after verdict. *Bristow v. Com.*, 15 Gratt. 634.

A new trial should not be awarded, because since the trial it has been ascertained that one of the jurors was not a citizen and resident of the county a year before the trial; when neither party, when the juror was sworn, objected to his serving as a juror, and when it does not appear that the party applying for the new trial was in any manner injured by the juror serving on the jury; and when it further appears that such party had such knowledge of the juror before he was sworn, as made it grossly negligent in him to fail to inquire before he was sworn as a juror into his qualification as such. *Zickefoose v. Kuykendall*, 12 W. Va. 23. See also, *Sweeney v. Baker*, 13 W. Va. 158.

Quære, if he may not make the objection at any time before the verdict is rendered? And it seems he may. *Dilworth v. Com.*, 12 Gratt. 689.

## (2) After Juror Sworn and before Verdict.

No exception to a juror on account of age or legal disability shall be allowed after he is sworn, unless by leave of the justice; but if the justice require it, a juror may be set aside at any time and another placed in his stead. *Dilworth v. Com.*, 12 Gratt. 689; *Bristow v. Com.*, 15 Gratt. 634.

## (3) After Verdict.

Under the Virginia Code, 1873, ch. 158, § 20, it was held, that an objection to a juror for a disability created by the constitution, came too late after verdict. *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512; *Poindexter v. Com.*, 33 Gratt. 766.

It is a principal cause of challenge to a juror that he was of the grand jury which found the indictment. But if the objection is not taken until after the verdict, it will not be set aside on this ground, unless it appears from the whole case that the juror was biased against the prisoner, who, therefore has not had a fair and impartial trial. *Bristow v. Com.*, 15 Gratt. 634.

In *Lawrence v. Com.*, 30 Gratt. 845, 848, the case of *Bristow v. Com.*, 15 Gratt. 634, is cited as authority for the proposition that an objection to the mode of selecting the jury in a trial for murder must be made at the time the jury are chosen, and the prisoner can not avail himself of it after verdict. But in *Lawrence's* case the court went further than the principal case and held, that in a felony case a venire facias may be presumed to have regularly issued from the recital of the record and an objection after verdict comes too late. This is overruled in *Jones v. Com.*, 87 Va. 63, 12 S. E. 226, and the court, in commenting on *Bristow's* Case, at page 66, says: "*Bristow's* Case, 15 Gratt. 634, which has been referred to, has no application. In that case the objection was, not that there was no venire, but that the jury had been improperly selected after

the venire had been executed, and it was held, that the objection came too late after verdict. The difference between that case and this is that here the omission to direct a venire leaves the record destitute of an essential part, which, therefore, can not be supplied by presumption not affected by the doctrine of waiver; whereas any defect in selecting the jury from the persons brought in under the venire, nor being thus essential, may be waived; and so, upon the same principle, objection to the competency of a juror must be made before he is sworn upon the jury, unless by leave of the court."

The objection to a juror that he was not a competent juror, because he had not paid his capitation tax of the previous year, comes too late after a verdict of conviction in a criminal trial; and is not good ground for setting aside the verdict, and granting a new trial to the prisoner. *Poindexter v. Com.*, 33 Gratt. 766.

**Grounds Unknown until after Verdict.**—A new trial will not be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as such juror, but which was unknown to the prisoner until after the verdict, and which could not have been discovered by the exercise of ordinary diligence, unless it appears from the whole evidence submitted to the court upon such motion (not from the evidence before the jury) that the prisoner suffered injustice from the fact that the juror served in the case. *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380.

If the prisoner does not know, or might not with diligence have known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objection to the juror, if made before any of the evidence is introduced. *Dilworth v. Com.*, 12 Gratt. 689.

#### (4) In Appellate Court.

In the appellate court objection can not be made for the first time that a person served on a jury without being selected by the court or summoned by the sheriff. *Short v. Com.*, 90 Va. 96, 17 S. E. 786. See also, Va. Code, 1887, § 3156.

#### b. Steps Necessary in Lower Court to Make Error Available.

An objection that jurors summoned in a criminal case were not free from exception can not be made in the appellate court, where it does not appear that the objection was made in the trial court, or that the accused was injured thereby. *Acts*, 1893-94, ch. 43; *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784; *Abernathy v. Com.*, 92 Va. 803, 23 S. E. 788.

#### c. Presumption as to Prejudice.

An appellate court will not inquire whether injury has been done to the prisoner by improperly setting aside a competent juror, but the law will intend prejudice to the prisoner. *Montague v. Com.*, 10 Gratt. 767, 768.

#### d. Venire Illegally Executed.

Where the prisoner objects to a juror on the grounds that the venire facias was illegally executed, and the court sustained the objection, it is proper to set aside the whole return, and direct another venire facias. *Epes' Case*, 5 Gratt. 676.

#### e. Harmless Error.

The mere exclusion of a juror upon a challenge for cause upon insufficient ground will not be cause for reversal. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

"Where a disqualified juror is put on a jury, it is of course error; but, where a qualified juror is improperly rejected, it is a wholly different thing. In such case the man taking his place is qualified and unexceptionable." *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

"In *Montague's Case*, 10 Gratt. 767, point 4 of the syllabus is: 'The deci-

sion of a court allowing a challenge on the part of the commonwealth, or disallowing a challenge on the part of the accused, whether such challenge be a principal challenge, or a challenge to the favor, is matter of exception on the part of the accused, which it is his right to have reviewed in an appellate court. I am of opinion that this decision is erroneous, and hurtful to the practice of the courts and the administration of justice and ought not longer to prevail. The doctrine that harmless error shall not reverse and render fair trials abortive has made great progress since the date of the decision cited. Judge Lee gave no reasons in the opinion, except that in criminal cases, the law would intend harm to an accused where he is deprived of a right. He did not even refer to the quære in *Clare's Case*, 8 Gratt. 606, and the strong argument of Judge Lomax, probably overlooking them. That argument is, in my judgment, unanswerable." *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

#### f. Curing Error.

If the court erroneously overrule a prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenge the juror, the error of the court is not cured by the subsequent exclusion of the juror, although the prisoner has not exhausted his peremptory challenges, even to the last. *Lithgow v. Com.*, 2 Va. Cas. 297, 298.

Should a prisoner's objection to a juror be improperly overruled, the error is not cured by the juror's name being stricken off from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner. *Dowdy v. Com.*, 9 Gratt. 727 (1852).

If the prisoner objects to a juror, and his objection is overruled; and he excepts, and after the panel is made up, but before the prisoner has exercised his right of challenge, the court,

on the motion of the attorney for the commonwealth, out of abundant caution, sets aside the juror, it is not error. *Wormeley v. Com.*, 10 Gratt. 658.

#### g. Scope of Review.

Though in all cases great weight is justly due to the opinion of a court before whom the jurors are questioned and examined, yet upon exception taken the appellate court must judge from the facts therein stated, whether the reason for setting aside a juror is good and sufficient or the contrary. *Montague v. Com.*, 10 Gratt. 767.

#### 5. Waiver of Right to Challenge.

**General Rule.**—As a general rule, a juror should be challenged for cause before he is sworn. *Com. v. Jones*, 1 Leigh 598.

"The right of challenge, where it exists, must be exercised before the jury shall be sworn, and if not so exercised, the objection is unavailing to set aside the verdict." *Hunter v. Matthews*, 12 Leigh 228, 237.

The verdict of a jury will not be set aside because of grounds of challenge against a juror which might have been known to the challenger or his counsel by the exercise of ordinary diligence, a failure to exercise such ordinary diligence being deemed equivalent to a waiver of the cause of challenge. *Wagoner v. Iacger*, 49 W. Va. 61, 38 S. E. 528.

An objection to a venireman, that he is not qualified according to law, comes too late after he is sworn to try the issue. *Thompsons' Case*, 8 Gratt. 637; *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

**After Election and Oath.**—But even after a jurymen has been elected and sworn, the court may, in its discretion, allow the prisoner to challenge him for cause, and strike him from the panel. *Toel v. Com.*, 11 Leigh 714; *State v. Williams*, 14 W. Va. 851; *State v. Howes*, 26 W. Va. 110.

Thus if the prisoner does not know, or might not with due diligence have

known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objection to the juror, if made before any of the evidence is introduced. *Dilworth v. Com.*, 12 Gratt. 689.

**After Verdict.**—An objection to a juror because he is under the age of twenty-one years comes too late after verdict. The objection, though good if raised in time, must be deemed to have been waived at such stage of the proceedings. *Ilite v. Com.*, 96 Va. 489, 31 S. E. 895.

After a juror has been fully examined on his voir dire, and has stated that he has not made up or expressed any opinion as to the guilt or innocence of the prisoner, and can give him a fair and impartial trial, and has been accepted without objection, an objection by a prisoner, unsupported by the affidavit of himself, or any one else, that he has discovered since the jury was sworn that the juror had been a deputy sheriff, and, two years before the trial, had a warrant for the arrest of the prisoner, and, with others, had pursued him for several days, and had several times visited the neighborhood in search of him, though no arrest was ever made, is not a valid objection, and does not entitle prisoner to a new trial; certainly not, when made for the first time after verdict. *Gray v. Com.*, 92 Va. 772, 22 S. E. 858. See also, *Bristow's Case*, 15 Gratt. 634.

#### C. PEREMPTORY CHALLENGE.

##### 1. Right to Challenge.

The prisoner has an absolute right to challenge a juror peremptorily at any time before he is sworn. *Hendrick v. Com.*, 5 Leigh 707.

Thus, it was error, where a person is called to serve as a juror in a criminal case, and is elected by the prisoner, but before he is sworn the prisoner retracts his election and asks that he may be permitted to challenge him

peremptorily, for the court to refuse to permit such challenge. *Hendrick v. Com.*, 5 Leigh 707.

A court in a felony case may, for good cause, without the consent of the accused, withdraw a juror, and substitute another. The accused is entitled to a peremptory challenge of such juror. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

"Another complaint is that the court withdrew one of the jurors after a portion of the evidence had been introduced, and substituted another one, without obtaining the consent of the prisoner, and without tendering the prisoner a peremptory challenge to the new juror. In *State v. Davis*, 31 W. Va. 390, 7 S. E. 24, under W. Va. Code, ch. 159, § 7, the authority of the court, where the necessity exists, of withdrawing a juror and substituting another, is fully asserted even against the explicit protest of the party on trial. It does not appear what the reason of this withdrawal of a juror was; but we must presume that it was sickness or other good cause until it otherwise appears, as the law presumes that the court performs its legal duty properly. *McKinney v. People*, 7 Ill. 540. Error is not presumed. If no proper reason existed, the prisoner could have shown it by bill of exceptions, but has not done so. *State v. Davis*, *supra*, says the court has authority to withdraw a juror in a proper case, and he who asserts that a proper case did not exist, ought to be called upon to show it. Another consideration is that the prisoner made no objection to this withdrawal, and never said anything against it until he embodied it in a motion for a new trial. I need not cite law to show that there must be an exception to the action of the court at the time it takes place, and that a party can not be silent, take his chances of a favorable verdict, and if it is against him, impeach it for that cause. *Greenbrier Indus. Expo. v. Ocheltree*, 44 W. Va. 626. As to the

right of peremptory challenge, the prisoner did not ask it. It was a right which he could waive. Nobody denied it. The court could not thrust it upon him. A party must assert a right which is waivable by him." *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

#### **Inquiry as to Identity of Convict.—**

Upon an inquiry, in pursuance of the statute, 1 Rev. Va. Code, ch. 171, § 16, whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as a juror. *Brooks v. Com.*, 2 Rob. 845.

#### **2. Denial of Right.**

Where an accused person has the right to challenge peremptorily jurors, and this right is denied, the judgment and verdict will be set aside, and a new trial awarded. *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

#### **3. Waiver.**

An accused may waive his right of peremptory challenge. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

#### **4. Overruling or Sustaining Challenge.**

A peremptory challenge is properly overruled which is made to a person, who being called to serve as a juror in a criminal case, first states, when being examined upon his voir dire, that he is not a freeholder; but soon afterwards, before the panel is completed, returns into court, and says that he is mistaken; that he has been reminded by a friend of his mistake, and that he is a freeholder. The court should permit the correction and hold him a good and lawful juror. *Hendrick v. Com.*, 5 Leigh 707.

### **VII. Impaneling and Swearing.**

#### **A. IN GENERAL.**

The object of the law is in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly

free from bias or prejudice either for or against the accused, or for or against either party in civil cases. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

The statutory provisions under §§ 3, 4, ch. 17, Va. acts, 1877-78, in respect to impaneling juries, are imperative and essential, and the accused is entitled to demand strict compliance with them. Omission of such compliance is error. *Hall v. Com.*, 80 Va. 555.

Where there are two issues joined in an action, the jury may be sworn to try one. *White v. Clay*, 7 Leigh 68; *Mackey v. Fuqua*, 3 Call 19. See also, *Baylor v. Baltimore*, etc., R. Co., 9 W. Va. 270, 282; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555, 572.

Where there has been an issue joined on a declaration to which a demurrer is subsequently sustained, and an amended declaration is filed to which no plea is entered, it is error to impanel a jury sworn to try the issues joined, when in fact no issue was joined on the amended declaration. *Baltimore*, etc., R. Co. *v. Gettle*, 3 W. Va. 376.

## B. NATURE, FORM AND SUFFICIENCY OF OATH.

**Substantial Compliance with Prescribed Form.**—If the oath is substantially in the prescribed or recognized form, it will be sufficient, and a literal adherence to form will not be required. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

A verdict will not be set aside, where the oath taken by a jury in a condemnation proceeding was not administered in exact form, if it be apparent that the jury had before them the proper matters for their consideration, and the plaintiff could have suffered no damage because of any informality in the oath. *Railroad Co. v. Foreman*, 24 W. Va. 663.

**Insertion of Full Form in Record Unnecessary.**—“The court said that while the oath in felony cases, ‘You

shall well and truly try and true deliverence make between the commonwealth and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God’—is the correct oath, still no law prescribed it, common or statute, and one of the same import would be sufficient, and that it was not necessary that the full form of the oath should be literally inserted in the record, but it would be sufficient that it should therein simply appear that the jury was duly sworn according to law. The court said that the statement of the record as to the oath was obviously not the form of oath actually administered, but was merely intended to state the fact that the jury was sworn. So we can say in this case.” *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

**Under W. Va. Code, § 214, Ch. 50.**—The proper plea for the defendant to file in an action of forcible entry and detainer is, ordinarily, “not guilty,” and the proper oath to administer to the jury is that prescribed by § 214, ch. 50, of the Code of West Virginia. *Supervisors v. Ellison*, 8 W. Va. 308.

**To Try Issue, Not to Inquire of Damages.**—Though, in an action sounding in damages, there is an order at rules for an entry of damages, yet a plea of the general issue, or other issuable plea, filed in term, annuls that order; and the jury is properly sworn to try the issue, and not to inquire of damages. *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190.

**“Well and Truly to Try Issue Joined.”**—“In *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777, a murder case, the entry was that the jurors were ‘elected, tried and sworn well and truly to try the issue joined,’ and it was held sufficient.” *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

**“Truth to Speak upon Issue Joined.”**—An oath to a jury in a civil case “the truth to speak upon the issue

joined in this case," is sufficient, though it omit the words "according to the evidence." Were it not alone sufficient, a statement in the record that the jury was sworn would not imply that such was the full oath actually administered, but would be taken simply as stating that the jury was sworn, and the presumption would be that it was accurately sworn. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

In an action for the recovery of money before a justice under the provisions of section fifty of chapter fifty of the Code of West Virginia of 1868, "it is contemplated that some answer or plea be entered or filed by the defendant, if he appear and make defense. And if in such action the justice renders judgment in favor of the plaintiff, and the defendant appeals to the circuit court, if no answer or plea appears by the record to have been entered or filed before the justice or in the circuit court, it is error to swear the jury 'the truth to speak upon the issue joined,'" *High v. Pearce*, 9 W. Va. 291.

**"Truth of and upon the Premises to Speak."**—"In 3 Rob. Prac. 177, the oath or rather the record entry, is, 'who being elected, tried and sworn the truth of and upon the premises to speak.'" *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

"In *Lawrence's Case*, 30 Gratt. 845, the order book showed that the jury 'were sworn the truth of and upon the premises to speak,' and it was held good."

**"Well and Truly to Try the Issue Joined."**—In an action of ejectment, when an issue has been regularly made, though the oath administered to the jury, well and truly to try the issue joined, is sufficient, an oath, to speak the truth of and upon the premises, is not objectionable. *Mercer Academy v. Rusk*, 8 W. Va. 373.

**To "Try the Issue" between the Parties.**—In a case taken by appeal from

the judgment of a justice to the circuit court, where it was tried by jury, the supreme court will not reverse the judgment simply because the jury were sworn to "try the issue" between the parties, where the record fails to show that any plea had been filed or issue made in the case, in the absence of anything to show that the plaintiff in error was prejudiced by such irregularity, if it was such. *Tully v. Despard*, 31 W. Va. 370, 6 S. E. 927.

**"Well and Truly to Inquire," etc.**—"The oath of the jury, on such trial where want of full disclosure has been suggested, is substantially in conformity to the statute where they are sworn to well and truly inquire whether the garnishee has fully disclosed the debts due by him to, or effects in his hands of, the debtor, and also to ascertain the indebtedness of the garnishee to the debtor, and a true verdict render according to the evidence." *Baltimore, etc., R. Co. v. Wilson*, 2 W. Va. 528.

**To "Well and Truly Try and True Deliverance Make."**—It is not error to swear the jury to well and truly try and true deliverance make, and a true verdict render, according to the evidence, instead of swearing them "a true verdict to render according to the law and the evidence." *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

**To "Try the Matter in Difference between the Parties."**—In the action of unlawful entry and detainer prosecuted under the two hundred and eleventh, two hundred and twelfth, two hundred and thirteenth, two hundred and fourteenth, two hundred and fifteenth, two hundred and sixteenth, two hundred and seventeenth and two hundred and eighteenth sections of said chapter fifty it is proper that some answer or plea be entered or filed by the defendant if he appear and make defense. And if the justice renders judgment in favor of the plaintiff in such action and the defendant appeals to the circuit



court, if no answer or plea appears by the record to have been entered or filed before the justice or in the circuit court, it is error to swear the jury "to try the matter in difference between the parties." *Supervisors v. Ellison*, 8 W. Va. 308.

### C. NECESSITY AND SUFFICIENCY OF RECORD.

A record which shows that the jury "were sworn the truth of and upon the premises to speak," sufficiently shows that the jury were sworn in due form. *Crump v. Com.*, 98 Va. 833, 23 S. E. 760; *Brown v. Com.*, 86 Va. 466, 10 S. E. 745; *Fisher v. Duncan*, 1 H. & M. 563.

The record must show when and how the jury were sworn. *Younger v. State*, 2 W. Va. 579.

If the record should disclose that the jury had been properly sworn, and all the other prerequisites had likewise appeared, yet still the fact appearing that the juror who signed the verdict was other and different from any of the jurors named as having been sworn, and there being no averment that the juror who signed the verdict had been sworn, this of itself would be sufficient to set aside the judgment and verdict. *Younger v. State*, 2 W. Va. 579.

It is not necessary, that the form of the oath administered to the jury in a felony case should be entered on the record; it is sufficient, if the record shows that the jury were duly sworn. *State v. Sutfin*, 22 W. Va. 771.

Where several pleas are filed, and several issues made on them, and the record states, that the jury was sworn to try the issue joined and find a verdict, which is responsible to all the issues; and judgment is entered thereon, this court will not reverse such judgment, because of the manner, in which the record states the jury was sworn. *Sweeney v. Baker*, 13 W. Va. 158, 160.

### D. PRESUMPTION THAT PROPER OATH ADMINISTERED.

Where it appears by the record in a felony case that the jury were elected, impaneled, tried and sworn as required by law, it will be presumed that the proper oath was administered to them, and especially is this the case where the prisoner and his counsel were present in court, and made no objection at the time the oath was administered. *State v. Ice*, 34 W. Va. 244, 12 S. E. 695.

If the order recite that the jury were "sworn the truth to speak upon the issue joined," without more respecting the oath, and it does not appear that any objection was made to the form of the oath administered, it is presumed that the jury were properly sworn. *State v. Kellison* (W. Va.), 47 S. E. 166.

### E. WAIVER OF OBJECTION.

"There is another reason why this point should not reverse the trial. The defendant had right to object to the oath when administered and to demand a proper one, if not satisfied with the one used, and he could not sit silent, take his chances of a verdict in his favor, and then take advantage of such defect. He could have shown the oath actually administered by bill of exceptions, and must do so, as held in *Lawrence's Case*, 30 Gratt. 845, and in *Dysen v. State*, 26 Miss. 32, and many other cases cited in 1 *Thompson on Trials*, § 108. I will add that an oath such as that in this case, to try the issue joined, was held good on principle and authority in civil cases. *Pierce v. Tate*, 27 Miss. 238; *Windham v. Williams*, Id. 313." *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

Defects in the form of the oath administered to the jury are waived by failure to object. *State v. Ice*, 34 W. Va. 244, 12 S. E. 695.

## VIII. Custody and Conduct of Jury.

See generally, the titles NEW TRIALS; VERDICT.

**A. CUSTODIAN OF JURY.****1. Sheriff.**

In a prosecution for a felony, where the punishment may be death or confinement in the penitentiary for more than ten years, the jury must be kept in the custody of the sheriff or other proper officer when not in the presence of the court, and that they were so kept must affirmatively appear from the record, or the verdict and judgment will be set aside. *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784.

And the sheriff is ex officio bound to keep the jury when adjourned in a criminal cause. *Bennett v. Com.*, 8 Leight 745.

A jury impaneled and sworn in a felony case is, while not present in court, by the law committed to the custody of the sheriff or other officer, until it is discharged, without any special order of the court committing it to his care. *State v. Poindexter*, 23 W. Va. 805.

It is not error in the circuit court to refuse to set aside a verdict in a felony case, because it appears by the record that during the trial the court on a certain day before its adjournment administered the oath to the deputies of the sheriff, and that on the next day the jury appeared in court "in charge of the sheriff," pursuant to their adjournment. *State v. Poindexter*, 23 W. Va. 805.

**2. Presiding Judge.**

The authority of a judge who presides at a criminal trial, also extends over the jury, not only during the day whilst they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a jury in the temporary absence of the sheriffs to whom the jury has been committed. *Philips v. Com.*, 19 Gratt. 485.

A jury, while in their room in the courthouse consulting of their verdict, are still constructively in the presence of the court. *Gilligan v. Com.*, 7 Va.

Law Reg. July 1901 (Supreme Court of Appeals, at Richmond, January 1901).

**3. Oath of Custodian.**

It is not indispensably necessary that the sheriff should be sworn; if it were necessary to swear him, it would be presumed that he was sworn, in a case where the record does not show the contrary. *Bennett v. Com.*, 8 Leight 745.

Where the record shows that, at the beginning of the trial of a criminal case, all the officers in charge of the jury were only sworn with the usual oath to keep the jury during the trial, when in the absence of the court, it is sufficient. It is unnecessary to show that such oath was administered upon each adjournment of the court. *Reed's Case*, 98 Va. 817, 36 S. E. 399; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695.

**B. REFRESHMENTS AND MEDICAL ATTENTION.**

It is not misbehavior in a juror, between the adjournment of the court in the evening and its meeting next morning, to drink spirituous liquors in moderation. *Thompson's Case*, 8 Gratt. 633.

Where the Deputy sheriff having the jury in charge admits that liquor in sufficient quantities to make the jury or some of them intoxicated was taken by him to the jury room on the day the verdict was rendered, the presumption arising therefrom that the prisoner was injured thereby is not rebutted by the affidavit of the guilty deputy, that none of the jury were intoxicated. *State v. Greer*, 22 W. Va. 800.

It is no cause for setting aside a verdict, where a jury agrees on its verdict, and it is sent in by the foreman, and the justices not being on the bench at the time, two of the jurors separate from their fellows and converse with others, though not on the subject of the case, after which the justices resume their seats. If the verdict is rendered. *Ragland v. Wills*, 6 Leigh 1 (1835).

### C. CONVERSATIONS.

**With Witnesses.**—And it is misconduct on the part of a juror, after the case has been submitted to the jury and they have retired, to consult of their verdict, to ask one of the witnesses whether he had not made certain statements on the witness stand. *Vanmeter v. Kitzmiller*, 5 W. Va. 380.

**With Interested Parties.**—But it is highly reprehensible for the parties to converse with the jurors, and however innocent, it is calculated to impair confidence in the impartiality of verdicts, and should be frowned upon by the courts. Yet casual conversations between parties and jurors during a recess of the court have never been considered sufficient of themselves to set aside a verdict. *Borland v. Barrett*, 76 Va. 128.

**Conversing with Strangers.**—If after the retirement of a jury in a criminal case (they being kept together, under the care of the sheriff, in a room separate from all others), one of the jurors calls to a friend from the window, desiring him to inform his family of the cause of his absence, and requesting him to procure his watch, and deliver it to the sheriff for him, this conversation is not sufficient to set aside the verdict, although the sheriff happens not to hear it. *Kennedy v. Com.*, 2 Va. Cas. 510.

A jurymen should not be allowed to discuss with outside parties the manner of witnesses who have testified before them, or the weight and character of the evidence during the progress of the trial. *Vanmeter v. Kitzmiller*, 5 W. Va. 380; *Dower v. Church*, 21 W. Va. 23.

### D. SEPARATION OF JURY.

#### 1. Criminal Cases.

##### a. In General.

The jury must be kept in the custody of the sheriff or other proper officer when not in the presence of the court, and that they were so kept must affirmatively appear from the record, or

the verdict and judgment will be set aside. *Barnes v. Com.*, 92 Va. 794, 795, 23 S. E. 784.

A mere separation of the jury will not entitle the person to a new trial; but where there has been an improper separation of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of the presumption, that such separation has been prejudicial to him, and the burden of proof is upon the prosecution to show beyond a reasonable doubt, that the prisoner has suffered no injury by reason of the separation. If the prosecution fails to do this, the verdict will be set aside. *State v. Robinson*, 20 W. Va. 714.

But the separation of a juror out of the custody and control of the officers having charge of the jury, is prima facie sufficient to vitiate the verdict; and it is incumbent on the commonwealth to refute that presumption, by disproving all probabilities or suspicions of tempering. *Philips v. Com.*, 19 Gratt. 485.

##### b. What Constitutes a Separation.

The fact that the jury at a hotel during the trial of a felony case occupied two separate rooms, each portion of the jury being in charge of an officer, does not constitute a separation of the jury. *State v. Robinson*, 20 W. Va. 714, 716.

While all the jurors in a felony case are attended by proper officers, there can be no such separation as will raise a presumption of impurity in their verdict and throw upon the state the burden of showing beyond a reasonable doubt, that the prisoner has suffered no injury by reason thereof, the verdict being against him; but, under such circumstances, there may be such misbehavior on the part of the jurors as will raise such presumption. *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, approving *State v. Cartright*, 20 W. Va. 32; *State v. Robinson*, 20 W. Va. 714; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982;

*State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

If the court can see that the officers who had the jury in charge have kept them together within the practical meaning of the rule, and have not spoken to them themselves, nor suffered any other person to speak to them, touching any matter relative to the trial, until they have returned again into court, that is sufficient, although it may be that in leaving the courthouse and returning they were separated somewhat more than is usual, and passed within hearing of persons talking on other subjects. *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

And where on a trial for murder, during a recess, the jury is committed to the keeping of the high sheriff, who is sworn to keep them; but his deputy is not sworn, the high sheriff goes out with a part of the jury, leaving the others in the jury room with the deputy, and with the door locked or closed, this is not such misconduct of the jury which will entitle the prisoner to a new trial. *Trim v. Com.*, 18 Gratt. 983.

#### **c. Separation before Whole Number Elected and Sworn.**

In impaneling a jury for trial of an indictment for felony, there is no necessity to keep jurymen who have been elected and sworn together and separate from other persons, under the charge of the sheriff, until the whole number shall have been elected and sworn. *Tooele v. Com.*, 11 Leigh 714; *Epes' Case*, 5 Gratt. 676.

#### **d. Separation in Adjournment without Order.**

It is not sufficient ground for the discharge of a prisoner from further prosecution, under an indictment, that at a former term of the court, he had been arraigned upon the indictment, a jury had been impaneled, been charged with his case, had retired to consult of their verdict, and, not agreeing, were confined the full legal term of the

court, and did not render any verdict in the case, but separated in the adjournment of the court at the end of the term without an order discharging them. *Com. v. Thompson*, 1 Va. Cas. 319.

#### **e. Particular Instances.**

In a criminal case, the separation of one or more of the jurymen from the rest, for innocent purposes (such as going to see a horse taken care of—to procure great coats, cushions, etc., from the bar of the tavern to wear or rest on in the jury room—to wash at the tavern porch, etc.) is no ground for setting aside the verdict, provided, the separation is with the authority of, and the juror is accompanied by, one of the officers who has charge of the jury; and provided also, there is no actual improper communication between the jurors and other persons during the said authorized separation. *Thomas v. Com.*, 2 Va. Cas. 479; *Mo-Carter v. Com.*, 11 Leigh 633.

If the jury, on their retirement for the night, are placed upstairs in a tavern, in five lodging rooms, which are separated from each other by a common passage, into which they all open, the doors of the lodging rooms being generally open; the doors to the common passage kept constantly shut, so as to exclude other persons, this disposition of the jury is a strict compliance with the law, which requires that the jury should be kept together. *Kennedy v. Com.*, 2 Va. Cas. 510.

In *Martin v. Com.*, 2 Leigh 745, it is declared that, where a jury is impaneled and sworn, and before any evidence is given, some of them separate from their fellows for a brief space of time, such separation being before any evidence has been given, it does not furnish a cause for setting aside a verdict of conviction. Especially is this so, where the separation is so momentary, that any tampering with the jurors is hardly possible.

Where a sheriff, to whom a jury is

committed in the progress of a criminal trial, walks with them to a neighboring house, and while there withdraws from the room where they are, leaving them in the company of other persons, though there is no allusion by them to the trial during the absence of the sheriff, yet the verdict should be set aside, and a new trial directed. *Com. v. Wormley*, 8 Gratt. 712.

Upon a trial of indictment for murder, the jury, not agreeing on a verdict, are, after dark, adjourned over till next morning, and committed to two sheriffs to be enclosed in a room to be prepared for them; in conducting them from the courthouse to their room, one juror separates from his fellows, gets twenty-five yards from them and the sheriff having them in charge, tells a servant whom he meets with to take care of his horse, says nothing else to any one, and no one speaks to him; he is immediately pursued by one of the sheriffs, and brought back to the rest of the jury; his separation from his fellows does not exceed a minute, and he was a yet shorter time out of sight of the sheriffs; next morning, the jury finds prisoner guilty of murder in the first degree, and the court passes sentence of death. Held, that such separation of the juror from his fellows is no cause for setting aside the verdict. *Com. v. Howard*, 11 Leigh 631.

In impaneling a jury for trial of an indictment for felony, eight are elected and sworn, and three elected but not sworn; one who had been sworn separates from the rest, goes some miles off and stays some hours; the other ten are put in charge of sheriff, to keep together and separate from other persons, till ensuing morning; upon attachment against the absconding juror, he is taken the same night, and put and kept in the same room with the other jurymen till next morning, but there appears to have been no conversation on the subject of the prosecution; next morning, by allowance of

the court, this juror is challenged by the prisoner for cause, and set aside; the jury is then completed, and find the prisoner guilty. Held, that the separation of the absconding juror from his fellows, and his subsequent association with them, though he was afterwards struck from the panel, does not vitiate the verdict, and is no good reason for a new trial. *Tooele v. Com.*, 11 Leigh 714.

"The prisoner claims that the verdict ought to have been set aside because of separation of the jury. At a dinner recess during the trial the jury, while taking a walk in charge of the sheriff, stopped in a bowling alley, but they did not play, further than that two or three jurors picked up some balls lying at one end of the alley and rolled them down the alley; that they spoke to no one to set up pins or play; that there was a man sixty or seventy feet away from them setting up a few pins, but was not asked to do so by the jurors; that while there two or three people came in the large room, seventy or eighty feet by thirty, but did not come near or communicate with the jurors. The sheriff and deputies were with the jury, in charge of it. No conversation or communication whatever was had by the jurors with any one. All the jurors swear to this. They were there five minutes. It further appears that as they went from the bowling alley, on the street the sheriff said 'stop a moment, a man wants to take our pictures,' and the jurors and sheriff stopped one or two minutes, and a man took a snap-shot picture of them; that they spoke to no one except the sheriff, nor did any one speak to them. The twelve jurors swear to this. They say that they did not know whether or not the picture took in the prosecuting attorney, W. R. Brown, or any one else, though the picture shows that it included him and others. The affidavit of the jurors says that they spoke to no one, nor did Brown or any one else speak to them. There is no showing

at all of any further separation, or of any intercourse, conversation or communication between the jurors and anyone else save the sheriff and his deputies. The jurors swear that from the beginning to the end of the trial there was none. Judge Poffenbarger has lately fully reviewed the case upon this subject, and this renders it unnecessary for me to rediscuss it. *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605. The law is well settled. It is plain there was no separation." *State v. Cottrill*, 52 W. Va. 363, 367, 43 S. E. 244.

#### f. Operation and Effect.

Separation of the jury in a criminal case only raises a presumption of impurity in the verdict, and if that presumption be fully overcome and it be shown beyond reasonable doubt that the prisoner has not been prejudiced thereby, such separation or misconduct does not vitiate the verdict. *State v. Clark*, 51 W. Va. 457, 41 S. E. 204.

Pending a trial for felony and before the testimony was closed, five of the jury having received permission to retire from the courtroom accompanied by the sheriff, another juror thereupon leaves the jury box without the knowledge of the court, passes out of the courthouse through a crowd of persons collected about the door, and remains absent a few minutes, after which he returns into court; having (as he deposed) held no communication whatever with any person during his absence; but not having been, during that period, in charge of the sheriff, or even seen by him. The trial proceeded and the prisoner was convicted. Held, that such separation of the juror from his fellows was sufficient cause for setting aside the verdict. *Overbee v. Com.*, 1 Rob. 756.

**Offense Not Punishable by Death or Ten Years' Confinement in Penitentiary.**—Where the offense tried is not punishable with death, or ten years' confinement in the penitentiary, an ob-

jection that the jury were allowed to separate has no merit, though the court may have ordered that they be boarded at a hotel during the trial; but the objection has merit, if the offense tried is punishable with death or confinement for ten years in the penitentiary. *Jones v. Com.*, 79 Va. 213. See also, *Jones v. Com.*, 31 Gratt. 830.

#### 2. In Civil Proceedings.

Where in an action of assumpsit against an administrator, issues are joined upon pleas of non assumpsit and fully administered and the jury, after retiring from the bar, without leave of court or consent of parties, separate and disperse and afterwards render a verdict for defendant, it is not such misconduct on the part of the jury as to justify the verdict being set aside. *Howle v. Dunn*, 1 Leigh 455.

#### E. RECEIVING AND READING LETTERS AND NEWSPAPERS.

**Newspapers.**—Before a jury trying a felony case should receive newspapers, such newspapers should be inspected by the court, and all objectionable matter be cut out. *State v. Robinson*, 20 W. Va. 714, 716.

While it is the safer and better practice to exclude newspapers from a jury sitting in a felony case, yet, when the court, in the presence of a prisoner and his counsel, and without objection on their part, at the instance of the jury, permits them to have access to newspapers under instructions that they shall scrupulously avoid reading any parts of said papers that have reference to the trial, the prisoner can not after verdict make objection on that account. He has no right to sit mute, prepared to abide by the result if favorable, and to make objection if adverse. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

The mere reading of newspapers by members of a jury, while trying a felony case, will not vitiate a verdict rendered against a prisoner, unless such newspapers contain matter calculated

to influence the minds of the jury against the prisoner to his prejudice. *State v. Robinson*, 20 W. Va. 714, 716.

Thus, a newspaper containing an account of a horrible murder in no way connected with the case on trial, read by the jury while trying a murder case, is not calculated to prejudice the minds of the jury against the prisoner. *State v. Robinson*, 20 W. Va. 714, 716.

**Sealed Letters.**—The reception of sealed letters by jurors during the trial of a felony, and especially a capital case, renders the verdict vicious; and it should be set aside and a new trial granted the prisoner, who has been convicted, although the jurors in the absence of the letters, swear that none of such letters so received in any manner related to the case on trial. *State v. Robinson*, 20 W. Va. 714, 715.

Before letters addressed to members on a jury, while trying a felony case, are received by them, they should first be inspected by the court, so that the court can know, that no influence calculated to prejudice the prisoner was in that way brought to bear upon the jury. *State v. Robinson*, 20 W. Va. 714, 716.

#### **F. TAKING WRITTEN INSTRUCTIONS TO ROOM.**

See generally, the title **INSTRUCTIONS**, vol. 7, p. 701.

It is not error on a trial for rape, after the jury are directed to consider of their verdict, for the clerk to call their attention to the charge which has been given to them as to the punishment, and, at his suggestion, to take such charge with them to their room. *Mitchell v. Com.*, 89 Va. 826, 17 S. E. 480.

On a criminal trial the indictment, the written instructions of the court, or other writings proper to be given into the hands of the jury, upon their retirement from the presence of the court, or afterwards, should be delivered to them in the presence of the prisoner and his counsel, in order that objection,

if there be any, may be made. *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527.

#### **G. TAKING DEPOSITIONS TO ROOM.**

See generally, the title **DEPOSITIONS**, vol. 4, p. 549.

In criminal cases, it is improper to permit the jury to take depositions in behalf of the accused to its room, on retiring; however, the court should, on its request, have any portion of such depositions reread to it. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

In *Hansbrough v. Stinnett*, 25 Gratt. 495—an action for slander—it was held, that a deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased. And this case further holds that papers read in evidence, though not under seal, may be carried from the bar by the jury. Va. Code, 1887, § 3388. However, in *Welch v. Insurance Co.*, 23 W. Va. 288, an action of assumpsit based on a policy of insurance against fire, it was held that depositions read before a jury ought not, against the protest of one of the parties to a suit, to be permitted to be taken to the jury room on their retirement.

#### **H. CASUAL VISIT TO SCENE OF HOMICIDE.**

In *Com. v. Brown*, 90 Va. 671, 19 S. E. 447, it was held that a mere casual visit to the scene of homicide by the jury, during recess, whilst taking exercise under custody of an officer in charge, in prisoner's absence, when there is no proof of prejudice or conversation regarding the scene, or of any influence on the jury thereby, was not such misconduct as to furnish grounds for setting aside the verdict.

#### **I. TAKING INSTRUMENTS APART AND EXAMINING.**

Where upon a trial for murder, cartridge hulls found at the scene of the homicide are introduced by the prosecution, and the prisoner's Winchester

rifle, with shells fired from it during the trial introduced by him to show that the plunger struck the shells differently from those introduced by the prosecution; and the jury are permitted, without objection, to take the rifle and shells to their room; it is not misconduct in the jury to take it apart and examine the plunger and ascertain that it has been recently tampered with and fixed so as to explode the cartridges differently from those put in evidence by the prosecution. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

## IX. Discharge of Jury.

### A. AUTHORITY TO DISCHARGE, AND PROPER EXERCISE OF SAME.

**Jury as a Whole.**—Under § 12 of ch. 202, Va. Code, 1873 (Va. Code, 1887, § 4026), the court may discharge a jury in any criminal case, felony or misdemeanor, whenever, in its opinion, they can not agree on a verdict, or there is a manifest necessity for such discharge, whether the prisoner consents or not. But the discretion exercised in such cases by the trying court may be reviewed by the appellate court. *Wright v. Com.*, 75 Va. 914; *Crookham v. State*, 5 W. Va. 510 and in *Dye v. Com.*, 7 Gratt. 662, this authority is held to be rightly exercised in misdemeanor cases, without, or even against the consent of the defendant. Nevertheless, there must be a necessity for the discharge of a jury to authorize it. *Williams v. Com.*, 2 Gratt. 567.

Thus, on a trial for felony, the court has no authority to discharge the jury without the consent of the prisoner, merely because the court is of opinion that the court will not be able to agree. *Williams v. Com.*, 2 Gratt. 567.

The power to discharge is properly exercised, in a capital case, where the jury has been kept together for nine days without agreeing on a verdict, and the health of one of the jurors is

suffering from confinement, while the personal attentions of another juror are required by the situation of his wife. *Com. v. Fells*, 9 Leigh 613.

But the fact that a small red dress, belonging to, and worn by the deceased when injured, is placed by the sheriff on the railroad track at the point where the accident occurred, while the jury are viewing the place and its surroundings, and while they are looking down the track from the point the engine first came in sight of the deceased, is not sufficient misconduct to require the discharge of the jury; nor, after a cautioning instruction, is it sufficient error to justify the setting aside of their verdict; it being merely the illustration or demonstration of a physical fact, about which the defendant can introduce contradictory evidence or can examine the plaintiff's witnesses. *Bias v. Chesapeake, etc., R. Co.*, 46 W. Va. 349, 33 S. E. 240.

And where a prisoner is on trial for felony, and the court discharges the jury, on the ground that they are unable to agree, and the prisoner is afterwards tried and convicted, and the record fails to show that he made any objection to the discharge of the jury, or made any motion in the court below for his discharge, in the appellate court he will be deemed to have waived all objections to the discharge of the jury; or it will be presumed that the court below discharged the jury impaneled and sworn in the case for sufficient cause, and with the consent or acquiescence of the defendant. *State v. Sutton*, 22 W. Va. 771; *Dye v. Com.*, 7 Gratt. 662.

On a trial for stealing certain bank notes, "the members and denomination of which are known to the jurors," the evidence of the commonwealth showed that the number and denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence, the court, on the motion of the prisoner, excluded



the evidence; and then, against the objection of the prisoner, discharged the jury. On a second indictment for the same offense, it was held, that if the jury had, on the first trial, rendered a verdict in favor of the prisoner, it would not, under the statute, Virginia Code of 1860, ch. 199, § 16, have been a bar to another indictment and trial for the same offense; and therefore the discharge of the jury was no injury to the prisoner. *Robinson v. Com.*, 32 Gratt. 866.

### **B. NECESSITY OF ORDER DISCHARGING.**

And it is not sufficient ground for a discharge of a prisoner from further prosecution, under an indictment, that a jury had been impaneled, been charged with his case, had retired to consult of their verdict, and, not agreeing, were confined the full legal term of the said court, and did not render any verdict in the case, but separated on the adjournment of the court at the end of the term without an order discharging them. *Com. v. Thompson*, 1 Va. Cas. 319.

The practice of finally adjourning the court, without noticing the jury, whereby it is discharged by operation of law; or of discharging them simultaneously with the final adjournment of the court, is proper. *Williams v. Com.*, 2 Gratt. 567.

### **C. OPERATION AND EFFECT OF DISCHARGE.**

If a court improperly discharge the jury without the consent of the prisoner, he is entitled also to be discharged from the prosecution. *Williams v. Com.*, 2 Gratt. 567.

But the discharge of a jury, after they have rendered a verdict against a prisoner, which verdict is adjudged to be a nullity because it was not duly perfected, and therefore set aside as insufficient, is no bar to a prosecution under the same, or a new indictment. *Gibson v. Com.*, 2 Va. Cas. 111; *Stuart v. Com.*, 23 Gratt. 950.

If on a trial for robbery, the court, without prisoner's consent, discharges a jury which is unable to agree, these facts will not sustain a plea of "former jeopardy," on a subsequent trial. *Jones' Case*, 86 Va. 661, 10 S. E. 1003.

### **D. ERRONEOUS DISCHARGE.**

If it is not suggested that the accused is insane at the time of the trial, and the jury which is impaneled for the trial of the cause is discharged, the prisoner is thereby wronged from making his proper defense before the jury, and is entitled upon his motion to be discharged from further prosecution of the indictment. *Gruber v. State*, 3 W. Va. 699.

## **X. Special or Struck Juries.**

### **A. RIGHT TO DEMAND AND DISCRETION IN ALLOWING.**

The allowance or refusal of a special jury is a matter resting in the sound discretion of the court. *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348; *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504.

"Blackstone says, in treating of special juries, that they were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. 3 Bl. Comm., 357. In his treatise on Trial by Jury (§ 72), Proffatt, after quoting this passage from Blackstone, lays it down that a motion for a special jury is addressed to the discretion of the court; 'and it is evident,' he adds, 'that certain reasons or circumstances must be presented by a party who makes a motion for the impaneling of such a jury.' In this county it is generally a matter of statutory regulation. In some of the states a motion for a special jury is allowed as of course, but it is not so in all of them, nor is it so in this state. The language of our state, now carried into § 3158 of

the Code, is that 'any court, in a case where a jury is required, may allow a special jury,' etc., thus leaving it, as at common law, to the discretion of the court—a discretion, it is true, not arbitrary, but a sound judicial discretion, to be governed by settled principles, and reviewable, when exercised, by the appellate court. Each case, therefore, must stand upon its own circumstances, and when it appears from a survey of the whole record that injustice has not been done, the judgment of the trial court will not be reversed, although the appellate court may be of opinion that, upon the showing made, a special jury ought to have been allowed. In such a case the error is not to the prejudice of the party complaining." *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 133, 12 S. E. 348.

#### **B. RIGHT TO SPECIAL JURY.**

**In Felony Cases.**—The West Virginia Code, ch. 116, § 21, relative to special juries, amended in 1870, does not apply in cases of felony. *State v. Miller*, 6 W. Va. 600.

Under § 3 of chapter 159 of the Code of West Virginia providing that "in case of felony twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel can not be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, free from exceptions, be completed, etc.;" where a jury is to be impaneled in the felony case, the law is satisfied if the sheriff selects them and it is not necessary to put the names of those summoned into the box and draw from such box the names of twenty jurors. *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

**Prosecution for Giving Whiskey to a Voter on Election Day.**—The offense charged under West Virginia Code, ch. 5, § 10, of giving a voter intoxicating liquor on election day, is not within the meaning of the term "civil case,"

as used in § 21, ch. 116, W. Va. Code, and therefore the accused is not entitled to a special jury. *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

#### **C. OPERATION AND EFFECT OF REQUEST.**

Where a prisoner charged with murder is arraigned, and it is announced that he is ready for trial, whereupon the court expresses the opinion that the prisoner might be legally tried by a special jury; and informs him that unless he asks to be tried by such a jury the case will be continued; and thereupon the prisoner, stating that he does not wish to waive his right, but, in order to get a new trial, does ask for a special jury, such speech and ruling of the court is erroneous. It is erroneous because it influences the prisoner to ask for a special jury, and so to waive his right to strike eight jurors from the panel, and acquiesce in the wrong of the prosecuting attorney's striking off two without cause. And by reason of this the accused shall not be precluded to question the legality of the proceeding, as if he had not asked for the special jury, but had at the proper time objected; or had moved to strike eight from the panel; or had objected to the prosecutor's striking off any. *State v. Miller*, 6 W. Va. 600.

#### **D. REVIEW OF DISCRETION.**

Under Virginia Code, 1887, § 3158, authorizing a special jury, the discretion of the trial court in refusing one can not be interfered with on appeal, where there was no showing, in support of the request, that the facts alleged therein were true, and it is not made to appear on appeal that any prejudice resulted from the refusal. *Southern R. Co. v. Oliver (Va.)*, 47 S. E. 862.

Motions for a special jury are addressed to the sound discretion of the court, and its judgment will not be reviewed, unless it plainly appears that the discretion has been improperly ex-

exercised. *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504.

## **XI. View by Jury.**

### **A. STATUTORY PROVISIONS ALLOWING.**

#### **1. Va. Code (1887), § 3167.**

**Provision and Scope Stated.**—The Va. Code (1887), § 3167, relating to views by a jury, providing that "the jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing, relating to the controversy between the parties, when it shall appear to the court that such a view is necessary to a just decision" \* \* \*; applies to criminal as well as civil cases and under its provisions the court may, at the instance of the commonwealth and against the objection of a prisoner, direct a view by the jury better to understand and apply the evidence in the case. *Litton v. Com.*, 101 Va. 833, 843, 44 S. E. 923.

**History of Statute.**—"In order to give to this statute a correct interpretation, we deem it necessary to trace its history. It was doubtless taken from 6 Geo. IV, ch. 50, § 23. In 2 Tidd's Pr. 796 (Amer. Notes), it is said: 'In a criminal case, there could formerly have been no view, without consent. But now, by St. 6 Geo. IV, ch. 50, "where any case, either civil or criminal, or on any penal statute, depending in any of the courts at Westminster, or in the counties palatine, or great sessions in Wales, it shall appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issue, in every such case, such court, or any judge thereof in vacation, may order a rule to be drawn up, con-

taining the usual terms, and also requiring, if such court or judge so think fit, the party applying for the view to deposit in the hands of the undersheriff a sum of money to be named in the rule for the payment of the expenses of the view,'" etc. This statute was enacted the sixth year of the reign of George IV, and it was at that time an open question in this country whether a view could be allowed in a criminal case in the absence of a statute authorizing it; some of the courts holding that it could not, and others taking the opposite view. In *Robinson's Practice* (old Ed.), pp. 178, 179, the subject is briefly discussed, and some of the decided cases are given, in which the view was denied and allowed, but the author expresses no opinion on the subject. When our statutes were confided in 1849 there was ingrafted, as § 10 of chapter 162, Code, 1849, under the heading of 'Juries Generally,' the following: 'Section 10. The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided the party making the motion shall advance a sum sufficient to defray the expenses of the jury, and the officers who attended them in taking the view; which expenses shall be afterwards taxed like other legal costs.' It will be readily observed that this statute is substantially the same as the act of Geo. IV, supra, the principal difference being in the omission of the words 'either civil or criminal.' It will be observed, also, that when this statute was enacted it became § 10 of the chapter entitled 'Juries Generally,' and that other sections of the chapter apply, beyond dispute, to criminal cases, so that the argument to be deduced from its collocation is wholly in favor of its operation in criminal as well as civil cases. In the compilation of our

statutes into what is called the 'Code of 1870,' the statute just quoted appears under the same heading and in identically the same words as § 39, ch. 162. It so appears in the compilation known as the 'Code of 1873,' as § 37, ch. 158; and, when the revision of our statutes was made in 1887, no change whatever was made in the statute, except to place it under the head of 'Juries in Civil Cases,' instead of under the former heading. While the collocation or classification of a statute in the Code is to be considered in determining the legislative intent in its enactment, it is not sufficient of itself to warrant the collusion that the placing of a statute under the head of 'Juries in Civil Cases,' therefore applicable to both civil and criminal cases, repeals it as to the latter, and confines its operation to the former. Nor do we attach any importance to the omission of the words 'either civil or criminal' when the statute of 6 Geo. IV, supra, was ingrafted into the Code of 1849. When the statute says 'in any case,' it includes the only two classes of cases we have; viz., civil and criminal; and doubtless it was in the legislative mind that, having used the words 'in any case,' the words 'either civil or criminal' would be mere surplusage. If the words 'in any case' are to be construed as not applying both to civil and criminal cases, which class is to be excluded? Would it not be as grave an invasion of the province of the legislature to say, by judicial interpretation, civil cases only were in the contemplation of the framers of the statute, as it would be to hold that criminal cases only were within its purview? Is it not safer to do no violence to the language employed, to give to the words used their natural meaning and effect, and to hold that the phrase 'any case' covers all cases to be tried by a jury? There is nothing in the phraseology of the statute that confines its operation either to be the civil or criminal cases, but both are included, and a

view may, in the discretion of the presiding judge, be ordered in either case, whether there be objection on the part of either party or not; and it is a matter of common knowledge that it has been the practice in this state for a great while to permit the jury to view the premises or locality where the crime is alleged to have been committed, though we can not recall that such has been the practice in cases in which the accused objected. We are also of opinion that the mere preservation of the provision contained in the original English statute from which our statute (now § 3167 of the Code) was taken, relative to the costs of a view, nor the fact that the legislature, by act of January 18, 1888 (acts, 1887-88, p. 18, ch. 15), amending § 4048 of the Code, declared that § 3167 'shall apply to jurors and juries in all cases, criminal as well as civil,' justifies the conclusion of § 3167 was theretofore applicable to civil cases only. With reference to the first proposition, we deem it only necessary to say that, in the enforcement of the provision in the statute touching costs, the courts are controlled by it and other statutes in force in this state, in *pari materia*; and, with reference to the second proposition, that, in our view, the amendment of § 4048 of the Code was wholly unnecessary to make § 3167 applicable to criminal cases." *Litton v. Com.*, 101 Va. 833, 845, 44 S. E. 923.

## 2. W. Va. Code, Ch. 116, § 30.

A view can not be had except under the West Virginia Code, ch. 116, § 30, which provides that the jury may be taken to view the premises, at the request of either party. *State v. Henry*, 51 W. Va. 283, 300, 41 S. E. 439; *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465; *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628.

## B. RIGHT TO DEMAND VIEW.

The parties have a right to have the premises viewed by the jury as well as by the commissioners, for the as-

certainment of facts, before rendering their verdict. *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

### C. DISCRETION OF COURT.

A motion for a view is peculiarly within the discretion of the trial court. *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842; *Davis v. American Tel., etc., Co.*, 53 W. Va. 616, 45 S. E. 926.

By § 30, ch. 116, W. Va. Code, 1891, "the jury may in any case, at the request of either party be taken to view the premises or the place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision." If a motion under this section is made it is peculiarly within the discretion of the trial court, and, before a ruling thereon will be disturbed, it must be made clearly manifest that such view is necessary to a just decision, that it is practicable, and that request therefor was denied, to the probable injury of the party applying. *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465; *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628.

**At Common Law.**—"There is conflict of authority whether the court may, at common law, in its discretion, permit the jury to visit and view the premises where it is alleged a crime was committed, not for the purpose of furnishing evidence upon which a verdict is to be founded, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court. 9 Amer. & Eng. Ency. L. 725; 22 Ency. Pl. & Pr. 1038, and authorities cited. But in our opinion, the matter is controlled in this state by statute." *Litton v. Com.*, 101 Va. 833, 44 S. E. 923.

### D. NECESSITY OF VIEW.

A view is not often essential. It is inconvenient and productive of delay

and costly. It is requisite only where other evidence is inadequate to fairly present the case to the jury. *Davis v. American Tel., etc., Co.*, 53 W. Va. 616, 45 S. E. 926; *Gunn v. Ohio River Co.*, 36 W. Va. 165, 14 S. E. 465.

In an action by a contractor on a railroad against the company for work and labor, the plaintiffs having offered evidence tending to show that certain excavation which was a part of the work in controversy, was of solid rock and the defendant having offered evidence tending to show the contrary; the defendant moved the court to have the jury taken to view the premises, they being about thirty miles off on the line of the road, and offered to send the jury on the train of the company, and defray the expenses. The court having overruled the motion, the appellate court can not say the court below erred, unless it appears from the record that a view was necessary to a just decision; and that does not so appear. *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447.

### E. OBJECT OF VIEW.

"The object of such view must be to acquaint the jury with the situation of the premises, and the location of the property, so that they may better understand the evidence, and apply it to the local surroundings of the case." *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

### F. PRESUMPTION AS TO ALLOWANCE OF VIEW.

"But if there was a view, it is conclusively presumed here, in the absence of anything appearing in the record to the contrary, that either the state or the prisoner requested it." *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

"The presumption that the proceedings of the court were regular, when error is not affirmatively shown, by bill of exception or otherwise, except as to those things which are held to be essential to a legal conviction, such as indictment, pleading, impaneling of a

jury, the oath of the jury, trial by jury, verdict and judgment, is conclusive on the question of the proper allowance of the view. This question is fully discussed in *State v. Beatty* (decided at this term of court) 51 W. Va. 232, 41 S. E. 434. See also, *Shrewsbury v. Miller*, 10 W. Va. 115; *Richardson v. Donehoo*, 16 W. Va. 685, 687 (syl., point 14); *Griffith v. Corrothers*, 42 W. Va. 59, 24 S. E. 569." *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

#### G. INSTRUCTIONS AS TO PURPOSES AND USE OF VIEW.

When a view of the premises is taken the court is not bound to instruct the jury that they should not consider as evidence any of the objects or locations pointed out to them upon the grounds. *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

"As to the duty of the court to instruct the jury upon its own motion that they should not take into consideration as evidence anything they saw while at the premises, the same rule applies; for it is presumed that if it was the duty of the court to give such instruction, that duty was performed. This is the position taken by this court in the case of *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434, in reference to the question whether it is the duty of the court, upon its own motion, to instruct the jury in a trial on an indictment for murder that, if they find the defendant guilty of murder in the first degree, they may recommend imprisonment. It is further held in that case that the court is not bound to give such instruction upon its own motion, for the right to such instruction does not belong to that class of rights which are guaranteed to the citizen by the constitution. So in this case. Neither the constitution nor the statute directs the giving of such instruction, nor forbids a conviction without it. Moreover, such an instruction is not

proper under the decisions of this court. 'When the jury have been properly permitted to review the premises in dispute, it is not improper to refuse a request which requires the court to instruct the jury that they are not to take into consideration anything they saw or any impression they received at the view of the premises, in determining the rights of the parties to this suit. *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.'" *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

"The modification of the fourteenth, and the rejection of the fifteenth, involve the consideration of our statutes permitting the jury at their own request, or on motion of either party, to inspect the premises in dispute. \* \* \* To instruct them to disregard everything they saw, and every impression they derived from the view, would be to mislead them, because it is apparent that the view would be absolutely useless, and would not conduce to a 'just decision,' if both sight and apprehension were to be closed against the results naturally to be derived from an inspection of the premises. Va. Code, 1887, ch. 116, § 30; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447, 471. The modification of the seventeenth and eighteenth instructions propound the law precisely as we understand, and have endeavored to explain it." *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

#### H. DENIAL OF VIEW AS CONSTITUTING ERROR.

The refusal of an allowance of a view by a jury will not be ground of reversal unless it is clearly manifest that a view was necessary to a just verdict, and that its refusal operated to the injury of the party asking it. *Davis v. American Tel., etc., Co.*, 53 W. Va. 616, 45 S. E. 926; *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 14 S. E. 465.

## **Jury Box.**

See the title **JURY**.

## **Jus Accrescendi.**

See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 8, p. 89.

**JUS DISPONENDI.**—**Jus disponendi** means the right of disposition. *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. 3. See also, *Geiger v. Blackley*, 36 Va. 328, 330, 10 S. E. 43.

**JUST CAUSE.**—In *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 371, 33 S. E. 262, 265, it is said: "The plaintiff's first instruction uses the words **just cause** for 'probable cause' and it is to that extent erroneous, for, while 'probable cause' is **just cause**, **just cause** may be and is something else; and hence is misleading, so far as the jury is concerned, for it may be taken to mean full or complete cause, such as would secure the criminal conviction of the defendant."

**Just cause** in the sense of sufficient reasonable cause, see *Clafin v. Steenback*, 18 Gratt. 842, 850.

**JUST COMPENSATION.**—In *Stewart v. Ohio River R. Co.*, 38 W. Va. 438, 18 S. E. 604, 609, it is said: "And **just compensation** is that which makes him whole, and, in respect to general benefits or damages resulting from the road, leaves him in as good a situation as his neighbor, no part of whose property has been taken. *Lewis Em. Dom.*, § 471, p. 607. See *Cooley, Const. Lim.* 567." See also, *Norfolk, etc., R. Co. v. Nighbert*, 46 W. Va. 202, 32 S. E. 1032. And see the title **EMINENT DOMAIN**, vol. 5, p. 88.

**JUST DEBTS.**—See the titles **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 572; **MARSHALING ASSETS AND SECURITIES; WILLS**. And see *Trent v. Trent*, *Gilmer* 174; *Downman v. Rust*, 6 Rand. 587; *Clarke v. Buck*, 1 Leigh 487; *Thompsons v. Meeks*, 7 Leigh 419, 429.

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See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; AFFIDAVITS, vol. 1, p. 227; AMENDMENTS, vol. 1, p. 321; APPEAL AND ERROR, vol. 1, p. 654; APPEARANCES, vol. 1, p. 677; ASSAULT AND BATTERY, vol. 1, p. 732; ATTACHMENT AND GARNISHMENT, vol. 2, p. 70; AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181; BAIL AND RECOGNIZANCE, vol. 2, p. 213; BASTARDY, vol. 2, p. 339; BILL OF PARTICULARS, vol. 2, p. 376; BILL OF REVIEW, vol. 2, p. 394; BONDS, vol. 2, p. 507; BRIBERY, vol. 2, p. 622; BRIDGES, vol. 2, p. 625; CERTIORARI, vol. 2, p. 759; COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 14; COMPROMISE, vol. 3, p. 37; CONFESSION OF JUDGMENTS, vol. 3, p. 64; CONTINUANCES, vol. 3, p. 270; CORONERS, vol. 3, p. 508; COSTS, vol. 3, p. 605; CRIMINAL LAW, vol. 4, p. 1; DEMURRERS, vol. 4, p. 465; DEPOSITIONS, vol. 4, p. 549; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, pp. 693, 713; ELECTIONS, vol. 5, p. 5; EVIDENCE, vol. 5, p. 295; EXCEPTIONS, BILL OF, vol. 5, p. 357; EXECUTIONS, vol. 5, p. 416; EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 5, p. 474; FALSE IMPRISONMENT, vol. 5, p. 816; FERRIES, vol. 6, p. 29; FINES AND COSTS IN CRIMINAL CASES, vol. 6, p. 40; FORCIBLE ENTRY AND DETAINER, vol. 6, pp. 181, 185; FOREIGN CORPORATIONS, vol. 6, p. 203; FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 261; GAMBLING CONTRACTS, vol. 6, p. 686; GAMING, vol. 6, p. 698; HABEAS CORPUS, vol. 7, p. 1; JURISDICTION, vol. 8, p. 842; JURY, ante, p. 1; SERVICE OF PROCESS; SUMMONS AND PROCESS.

As to the discretionary power of a justice to administer or refuse to administer the oath of insolvency to an insolvent, see the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 250. As to the jury in a justice's court and all questions appertaining thereto, see the title JURY, ante, p. 1. As to when the judgment of a justice of the peace becomes a lien on real estate, see the title JUDGMENTS AND DECREES, vol. 8, p. 161.

### **I. Definitions and Nature of Office.**

A justice of the peace is a judicial officer of an inferior local court, with jurisdiction in civil cases when small amounts are involved, and in criminal cases of misdemeanors and petty crimes. 18 Am. & Eng. Ency. Law (2d Ed.) 8.

**Subordinate Judicial Officials.**—"Justices of the peace are a class of official persons known to the English and

American law, with subordinate judicial powers in pais, including the preservation of the peace. The mode of their appointment, the tenure of their office, the precise nature and extent of their official functions, both judicial and ministerial, even their appellative designation, must, of course, in the several states and territories of the union, be governed by the municipal laws there prevailing; and are circumstances not regarded by our statute. It is enough, if the general scope and

nature of their powers be in some degree those of the general class to which they belong. We know that in Virginia, justices of the peace of our cities and corporate towns are appointed and known, and designate themselves in their official acts, by the appellation of aldermen. This we also know, as a historical fact, to be usually, if not universally, true in reference to justices of the peace of the cities and corporate towns of the other states and territories." *Welles v. Cole*, 6 Gratt. 645, 661.

**Not a State Court.**—In the act of congress providing for the removal of causes from certain state courts to the federal courts, a justice of the peace is not a state court within the meaning of the act, and no motion for a removal could have been made before him. *Rathbone, etc., Co. v. Rauch*, 5 W. Va. 79.

**Functions Similar to United States Commissioner.**—The functions of the United States commissioner in committing for trial are precisely like those of a justice of the peace, and there is no difference in principle between the effect of the judgment of the justice and that of the commissioner. *Jones v. Finch*, 84 Va. 204, 4 S. E. 342. See also, *Womack v. Circle*, 32 Gratt. 324.

## II. Appointment and Oath.

**Authority Delegated to County Court.**—Section 97 of Code of Virginia of 1887 (see § 97, Code of 1904) which gave authority to the county courts to appoint additional justices whenever the public service required it, did not violate §§ 2, 4, of art. 7 of the constitution, and it is not an unwarranted delegation of legislative power. *Ex parte Bassitt*, 90 Va. 679, 19 S. E. 453. See also, the title CONSTITUTIONAL LAW, vol. 3, p. 170.

**By Governor.**—The governor may commission some of the persons recommended as justices at the same time by the county court, and may re-

fuse to commission the others. *Frederick Justices v. Bruce*, 4 Gratt. 281.

**When Oath May Be Taken before a Justice.**—A person, who has been appointed by the governor as a justice, may take the oath of office before a justice of the peace if it be done in the courthouse on a court day. *Frederick Justices v. Bruce*, 4 Gratt. 281.

## III. Powers and Duties.

**No Authority to Regulate Freight Rates in Absence of Statute.**—In the absence of legislative enactment a justice of the peace has no authority to determine the rate of freight charges by a railroad corporation. *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196.

**Revocation of Submission to Arbitration.**—See the title ARBITRATION AND AWARD, vol. 1, p. 693.

**Fees.**—Under § 20, ch. 137, of the West Virginia Code of 1899, justices' fees in felony cases must be audited and paid by the county court or tribunal in lieu thereof, as other claims against the county. *Gillespy v. Board of Commissioners*, 48 W. Va. 269, 37 S. E. 543.

## IV. Liabilities.

**Civil Liability.**—"In *Stone v. Graves*, 40 Am. Dec. 131, it was held, that a justice of the peace was not liable in a civil action, when acting judicially, and within the sphere of his jurisdiction, however erroneous his decision or malicious his motive." *Johnston v. Moorman*, 80 Va. 131, 143. See the title JUDGES, vol. 8, p. 150.

**Liability for Sale of Exempt Property.**—A justice of the peace and the sureties in his bond are liable under it for double the value of exempt property sold by a special constable under legal process by such justice. *State v. Allen*, 48 W. Va. 154, 35 S. E. 990. See also, the titles EXECUTIONS, vol. 5, p. 416; EXEMPTIONS FROM EXECUTION AND ATTACHMENT, vol. 5, p. 766.

**Criminal Liability.**—A justice of the peace, who maliciously and falsely issued a warrant commanding a surveyor of a road to appear before him, and answer the complaint of another person for not keeping the road in repair, and adjudged him to pay costs, when in fact the said person never did make the complaint, nor direct the prosecution, the justice himself having falsely used the name of such person, was held to be guilty of malfeasance in office, and indicted, fined, and moved from office. *Wallace v. Com.*, 2 Va. Cas., 130. See the title PUBLIC OFFICERS.

## V. Jurisdiction.

See also, the title JURISDICTION, vol. 8, p. 842.

### A. IN GENERAL.

#### Limitation Can Not Be Disregarded.

—It was stated in *James v. Stokes*, 77 Va. 225, that the limitations of the law fixing and limiting the jurisdiction of justices were eminently wise and proper; and founded on the soundest principles of public policy, and whether that be so or not, the provisions of the law could not be disregarded, and no manipulation of a debt could alter or affect the jurisdiction prescribed by law for that tribunal.

#### Can Not Be Enlarged by Consent.

The consent of parties can not enlarge the jurisdiction of a justice of the peace. *James v. Stokes*, 77 Va. 225; *Adams v. Jennings*, 103 Va. 579, 49 S. E. 982.

**Effect of Repeal of Statute.**—Where an enactment of the legislature which authorized such causes of action has been repealed, the jurisdiction of the justice of the peace over the same is repealed therewith, and he can not, under the pretense of deciding whether such enactment has been repealed or not, take jurisdiction of such causes of action, and, if he does so, he is guilty of exceeding his legitimate powers, subjecting him to restraint by prohibition. *Norfolk, etc., R. Co. v.*

*Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196.

#### Right of Property on Execution.

*H. Co.* recovered a judgment before a justice in R. county against H. & E. and had the same certified to the clerk of the circuit court of said county under § 118, ch. 50, of the West Virginia Code. The clerk of said court issued writ of execution thereon directed to sheriff of T. county who levied the same on property, claimed by J. B. E. The sheriff demanded and received from H. Co. an indemnifying bond. J. B. E. filed his petition under § 152, ch. 50, before a justice of T. county who notified the execution creditor and defendants to try the right of the property levied on before said justice. It was held, the execution having been issued from the clerk's office of a circuit court, the justice was without jurisdiction in the premises. *Erb v. Hendricks Co.*, 50 W. Va. 28, 40 S. E. 338.

#### Trial in Absence of Original Justice.

—If a justice fail to attend to try a case pending before him at the hour set, and no other justice appears to try the case at that time, when the hour has elapsed the case stands continued, by operation of law, for one week. After such continuance has become consummated by the necessary lapse of time, one of the parties to the suit, in the absence of and without the consent of the other, can not call in another justice to proceed with the trial of the case. If he does so, his judgment is without jurisdiction, and void, and may be set aside by the original justice, in custody of the docket and papers on motion, after notice to the opposing party. *Parsons v. Aultman*, 45 W. Va. 473, 31 S. E. 935.

#### Authority to Fix Freight Rates.

As to the authority of a justice to fix freight rates, see ante, "Powers and Duties," III.

### B. IN CIVIL CASES.

#### 1. Territorial Jurisdiction.

**West Virginia Code.**—Section 16 of

ch. 50 of the West Virginia Code of 1899 provides that, "the civil jurisdiction of a justice shall not extend to any action, unless the cause of action arose in his county, or the defendant, or one of the defendants, reside therein, or being a nonresident of the state, is found, or has property or effects, within the county." *Speidel Grocery Co. v. Warder* (W. Va.), 49 S. E. 534.

**Throughout County.**—A justice of the peace has jurisdiction throughout his county both by the constitution and statute, and, while he is required to reside in the district for which he is elected, he is authorized to hear and determine cases in other districts of the county. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Stanton-Belment Co. v. Case*, 47 W. Va. 779, 35 S. E. 851.

**Restricted to District Where Elected.**—Except when he is expressly authorized by law, a justice of the peace can not hear and determine a cause in a district other than the one for which he was elected. *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448.

A justice can not issue a summons to a defendant to appear before him at a place, named, without his own district. A judgment by default rendered by such justice upon such summons is void. *Stanton-Belment Co. v. Case*, 47 W. Va. 779, 35 S. E. 851.

The judicial powers of a justice are purely statutory, and he can not go beyond the limits there prescribed. If the legislature had intended to allow him to try cases in any district in his county on his own summons, he would not have been restricted as in § 2, when issuing a summons returnable without his own district—that it should be for appearance of the defendant before the justice of the district in which the summons was returnable. *Stanton-Belment Co. v. Case*, 47 W. Va. 779, 35 S. E. 851.

## 2. Jurisdiction of the Person—Manner of Obtaining Jurisdiction.

See also, the titles SERVICE OF

## PROCESS; SUMMONS AND PROCESS.

**Summons Issued and Served.**—In order that jurisdiction be conferred on a justice, the summons must be issued and served. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556. See post, "By Summons," VI, A, 1.

**Amendment of Summons.**—Where a party brings a civil action for the recovery of money, on contract, before a justice of the peace, and has the summons served and returned, he can not over the objection of the defendant, on motion, have the summons amended by inserting the names of additional parties as joint plaintiffs. *Phillips v. Deveny*, 47 W. Va. 653, 35 S. E. 821.

**After Transfer of Case.**—When a justice by agreement of parties transfers a case for trial to the office of a justice of an adjoining district, neither he nor his successor in office can try such case in his own district in the absence of either the plaintiff or defendant until he has legally reacquired jurisdiction thereof in such district by proper notice to the parties of the time and place of trial. *Simmons v. Thomasson*, 50 W. Va. 656, 41 S. E. 335.

## 3. Amount in Controversy as Determining Jurisdiction.

See also, post, "Restraint of Illegal Exercise of Jurisdiction," V, D.

### a. In General.

**Constitutional Provision of West Virginia.**—Section 28 of art. 8 of constitution of West Virginia provides that, "The civil jurisdiction of a justice of the peace shall extend to actions of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed \$300;" that this is a general jurisdiction, in which the justices are given original and concurrent jurisdiction over the actions named, the only limitation in such actions being that of the amount in controversy, which can not exceed \$300. *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196.

**Part of Demand May Be Waived.—**

A party may waive part of his demand, and sue before a justice for the balance, if the justice would have jurisdiction of the whole, though the effect is to cut off the right to an appeal. *Ward v. Evans*, 49 W. Va. 184, 38 S. E. 524.

So one having claim under contract for more than \$300, may, to get jurisdiction before a justice, release part of it and recover a less sum, but can not split one demand into several actions. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. 392; *Hutson v. Lowry*, 2 Va. Cas. 42; *James v. Stokes*, 77 Va. 225; *Adams v. Jennings*, 103 Va. 579, 49 S. E. 982.

**Affidavit to Establish Jurisdiction.—**

When the form of procedure in a justice's court does not require that the record or evidence show the value of the property in controversy, and it does not appear therein, affidavits may be filed in the supreme court to show a value giving jurisdiction. *Hannah v. Bank*, 53 W. Va. 82, 44 S. E. 152.

**b. How Determined.**

**Amount Demanded in Summons Decides.—**The amount of recovery in a civil action before a justice demanded by the summons is the test of the amount in controversy, on the question of jurisdiction. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Todd v. Gates*, 20 W. Va. 464; *Stewart v. Baltimore, etc., R. Co.*, 33 W. Va. 88, 10 S. E. 26.

Although a complainant in a justice's court claims items of recovery aggregating an amount in excess of the jurisdiction of that court, yet if the summons demands a sum within that jurisdiction, the action can not be dismissed for want of jurisdiction. *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489.

Though in an action before a justice the proof shows grounds for recovery of an amount beyond the jurisdiction,

the plaintiff before verdict may withdraw any item, and then reduce his recovery within the jurisdiction and prevent the dismissal of his suit. *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489.

**Interest and Costs Excluded.—**The amount for which judgment is sought, exclusive of interest and costs, determines the jurisdiction of a justice. *Moore v. Harper*, 42 W. Va. 39, 24 S. E. 633. For civil jurisdiction of justices in Virginia, see § 2939 of Code of 1904; in West Virginia, Code, 1899, ch. 50.

**Claim for Specific Sum Can Not Be Split to Give Jurisdiction.—**

A person who claims a specific amount of damages for an alleged injury sustained in his business, will not be allowed to split up his claim, in order to reduce it to the jurisdiction of a justice, and to bring consecutive suits before a justice for such claim. *Hale v. Weston*, 40 W. Va. 313, 21 S. E. 742; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653.

But if the sum mentioned in the summons is within the jurisdiction of the justice, still if it appears during the trial that the plaintiff's claim was an entire sum and that the plaintiff had reduced it by feigned credits or otherwise, the action will be dismissed as *coram non judice*. *Todd v. Gates*, 20 W. Va. 464.

**Reduction of Unliquidated Damages.**

—A party claiming unliquidated damages may reduce his claim, so as to bring it within jurisdiction of a justice of the peace. *Wells v. Michigan Mut., etc., Ins. Co.*, 41 W. Va. 131, 23 S. E. 527.

**Damages for Breach of Official Bond.—**

Where an action for damages for a breach of the official bond of a constable was brought before a justice against the constable and his sureties, the jurisdiction of the justice is determined by the amount of damages claimed in the summons, and not by the penalty of the official bond of the

constable. *State v. Lambert*, 24 W. Va. 399.

**Bill of Particulars.**—Where a summons of a justice in a civil action for the recovery of money for the breach of contract demands judgment for \$300, though the plaintiff files two bills of particulars on different causes of action aggregating more than \$300, this is not cause for dismissing the action before trial, for want of jurisdiction. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653.

**Specific Claim for Damages Can Not Be Split.**—A claim for a specific amount of damages for an injury to plaintiff's business, can not be split so as to bring the amount within the jurisdiction of a justice, and then be sued on in several suits. *Hale v. Weston*, 40 W. Va. 313, 21 S. E. 742.

#### 4. Jurisdiction as Dependent on the Subject Matter or Relief Sought.

##### a. Actions Ex Contractu.

**Limited to Common-Law Actions.**—Although a justice of the peace has jurisdiction of civil actions of debt, he exceeds his legitimate powers whenever he extends such jurisdiction to include matters of controversy or causes of action unknown to the common law, and unauthorized by legislative enactment. *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196.

##### b. Actions Ex Delicto.

###### (1) Penalties and Forfeitures.

The five dollars forfeit prescribed by the law, § 37, ch. 44, W. Va. Code, 1891, to be paid by the proprietor of a grist mill for taking more toll than allowed by the statute, may be recovered in a civil proceeding before a justice of the peace. *West v. Rawson*, 40 W. Va. 480, 21 S. E. 1019. See also, the title PENALTIES AND FORFEITURES.

**Penalty for Failure to Deliver Message.**—Section 2939 of the Virginia Code provides that a justice of the peace shall have jurisdiction of any

claim to a fine not exceeding \$20, and of other claims not exceeding \$100. Where a penalty of \$100 was imposed by § 1292 of the Code, upon a telegraph company for failure to deliver a message, such penalty is a fine within the meaning of the statute, and a justice has no jurisdiction of the case. *Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. 431. See also, the title TELEGRAPHS AND TELEPHONES.

###### (2) Recovery of Money Lost at Gaming.

Where the testimony shows that the plaintiff lost to the defendants, betting at faro, within twenty-four hours, \$270, and he had paid or delivered the same to them, it was held, that he was entitled to recover it back by suit before a justice of the peace. *Cramer v. Pomeroy*, 47 W. Va. 56, 34 S. E. 762.

###### (3) Wrongful Killing of Horse.

A railroad company bound itself by contract under seal to make and maintain necessary cattle guards at the boundary lines of an adjoining land owner, which it neglected and failed to do. One of its trains running through the premises frightened and drove a horse through the gap where the guard should have been, into the premises of the next land owner, where the track was fenced, by reason of which the horse was killed. The railroad company may be sued before a justice and held liable under § 26, ch. 50, W. Va. Code, 1891; *Harrow v. Ohio, River R. Co.* (1894), 38 W. Va. 711, 18 S. E. 926. See also, the title CROSSINGS, vol. 4, p. 122.

##### c. Actions against Public Officers.

See also, the title PUBLIC OFFICERS.

**Motion against Constable for Money Received.**—By the express provision of the thirty-first section of the act, concerning the jurisdiction of justice of the peace, 1 Rev. Code, pp. 253, 254, a party may recover money received by a constable on execution by motion,

and any justice of the county in the court where the constable's official bond is deposited, may hear such motion and render judgment. The jurisdiction does not depend in any way upon the value of the execution or of the judgment, and is not affected by the fact that the party is at the same time prosecuting other motions against the same constable. *Hendricks v. Shoemaker*, 3 Gratt. 197. See also, the title **SHERIFFS AND CONSTABLES**.

**Against County Court.**—A justice of the peace has jurisdiction to entertain an action against a county court for the recovery of money due on contract, when the demand may be sued upon, as provided in § 41, ch. 39, W. Va. Code. *County Court v. Holt*, 53 W. Va. 532, 44 S. E. 887.

**d. Suits against Corporations.**

**Where Service May Be Made.**—A justice has jurisdiction of an action for money against a domestic corporation either in the county of its principal office or in the county where the cause of action arose, if service of process can be made in that county on a director or other officer or agent of the corporation, whether the person served resides therein or not, and the return of service need not show that he resides therein. *Speidel Grocery Co. v. Warder* (W. Va.), 49 S. E. 534.

**Suit against Railroad.**—The summons to commence a suit against a railroad company before a justice of the peace may be served upon the freight and passenger agent of the company in the county where the suit is brought, and where such agent resides, according to § 34 of ch. 50 of the Code. *Harrow v. Ohio River R. Co.* (1894), 38 W. Va. 711, 18 S. E. 926. See also, the titles **RAILROADS**; **SERVICE OF PROCESS**.

**e. Actions Involving Titles to Land.**

It is generally provided by statute that a justice of the peace shall not have jurisdiction of actions involving

title to real estate. *Miller v. Marshall*, 1 Va. Cas. 158; *Warwick v. Mayo*, 15 Gratt. 528.

**Trespass.**—It was held in *Belcher v. Gaston*, 4 W. Va. 639, that under § 11, ch. 50 of the Code of West Virginia of 1868, a justice of the peace had no jurisdiction to try actions for trespass to real estate, in a case where the title to such real estate was drawn in question.

**Obstructing Street.**—In a proceeding before a mayor or justice to impose a penalty on a party for obstructing a street, if a claim to a freehold, incorporeal hereditament or franchise is set up by the defendant, the mayor or justice has jurisdiction to try the fact whether the claim is bona fide made. If it is, then the jurisdiction is ousted. *Warwick v. Mayo*, 15 Gratt. 528. See also, the title **STREETS AND HIGHWAYS**.

**Unlawful Detainer.**—On the trial of a warrant issued by a justice in unlawful detainer, if answer of title is filed by the defendant setting forth therein acts showing that such title will come in question on trial thereof, which answer is verified by affidavit of the defendant or that of his attorney, if the justice be of opinion that the title to real property will come in question he shall dismiss the action at the cost of the plaintiff, unless the plaintiff or his attorney shall file an affidavit denying the truth of such fact. *Watson v. Watson*, 45 W. Va. 290, 31 S. E. 939.

In a warrant of unlawful detainer if it is a case in which the title to the land would properly come in question, and if the relation of landlord and tenant did not exist between the plaintiff and defendant, a justice of the peace has no jurisdiction to try the merits of the case, and it is his duty to dismiss the warrant. If after such dismissal an appeal be taken to the circuit court, it is the duty of such court to dismiss the warrant for want of jurisdiction, if the same facts appear. *Hughes v. Mount*, 23 W. Va. 130. See also, the

title **FORCIBLE ENTRY AND DETAINER**, vol. 6, p. 156.

## C. CRIMINAL PROSECUTIONS.

### 1. In General.

**Exclusive Original Jurisdiction of Misdemeanors.**—By § 4106 of the Code, as amended by acts, 1895-96, ch. 845, p. 924, justices of the peace are given exclusive original jurisdiction of all misdemeanors occurring within their jurisdiction. By § 4107 an unrestricted right of appeal to the county and corporation courts is secured, where a jury trial can be demanded. The effect of this statute is to take away from the county and corporation courts the power to try misdemeanors as courts of original jurisdiction. A warrant committing a prisoner charged with a misdemeanor by a county court is void. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930.

**Constitutionality of Statute.**—Section 4106, of the Virginia Code of 1887, as amended by acts, 1893-94, p. 430, provides that justices of the peace shall have concurrent jurisdiction with the county and corporation courts in petit larceny and other misdemeanors, whenever the accused elects to be tried by said justice, and this section is not in conflict with the constitutional provision that in criminal prosecutions a man has a right to a speedy trial by an impartial jury, as provision is made for a trial by jury on appeal to the higher court in cases of conviction before the justice. *Brown v. Epps*, 91 Va. 726, 21 S. E. 119. This case overruled *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, 342.

**Felony.**—The act of March 30th, 1871, sess. acts, 1870-71, p. 332, does not give justices of the peace jurisdiction to try a case of felony; and the conviction and punishment of a party by a justice for an assault and battery, will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice. *Murphy v. Com.*, 23 Gratt. 960.

**Mayor and Justice the Same.**—The criminal jurisdiction of the mayor of the city of Buena Vista is the same as that of justices of the peace of that city, and neither extended, at the time of the supposed offense alleged in this case, beyond the city limits. Sections 1032 and 1033 of the Code of 1887 (the latter as amended by acts, 1893-94, p. 664) applied, at the date of the warrant of arrest in this case, to towns only, and not to cities. *Agner v. Com.*, 103 Va. 811, 48 S. E. 493.

**Admission to Bail after Examining Court Sends Prisoner to Superior Court.**—See the title **BAIL AND RECOGNIZANCE**, vol. 2, p. 213.

### 2. Offenses Cognizable.

#### a. Petit Larceny.

See the titles **AUTREFOIS, ACQUIT AND CONVICT**, vol. 2, p. 181; **LARCENY**.

#### b. Violation of the Sabbath.

Section 3799 of the Virginia Code provides that any person laboring on the Sabbath shall forfeit two dollars for each offense. Section 745 provides that the word "fine" when used in that chapter shall include any pecuniary forfeiture; and § 712 provides that any fine imposed by statute shall be recoverable by indictments unless otherwise provided, except when the amount is less than \$20, when the recovery may be by warrant. Section 2939 provides that any fine less than \$20 recoverable by action at law, may be sued for before a justice by a civil warrant. Section 717 authorizes a justice to commit a defendant to jail until the fine and costs are paid. Under these statutes it was held that a justice had jurisdiction to impose a fine of two dollars for violating the Sabbath and to commit the offender to jail until payment. *Marx v. Milstead (Va.)*, 9 S. E. 617. The provision in the constitution in regard to trial by jury does not extend to such an offense. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See also, the title **FINES AND COSTS IN**



CRIMINAL CASES, vol. 6, p. 47. See generally, the title SUNDAYS AND HOLIDAYS.

**c. Presentment against Master for Suffering Slave to Hire Himself.**

The superior courts of law had no jurisdiction to try and determine a presentment against a master for suffering his slave to hire himself out; but on presentment being made, it ought to be certified to a magistrate to be by him acted on pursuant to the statute. *Com. v. Moore*, 2 Va. Cas. 155.

**D. RESTRAINT OF ILLEGAL EXERCISE OF JURISDICTION.**

See the title PROHIBITION.

**VI. Procedure.**

**A. COMMENCEMENT OF SUIT.**

**1. By Summons.**

See ante, "Jurisdiction of the Person—Manner of Obtaining Jurisdiction," V, B, 2. See also, the titles SERVICE OF PROCESS; SUMMONS AND PROCESS.

West Virginia Code, ch. 50, § 19, provides that: "Actions before justices are commenced by summons, or by the appearance and agreement of the parties without summons, and not otherwise." *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556, 557.

**Sufficiency.**—A summons issued by a justice of the peace requiring the defendant to appear before him at his office at a proper time therein specified to answer the complaint of the plaintiff "in a civil action for the recovery of money due on a judgment on the docket of — late a justice, to show cause why said judgment should not revive and be re-entered, and, execution issue thereon, in which the plaintiff will demand judgment for one hundred and sixty-two dollars and — cents exclusive of interest and costs," is sufficient. *Meighen v. Williams*, 50 W. Va. 65, 40 S. E. 332.

The words "damages for a wrong" are, in substance, according to their

legal definition, equivalent to the words "money due on contract;" the former phrase being broader than and including the latter according to ordinary legal phraseology and meaning. And where a person sues before a justice of the peace to recover money lost at gambling, stolen, or for which indebtedatus assumpsit would lie at common law, either phrase is sufficient in the summons to describe the cause of action. *O'Connor v. Dils*, 43 W. Va. 54, 26 S. E. 354.

**Must Be Signed by Justice Issuing It.**—

In issuing a summons to commence an action for the recovery of money, in order that the suit may be considered commenced or pending, the justice who issues the summons must sign it. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556.

**States Two Causes of Action.**—If the summons in a case before a justice states a legal cause of action, and is in other respects sufficient, the justice ought not to quash it simply because it states two or more causes of action. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298.

**Distress Warrant.**—A distress not being judicial process, need not be made returnable before a justice or court, but if it is made returnable to a justice, it is valid. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

**Amendment of Summons.**—A judgment may form the basis and subject matter of a civil action before a justice of the peace, and such summons, having all the requisites of a summons in such case after striking out certain words, is amendable in that respect, and if the plaintiff files a complaint showing the object of the action to be the obtaining of a judgment, and not the revival of the former judgment, such summons is thereby amendable; that part of the summons which purports to set forth the cause of action being regarded as pleading in the action to that extent. *Meighen v. Wil-*

liams, 50 W. Va. 65, 40 S. E. 332. See also, the title AMENDMENTS, vol. 1, pp. 321, 355.

**A misnomer** in a justice's summons is amendable, and is waived and cured by appearance and plea to the action. *Weimer v. Rector*, 43 W. Va. 735, 28 S. E. 716.

**Amendment of Return.**—The return of service of a summons from a justice's court, defective in failing to show that the service was made on the agent of a corporation in the county of his residence, may be amended before the justice. *Hopkins v. Baltimore, etc., R. Co.*, 42 W. Va. 535, 26 S. E. 187.

**Objection for Defects.**—The proper method to take advantage of any defect in the summons or in the return thereto in a justice's court, is by a motion to quash, because in that court there are no formal pleadings, and hence the question can not be raised by plea in abatement, as it might and ought to be raised in the circuit court, when the suit is brought originally in that court. *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123.

**The evidence of the plaintiff's debt**, which is required to be filed with the justice, under § 35, ch. 226, acts, 1872-73, is not a part of the summons and can not be regarded as such on a motion to quash the summons. *Todd v. Gates*, 20 W. Va. 464.

**Special Appearance.**—In order to take advantage of any defect in the summons or return in a justice's court, the defendant must appear for that purpose only, and must so state in submitting the motion. If he appears generally he will be regarded as having waived all defects. *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123; *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552.

If a defendant to a suit instituted before a justice after making a specific appearance for the purpose of quashing a fatally defective return of serv-

ice of summons, enters a general appearance to the action, proceeds with the trial of the case and the presentation of his defense and on judgment being rendered against him, appeals to the circuit court, he thereby cures the defects in the service and abandons his specific appearance and submits himself to the jurisdiction of the justice and the court, and after final judgment rendered against him by such court he can not prohibit the collection of the same because of the defective return of the summons. *Chesapeake, etc., R. Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147.

**Effect of Plea in Bar.**—If the defendant in a justice's court makes two motions, one for a continuance and the other to quash the return of the writ, and at a subsequent day to which it has been continued he appears, and without requiring the justice to act upon his motion to quash, files an informal plea in bar, and proceeds to trial, he will be deemed to have waived his objections to the writ. *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123; *Blankenship v. Kanawha, etc., R. Co.*, 43 W. Va. 135, 27 S. E. 355. See also, *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552.

**By Whom Served.**—Quære, can a summons issued by a justice be served by a credible person, though not an officer, he verifying his return by an affidavit? *Johnson v. MacCoy*, 32 W. Va. 552, 9 S. E. 887.

**In Bastardy Cases.**—See the title BASTARDY, vol. 2, p. 339.

## 2. By Attachment.

**Levy.**—In order that jurisdiction of an attachment be conferred on a justice, the attachment properly issued must be levied on the property of the defendant. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556. See also, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 88.

**Affidavit.**—An attachment may be sued out before a justice of the peace

on the plaintiff's filing an affidavit at the commencement of the action or at some time during its pendency. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556.

**Creates Lien from Levy.**—An attachment from a justice's court creates a lien on leviable chattels only from its levy. *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

### 3. Examination and Commitment in Criminal Cases.

See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, pp. 2, 7.

## B. PLEADINGS.

### 1. Necessity for Filing Pleadings.

#### a. In General.

**After Jury Sworn.**—In West Virginia before there can be a trial in a justice's court there must be a complaint either oral or written. Where the defendant demanded a jury, and after it was sworn and before any evidence was introduced the plaintiff made his complaint orally, it was held, that as the summons made a demand for a specific sum of money, and the defendant controverted that claim, by demanding a jury, the verdict would not be set aside for the reason that the complaint was made after the jury was sworn. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. 359.

#### b. Plea or Answer.

**Code of 1868.**—In an action for the recovery of money before a justice under the provisions of section fifty of chapter fifty of the Code of West Virginia of 1868, "it was contemplated that some answer or plea be entered or filed by the defendant, if he appear and make defense. And if in such action the justice renders judgment in favor of the plaintiff, and the defendant appeals to the circuit court, if no answer or plea appears by the record to have been entered or filed before the justice or in the circuit court, it is error to swear the jury 'the truth to

speak upon the issue joined.'" *High v. Pearce*, 9 W. Va. 291.

As to requirement of plea under present West Virginia Code, see *Morse v. Rector*, 44 W. Va. 202, 28 S. E. 763.

**Conclusion as to Pleadings.**—When there is no note in the record of the filing of complaint or answer in an action originating before a justice, but there is copied into the record both a complaint by the plaintiff and an answer by the defendant, signed by them respectively, with which the evidence of the parties adduced on the trial is entirely consistent and the record shows there was a full and fair trial, the court will presume that the pleadings were so made up. *Griffin v. Haight*, 45 W. Va. 460, 31 S. E. 957.

In an action before a justice of the peace, where there is no complaint filed by the plaintiff, and no answer or plea filed by the defendant, as required by § 50 of ch. 50 of the West Virginia Code, and it does not appear what evidence was offered before the justice, if the justice proceeds to render judgment against the defendant, who takes an appeal therefrom to the circuit court, and no plea is entered in that court by the defendant, nor does it appear what evidence was before the court, if the circuit court renders judgment against the defendant, and he objects and excepts, and makes the transcript of the justice's proceedings a part of the record, this court, upon writ of error, will reverse the judgment complained of, and remand the case for proper pleadings. *Morse v. Rector*, 44 W. Va. 202, 28 S. E. 763.

**Not Reversible Error.**—Where there has been a full trial before a justice as if on plea and issue, it is no reversible error that there was no plea or issue. *White v. Emblem*, 43 W. Va. 819, 28 S. E. 761.

In a case taken by appeal from the judgment of a justice to the circuit court, where it was tried by jury, the supreme court will not reverse the

judgment simply because the jury were sworn to "try the issue" between the parties, where the record fails to show that any plea had been filed or issue made in the case, in the absence of anything to show that the plaintiff in error was prejudiced by such irregularity, if it was such. *Tully v. Despard*, 31 W. Va. 370, 6 S. E. 927.

**Unlawful Detainer.**—In an action of unlawful detainer before a justice, a verdict, on full trial on the merits, will not be set aside because there was no plea and issue. The statute puts in the plea of "not guilty." *Simpkins v. White*, 43 W. Va. 125, 27 S. E. 361.

**Pleas in Abatement.**—The pleadings in justices' courts are prescribed by statute, and no provision is made for pleas in abatement. Such plea, therefore, to the jurisdiction of the justice, can not be properly filed, either before the justice, or the circuit court to which the action may be appealed. As a substitute for such pleas, § 66, ch. 50, Code, provides that "the action shall be dismissed at plaintiff's cost whenever it appears that it has been brought in the wrong county, or that for any other reason the justice has not jurisdiction thereof." *Mountain City Mill Co. v. Southern*, 46 W. Va. 754, 34 S. E. 782; *Todd v. Gates*, 20 W. Va. 464; *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123.

## 2. Number and Character of Pleadings.

Section 50, ch. 50, of the West Virginia Code, provides for the rules of procedure before justices as follows: "The pleadings in these courts are, first, the complaint by the plaintiff; second, the answer by the defendant." "The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing they shall be filed by him and a reference to them be made in the docket. In either case if the parties appear and the defendant made defense they shall be made up on the

return day of the summons, unless good cause be shown to the contrary."

**Common-Law Forms of Actions Abolished.**—Common-law forms of actions, in so far as justices' trials are concerned, are entirely abolished in West Virginia by § 49, ch. 50, of the Code. *O'Connor v. Dils* (1896), 43 W. Va. 54, 26 S. E. 354.

**Oral or Written.**—In a civil action before a justice of the peace the pleadings in the cause may be either oral or written, under acts of 1881, ch. 8, and if they are oral a brief statement of the contents of the pleadings should be made upon the justice's docket. See §§ 50, 179, W. Va. Code. *Poole v. Dilworth*, 26 W. Va. 583.

**Action on an Account.**—In an action before a justice, founded upon an account, note, or other writing for the payment of money, it shall be a sufficient complaint for the plaintiff to deliver the account, note, or other writing to the justice, and to state that there is due to him thereon from the defendant a specific sum, which he claims to recover in the action. *Mountain City Mill Co. v. Southern*, 46 W. Va. 754, 34 S. E. 782.

In an action for the recovery of money due on contract before a justice, a complaint in writing in the nature of a declaration in assumpsit with the common counts, the last count "also in the sum of two hundred and fifty-six dollars and thirty-six cents as stated in the account of the plaintiff against the defendant, attached to and made part of this complaint," and averring promise and failure to pay, and which account attached is a complete bill of particulars of the item, with date and amount of each and showing what the charge was for, with notice that it would be relied upon at the trial, is held sufficient under the statute. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222.

## 3. Joinder of Counts.

Plaintiff suing before a justice al-

leged in his first count that the defendant, a railroad company, negligently ran its train and killed the plaintiff's horse. The second count alleged that the defendant had bound itself by written contract to maintain the necessary cattle guards, and through its failure to do so the injury occurred. These counts were properly joined. *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 16 S. E. 926.

### C. CONTINUANCES.

See the title CONTINUANCES, vol. 3, p. 272.

### D. VERDICT AND JUDGMENT.

See also, the title JUDGMENTS AND DECREES, vol. 8, p. 161.

#### 1. Rendition of Judgment.

**Judicial Act.**—"In *Stallcup v. Baker*, 18 O. St. 544, it is held, that the rendition of judgment by a justice on a verdict of the jury is a judicial and not a ministerial act, and neglect on his part to render judgment on such verdict within the time required by law to make it valid is not a breach of his official bond conditioned that he 'shall well and truly perform every ministerial act that is enjoined upon him by law and by virtue of said office.'" *Packet Co. v. Bellville*, 55 W. Va. 560, 564, 47 S. E. 301.

**Irregular Rendition.**—"In *Robinson v. Kiouss*, 4 O. St. 593, the court holds that the statute which provides that 'upon a verdict the justice must immediately render judgment accordingly, does not make a judgment rendered upon a subsequent day absolutely void, but it makes it irregular and for such irregularity when not waived it is reversible.'" *Packet Co. v. Bellville*, 55 W. Va. 560, 564, 47 S. E. 301.

#### 2. Entry.

**Ministerial Act.**—The entry of judgment is in no respect the exercise of judicial power but the performance of a mere ministerial act. "An omission therefore to make such an entry will not render the entire proceedings a nullity. It may be made by the jus-

tice at any time, and will, for the purpose of sustaining the proceedings, be regarded as made." *Packet Co. v. Bellville*, 55 W. Va. 560, 564, 47 S. E. 301.

**Time of Entry.**—Although the statute requires that a judgment of a justice shall be entered within twenty-four hours after trial (Sundays excepted) a judgment rendered within such time, but entered after the time thus directed, is not void. *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301.

Where a judgment in an action tried before a justice is rendered and publicly announced by the justice on the day and at the close of the trial, although the clerical work of entering the judgment upon his docket is not performed until a few days thereafter, the statute is substantially complied with. *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301.

**Entry Nunc Pro Tunc.**—Two justices presided at a trial at which a verdict was rendered, but no judgment thereon was entered. Nearly two years afterwards, without notice they undertook to enter judgment upon the verdict nunc pro tunc. It was held, that such entry was unauthorized and illegal. *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629.

**Mistake as to Tense.**—By § 180, ch. 50 of the West Virginia Code, all formalities in the entry of a justice's judgment are dispensed with, and it is sufficient if the truth be stated so as to be intelligible. "Good grammar is not essential to a good judgment. The mistake of a proper tense will not render a justice's judgment unintelligible or invalid. Justices are not usually educated men, learned either in the intricacies of law or grammar, hence their records must be scanned with the greatest leniency." *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397.

**Statement of Defendants' Nonappearance.**—The fact that the justice

does not state in so many words on his docket that he waited one hour for the appearance of the defendants does not render the judgment invalid. The statement that "the defendant not appearing" is a sufficient compliance with § 179, ch. 50, Code. *Fishburne v. Baldwin*, 46 W. Va. 19, 32 S. E. 1007.

**Judgment as a Lien on Real Estate.**

—As to when the judgment of a justice of the peace becomes a lien on real estate, see the title JUDGMENTS AND DECREES, vol. 8, p. 320.

**3. Validity of Judgment.**

**a. Conditions Essential to Valid Judgment.**

In order that a valid judgment may be rendered by a justice of the peace, the suit must be brought against a defendant upon whom is the liability, and service of process upon another and different party will not confer jurisdiction of the subject matter. *Yates v. Taylor County Court*, 47 W. Va. 376, 35 S. E. 24.

**Judgment Invalid Based on Defective Process.**—Service of summons in an action before a justice against a domestic railroad corporation upon its president must be in the county in which he resides, and the return must show that fact, else it is invalid. A judgment based on a return of service not showing that fact, there being no appearance, is void. *Taylor v. Ohio River R. Co.*, 35 W. Va. 328, 13 S. E. 1009.

**Judgment without Notice Void.**—A judgment pronounced by a justice, without service of process upon or notice to the defendant, is void. *Kanawha, etc., R. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924.

"In any case where the court has jurisdiction of the subject matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers; and the judgment in the case, though it may be marked by er-

ror which will cause its reversal by a higher court, is not for that reason void." *Griffin v. Haught*, 45 W. Va. 460, 31 S. E. 957, 959.

**b. What Judgment Must Show.**

**Must Find Value of Property.**—A verdict in an action for the recovery of personal property before a justice must find the value of the property, and of each article sued for, as in the action of detinue, and the judgment must do so. *White v. Emblem*, 43 W. Va. 819, 28 S. E. 761.

A judgment in an action before a justice for the recovery of personal property, or in the formal action of detinue, which is only for the sum found by the verdict as the value of the property, is erroneous. It should be for the property, if to be had, and if not, then for its value. *White v. Emblem*, 43 W. Va. 819, 28 S. E. 761.

**"Defendant" for "Defendants."**—A judgment of a justice, which is plainly intended to be against two defendants named in the heading and summons, is not invalid for the reason that the word "defendant" is used in the body thereof instead of the word "defendants." *Fishburne v. Baldwin*, 46 W. Va. 19, 32 S. E. 1007.

**c. Judgment Rendered by Two Justices.**

When two justices sit together at the trial of a case, and no objection is made thereto at the time, the validity of the judgment can not afterwards be questioned on that account. *Griffin v. Haught*, 45 W. Va. 460, 31 S. E. 957.

**d. Judgments against Married Woman.**

Judgments of justices of the peace against a married woman on her contracts made during coverture, and judgments rendered by courts having no jurisdiction in such cases, are nullities creating no lien on her separate real estate. *Tavener v. Barrett*, 21 W. Va. 656, 658.

**e. Collateral Attack.**

The judgment of a justice can not be attacked collaterally for mere

amendable clerical omissions not in any wise invalidating the judgment, or rendering it uncertain as to time, parties, or the amount thereof. *Fishburne v. Baldwin*, 46 W. Va. 19, 32 S. E. 1007.

While a writ of prohibition will be awarded to prevent a justice of the peace from taking jurisdiction of a debt in excess of one hundred dollars which has been split up into notes, each less than one hundred dollars, all of which are due, and for which separate warrants are being prosecuted before him, yet where such warrants have proceeded to judgment before the justice, with the consent or acquiescence of the defendant, such judgments can not be thereafter collaterally assailed by third persons. This result does not in any degree impinge upon the maxim that consent can not give jurisdiction, as the justice had jurisdiction over the amount represented in each judgment. *Adams v. Jennings*, 103 Va. 579, 49 S. E. 982. See also, the title PROHIBITION.

#### 4. Action on Judgment.

##### When Action on Judgment Barred.

—Section 10, ch. 139, W. Va. Code, 1887, providing that an action may be brought on a judgment, on which no execution is issued within two years, at any time within ten years next after the date of the judgment, applies to judgments rendered by justices; and their judgments are not barred where ten years has not elapsed. *Livesay v. Dunn*, 33 W. Va. 453, 10 S. E. 808.

#### 5. Transcript of Judgment.

**Transcript Not Conclusive.**—A justice of the peace is not required to make other than a brief entry on his docket of the return of a summons, hence the transcript of his docket, as to a return of a summons, is not so conclusive as to render a judgment void for the reason the return as set out in the transcript is defective. *Moren v. American, etc., Co.*, 44 W. Va. 42, 28 S. E. 728.

**Improper Signature.**—A paper writ-

ing purporting to be "an abstract from a justice's docket," certified to as follows: 'A true abstract from docket in my possession,' signed, 'A. J. Kirkpatrick, — of the peace.' It was held, that it is not such a certificate as the statute, ch. 226, § 135, acts 1872-73, required, in order to make a transcript of a justice's judgment evidence. But the court did not decide the question as to whether the paper writing, if properly authenticated, would be such a transcript of the judgment as the statute requires. *Jackson v. Conrad*, 14 W. Va. 526, 528.

**Filing of Transcript.**—When the justice has transmitted to the clerk of the circuit court a complete transcript of his docket in the proceedings in the action, together with the original papers relating thereto, the clerk should file with them all the papers so transmitted to him by the judge. *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. 867.

**Constitutionality of Statute.**—Section 118, ch. 50, Code, 1899, allowing a transcript of a judgment of a justice to be filed in the office of a circuit court, and execution to be issued thereon, does not violate the provision of the constitution requiring the amount for jurisdiction of the circuit court to exceed \$50. *Speidel Grocery Co. v. Warder* (W. Va.), 49 S. E. 534.

#### 6. Execution.

**Void When No Judgment.**—An execution, purporting to be issued upon the judgment of a justice, when there is in fact no such judgment, but simply a verdict of a jury, is void, and the justice should quash such execution upon notice and motion. *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

**Can Not Be Served by Constable.**—It was formerly held that an execution issued by a justice of the peace from the court of a county or corporation in Virginia could not be served by a constable, except in the city of Richmond. *Stokes v. Perkins*, 4 Rand. 356.

**Purporting to Be Issued in Wrong County.**—An execution issued by a justice of the peace of one county is valid, though it purports to be issued in another county, if in fact it was issued in the proper county. *Davis v. Davis*, 2 Gratt. 363.

### E. NEW TRIALS.

See also, the title **NEW TRIALS**.

**Discretion of Trial Court.**—Under § 5, ch. 138, a trial court has large discretion in granting new trials conditioned on payment of costs by the moving party and the appellate court will not interfere unless it clearly appears that such discretion has been abused. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222.

**Construction of § 91, Ch. 50, W. Va. Code, 1891.**—The provisions in § 91, ch. 50, of the Code of West Virginia, 1891, that, "no more than one new trial shall be granted by a justice in any case," is construed to mean that not more than one new trial shall be granted either party in any suit. *Dickey v. Smith*, 42 W. Va. 805, 26 S. E. 373.

**No New Trial after Thirty Days from Judgment.**—Where more than thirty days had elapsed from the date of a judgment, a justice of the peace had no jurisdiction to award a new trial (§ 2946, Va. Code of 1887); and being without jurisdiction, it was proper for a writ of prohibition to restrain him to issue from the circuit court of that county. *Burroughs v. Taylor*, 90 Va. 55, 17 S. E. 745.

**Motion for Overruled.**—When a justice renders judgment on a verdict on one day, and on the next day a motion for a new trial is made and overruled, the ten days allowed for a certiorari begins to run on the latter day. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. 359. See also, the title **CERTIORARI**, vol. 2, p. 734.

**When Judgment Can Not Be Enjoined and Reversed.**—Under § 13, art. 3, of the constitution of West Virginia,

providing that no fact tried by a jury shall be retried except as at common law; and § 91, ch. 50, of the Code declaring that no more than one new trial shall be granted by a justice in any case, equity can not enjoin and reverse a judgment rendered on a verdict in the second trial of a cause in the justice's court, the issue being one of law and of fact. *Ensign, etc., Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. 782.

### VII. Docket.

See also, ante, "Entry," VI, D, 2.

**Statutory Provisions Directory.**—The West Virginia Code, 1891, ch. 50, § 178, which directs that the justice shall render on his docket the amount of money which the plaintiff demands, is merely directory, and its omission can not be cause for reversal. *Straley v. Payne*, 43 W. Va. 185, 27 S. E. 359.

**Entries Informal.**—By § 180, ch. 50 of the West Virginia Code of 1891, all formalities in the entries of a justice's judgment are dispensed with, and the same is sufficient if the truth be stated so as to be intelligible. *Davis v. Trump*, 43 W. Va. 191, 27 S. E. 397.

**Evidence Admissible to Prove Fact Omitted.**—Where the docket of a justice omitted to enter a proceeding which should have been entered, evidence may be admitted to prove the fact of such proceeding. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

### VIII. Review of Proceedings.

See also, the title **APPEAL AND ERROR**, vol. 1, p. 654.

#### A. APPEAL AND ERROR.

##### 1. Allowance of Appeal.

###### a. Right to Appeal.

"An appeal lies from the judgment of a justice rendered upon the verdict of a jury, just as in cases tried by him without a jury, and the writ of certiorari does not lie in such case. The cases of *Barlow v. Daniels*, 25 W. Va. 512; *Hickman v. Baltimore, etc., R.*



Co., 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455; *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298—so far as they hold to the contrary—are overruled." *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653.

**Conviction of Misdemeanor.**—Upon conviction of a misdemeanor the party is entitled, as of right, under the 15th section of ch. 213 of the Code, to an appeal from the justice's decision to the court of the county or corporation in which his conviction was had; and it is the duty of the justice to allow the appeal, if duly applied for. *Ex parte Morris*, 11 Gratt. 292. See also, the title MANDAMUS.

A writ of error lies from the supreme court of appeals to the order of a judge of a circuit court improperly refusing an appeal from the judgment of a justice of the peace. Such order made in a case tried by a jury in a justice's court, in obedience to the decisions of the supreme court of appeals, holding an act of the legislature, allowing appeals in such cases, to be unconstitutional, is a case involving the constitutionality of a law, and such writ lies, although the amount in controversy is less than one hundred dollars. *Clark v. West Virginia, etc., R. Co.*, 50 W. Va. 1, 40 S. E. 351.

**b. Mandamus to Compel Allowance.**

See also, the title MANDAMUS.

**Where Improperly Refused.**—If in a proper case an appeal is duly applied for and refused by the justice, the party may have relief by mandamus from the circuit court. *Ex parte Morris*, 11 Gratt. 292.

**Verdict of Jury.**—Where a judgment has been rendered by a justice upon the verdict of a jury, the circuit court can not, by mandamus, compel the justice to grant an appeal from said judgment; the constitution forbidding any appeal in such case. *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450.

**Where Improperly Dismissed.**—If an appeal from a justice of the peace

to the county court is improperly dismissed by the latter, the proper remedy to correct the error is a writ of mandamus. *Valley Turnpike Co. v. Moore*, 100 Va. 702, 42 S. E. 675.

**c. Duty of Justice on Allowance of Appeal.**

**Entry on Record.**—It is the duty of a justice from whose judgment an appeal is allowed to make an entry of the fact upon his record, and to immediately deliver to the clerk of the court which has cognizance of the appeal the original warrant, with the judgment and name of the surety endorsed thereon, together with all exhibits before him shown at the trial. Acts 1893-94, p. 486. For form of entry of appeal, see Mayo's Guide, p. 677. *Valley Turnpike Co. v. Moore*, 100 Va. 702, 705, 42 S. E. 675.

**2. Jurisdiction.**

**To Circuit Court.**—Where a circuit court has jurisdiction of an appeal from the decision of a justice, under Va. Code, § 2956, the appeal is direct and original, and can not come by way of removal from the county court. *Valley Turnpike Co. v. Moore*, 100 Va. 702, 42 S. E. 675.

Where a justice has no jurisdiction of a civil action, neither has a circuit court on appeal, though such court would have original jurisdiction in the case, and therefore such court must dismiss the action for want of jurisdiction. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653.

The usual course of appeal from a judgment of a justice of the peace is to the county or corporation court, and if a litigant claims the right of appeal to the circuit court on the ground that the constitutionality or validity of an ordinance or by-law of a corporation is involved, the burden is on him to show that fact to the justice who tries the case so that he may, in the first instance, allow the appeal and return the papers to the proper court. If the appeal is allowed to the county court,

that court has no power to remove the case to the circuit court on the ground that the appeal should have been to that court in the first instance. Its only power of removal is for cause, after notice, as provided by Code, § 3315. The only orders the county court could enter in such a case would be either to dismiss the appeal, or remand the case to the justice for such further action as might be necessary. *Valley Turnpike Co. v. Moore*, 100 Va. 702, 42 S. E. 675.

**To Recover Taxes.**—Where the constitutionality of no statute is called in question, the judgment of the corporation court upon an appeal from the decision of a justice, is final in a case to recover back money paid for taxes under protest after tender and refusal of coupons. *Bransford v. Karn*, 87 Va. 242, 12 S. E. 404.

**Trial De Novo upon Appeal.**—The judgment of a justice rendered upon the verdict of six jurors in an action for damages, in which no defense was made by the defendant, can not be tried de novo by the circuit court upon appeal. *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296, 4 S. E. 654; *Vandervort v. Fouse*, 30 W. Va. 326, 4 S. E. 660; *Barlow v. Daniels*, 25 W. Va. 512.

### 3. Grounds of Reversal.

**Technical Errors.**—If there has been a full and fair trial on the merits of the controversy in a civil action commenced before a justice, the judgment will not be reversed for mere technical errors, not prejudicial to the fairness of such trial. *Furbee v. Shay*, 46 W. Va. 736, 34 S. E. 746.

### 4. Bonds.

Action before a justice by York against Bert Free. An entry on the docket reads: "1891, April 4th, H. H. Free appeared and filed bond with Frank Burt as security, and asks that an appeal be granted to the circuit court of Marion county. Bond approved, and appeal granted. J. F.

Christy, Justice." The appeal bond recites the appeal as asked by Bert Free. The appeal is to be regarded as taken by Bert Free, not H. H. Free. *York v. Free*, 38 W. Va. 336, 18 S. E. 492.

### B. CERTIORARI.

As to the allowance of certiorari from a judgment of a justice of the peace, see the title CERTIORARI, vol. 2, p. 745. And see the title APPEAL AND ERROR, vol. 1, p. 655.

## IX. Disqualification and Removal.

**By Superior Court Not by Executive.**—It was held in *Edmiston v. Campbell*, 1 Va. Cas. 16, that the governor could not remove a justice of the peace from office, but that he might be removed by the judgment of a superior court of law.

**Acting as Coroner as Disqualification from Sitting on Examining Court.**—A justice of the peace who has acted as coroner in taking the inquest upon the dead body of a man, whom the prisoner is charged to have murdered, is not thereby disqualified from sitting as a member of the examining court. *Forde v. Com.*, 16 Gratt. 547.

**Justice Acting as Coroner.**—A justice of the peace acting as coroner, and having as coroner committed a person to jail for a felony, is not disqualified from certifying the fact of such commitment as a justice of the peace. *Wormeley v. Com.*, 10 Gratt. 658.

**Conviction of Felony Forfeits Office.**—A conviction of a justice of the peace for malicious stabbing is a felony, and although pardoned after being sentenced and confined in the penitentiary, it is a forfeiture of his office, and he is incapacitated from acting under his commission. The pardon did not avoid the forfeiture nor restore his capacity. *Com. v. Fugate*, 2 Leigh 724.

**Removal from State.**—A justice of the peace leaves the state with intent to establish his residence in another

state. He remains there nine months, but does not establish his permanent home there, and then returns and resumes his former residence in this state. It was held that he has no right to resume the exercise of his office of justice of the peace. *Poulson v. Justices*, 2 Leigh 743.

**Removal from County.**—The removal of a justice of the peace and his family, from his county to another, and remaining there for several years although he afterwards returns, is either an abandonment, virtual resignation or forfeiture of his office, and whether void, or only voidable, by a judicial proceeding eventuating in a judgment of amotion, no mandamus ought to issue to invest him with office not belonging to him if void, or which might be taken away from him if voidable. *Chew v. Justices*, 2 Va. Cas. 208. See *Amory v. Justices*, 2 Va. Cas. 523.

**Incompatible Office—Deputy Clerk.**—The offices of a deputy clerk of a county court, and of justice of the peace of the same county, are incompatible offices, so that they can not both be held at the same time. *Amory v. Justices*, 2 Va. Cas. 523.

**Office under United States Government.**—By the acts of 1821-22, ch. 26, if a justice of the peace is appointed and accepts an office under the United States government, or any other incompatible office, he thereby vacates his office of justice of the peace and his resignation of the other office will not restore him to the office of justice, nor can he ever lawfully exercise this latter office without a new commission. *Com. v. Sherrard*, 4 Leigh 643.

**High Sheriff.**—But although the office of deputy sheriff is incompatible with that of justice of the peace, by statute in Virginia the office of high sheriff is not incompatible with it. The acceptance of the office of deputy sheriff vacates the office of justice. *Com. v. Tate*, 3 Leigh 802.

**Acts Valid Prior to Disqualification.**—In *Maddox v. Ewell*, 2 Va. Cas. 59,

the question was raised but not decided, whether the acceptance of the office of coroner, by a justice of the peace, was a forfeiture of his office. But the court held, that it did not vacate his subsequent acts as justice, which were done before his disqualification was established by some proper judicial proceeding instituted for that purpose.

**Misbehavior in Office.**—A justice of the peace may be amerced and removed from office, upon an information against him in a superior court of criminal jurisdiction, for misbehavior in office. *Com. v. Alexander*, 4 Hen. & M. 522.

**Sitting on Bench While Intoxicated.**—Sitting on the bench while in a state of intoxication from drinking spirituous liquors, and rendered thereby incompetent to discharge the duties of the office with propriety, decorum and discretion, is misbehavior by a justice of the peace, for which a superior court may render judgment of a motion from office against him. *Com. v. Mann*, 1 Va. Cas. 308; *Com. v. Alexander*, 1 Va. Cas. 156; *Com. v. Alexander*, 4 Hen. & M. 522.

**Issuing Warrant Falsely and Maliciously.**—A justice of the peace, who maliciously and falsely issued a warrant commanding a surveyor of a road to appear before him, and answer a complaint for not keeping the road in repair, and adjudged him to pay the cost, when in fact there had never been any complaint made, but the justice falsely used the name of the complainant, was held to be guilty of malfeasance in office, and indicted, fined, and removed from office. *Wallace v. Com.*, 2 Va. Cas. 130.

**Justices Interested with Many Others in Public Landing.**—Upon an application to establish a public landing, the viewers reported that the place viewed would be of great convenience to the public, as a list containing a great many names had been shown to them, who would be benefited by it.

Two of the justices of the county were on the list, and when the order awarding the writ of *ad quod damnum* was made they were on the bench, and one of them was on the bench when the landing was established. It was held that this constituted no legal objection to the landing, and the justices were not disqualified. *Muire v. Falconer*, 10 Gratt. 12.

**Contract for Carrying Mail.**—Entering into a contract with the United States for carrying the mail, and being employed in performance thereof in transporting the mail, is a disqualification from holding the office of justice of the peace of this commonwealth. *Com. v. Israel*, 1 Va. Cas. 317.

## X. Proceedings Against.

See also, ante, "Liabilities," IV.

**Indictment—Allegations.**—An indictment against a justice in the county court for misbehavior in office must distinctly charge that the act imputed as misbehavior was done with corrupt, partial, malicious or improper motives, and above all with knowledge that it was wrong. *Jacobs v. Com.*, 2 Leigh 709.

In an information against a justice of the peace for bribery in the election of a clerk, it ought to be stated with certainty, that an election was holden, and that, at that election, the vote was given. *Newell v. Com.*, 2 Wash. 88.

**Corrupt Barter of Votes.**—A corrupt agreement between two justices of the peace, by which one agrees to vote for a certain candidate for office in consideration of the other's voting for another candidate, is not an offense within the statute against buying and

selling offices, but such agreement is a misdemeanor at common law, for which an indictment will lie. *Com. v. Callaghan*, 2 Va. Cas. 460.

**False Issuance of Search Warrant.**—Trespass *vi et armis*, and not case, is the proper action, against a justice of the peace, for maliciously and corruptly, with intent to injure and oppress, and without probable cause, issuing a search warrant by virtue whereof a constable forcibly enters the plaintiff's close, and takes and carries away from his possession certain slaves which he held as his property. *Muse v. Vidal*, 6 Munf. 27.

**Taking Defective Bond.**—Where a defective bond is taken from a guardian and his sureties by a justice of the county court who appointed him, so that the sureties are not bound for the defaults of the guardian, equity has no jurisdiction to enforce the liability imposed upon the justice by § 5, ch. 108, 1 Rev. Va. Code, but the action should be trespass on the case for misfeasance in office. *Austin v. Richardson*, 1 Gratt. 310.

**Proceedings in County Courts.**—Under the provisions of the West Virginia constitution, art. 8, § 24, county courts are authorized to exercise such other powers and perform such other duties, not of a judicial nature, as may be prescribed by law. Section 7, ch. 7, W. Va. Code, 1891, so far as it authorizes the county court to hear charges preferred against a justice of the peace, after having him summoned, and to remove him when a proper case is made, is judicial in its nature, and to that extent the section is unconstitutional. *Arkle v. Board*, 41 W. Va. 471, 23 S. E. 804.

**JUSTIFIABLE CAUSE.**—In *Young v. Gregorie*, 3 Call 446, 453, it is said: "Probable cause, therefore, is the very gist of the action; and, being absolutely necessary to sustain the suit, it must be averred. The words, *justifiable cause*, do not supply the omission, because there may not be a *justifiable cause*, and yet there may be a probable one; which must depend upon the complexion of things at the time the prosecution was commenced."

## Justifiable Homicide.

See the title HOMICIDE, vol. 7, p. 111.

## Justifiable Probable Cause.

See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 120; MALICIOUS PROSECUTION.

**JUSTIFICATION.**—It has been held that if in an action for slander the defendant plead the word **justification** alone, the plea is bad. *Kirtley v. Deck*, 3 Hen. & M. 388. See also, *Kerr v. Dixon*, 2 Call 379; *Rice v. White*, 4 Leigh 474, 481; *Harrison v. Brock*, 1 Munf. 21, 27. And see the title LIBEL AND SLANDER.

**JUSTLY.**—In *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. 787, 788, it is said: "The first one is bad for several reasons. It does not state that affiant believes that the plaintiffs are **justly** entitled to recover the amount specified. The statute uses both the words **justly** and 'recover,' and it is not enough to say that the plaintiff is entitled to recover. The word **justly** is designated to more deeply search the conscience, and guard against flimsy, unjust demands, by compelling the sworn conscience to explicitly state that the demand is just. It performs a material office, and is indispensable. *Crim v. Harmon*, 38 W. Va. 596, 601, 18 S. E. 753; *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. 977." See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 92. And see *Reed v. McCloud*, 38 W. Va. 701, 18 S. E. 924.

**KEEP.**—In *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725, 726, it is said: "It is difficult to conceive how the charge that the plaintiff 'was **keeping** Mrs. Bowler,' when taken in connection with the other words spoken, or considered by themselves, could have been understood by hearers in any other sense than that the plaintiff was guilty of criminal intercourse with her. If they did not mean that, what did they mean? The words **keep** or **keeping** have no doubt several meanings, but their signification in a particular sense depends upon the context—the words with which or the circumstances under which they are used. But when it is said in reference to a woman that a man is '**keeping** her,' or of a man that he is '**keeping** a woman,' the ordinary and popular construction of that language is that the relation between the parties is one which involves criminal intercourse." See generally, the title LIBEL AND SLANDER.

To **keep** is a synonym for to retain. *Richardson v. SeEVERS*, 84 Va. 259, 4 S. E. 712.

## Keeper of Seals.

See the title STATE.

## Keeper of the Rolls.

See the title MANDAMUS.

## Keno Table.

See the title GAMING, vol. 6, p. 692.

## **Kidnapping.**

See the title ABDUCTION AND KIDNAPPING, vol. 1, p. 56.

**KIN.**—See NEXT OF KIN. See also, the title DESCENT AND DISTRIBUTION, vol. 4, p. 591.

**KIND.**—In *Thornton v. Thornton*, 3 Rand. 179, 187, it is said: "The word **kind** (of whatever **kind** the estate be), means, I think, to describe the quantity, not the quality, of the estate. The quality was already marked, by calling them joint tenants. But, as there may be a joint estate in fee, for life, or years, and as it was the intention of the act to abolish the right of survivorship in all joint estates, it uses the terms 'of whatever **kind** the estate may be.'"

## **Kindergartens.**

See the title SCHOOLS.

**KITING.**—See *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931, 933.

## **Knights of Honor.**

See the title BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 344.

**KNOWINGLY.**—See DESIGNEDLY, vol. 4, p. 634.

## **Knowledge.**

See the titles EVIDENCE, vol. 5, p. 313; LACHES; LIMITATION OF ACTIONS; NOTICE; PRESUMPTIONS AND BURDEN OF PROOF.

As to carnal knowledge, see the title RAPE. As to averment of knowledge in indictments, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 411. As to judicial knowledge, see the title JUDICIAL NOTICE, vol. 8, p. 630.

**KNOWN.**—In *Miller v. Black Rock Springs, etc., Co.*, 99 Va. 747, 40 S. E. 27, 30, it is said: "Subterranean waters can only be the subject of riparian rights when flowing in defined or **known** channels. 'Defined' means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge. **Known** means the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground. **Known**, in this rule of law, is not synonymous with 'visible,' nor is it restricted to knowledge derived from exposure of the channel by excavation. Water percolating through the ground in no defined or visible channel is not a 'stream.' 14 Mews, E. C. L. 1955." See also, the title WATERS AND WATERCOURSES.

## **Knuckles.**

See the title WEAPONS.

## **Labels.**

See the titles DRUGGISTS, vol. 4, p. 831; FERTILIZERS, vol. 6, p. 37; PATENTS AND TRADE MARKS.

# LABOR.

## CROSS REFERENCES.

See the titles **BOYCOTT**, vol. 2, p. 612; **CONSPIRACY**, vol. 3, p. 132; **HOMESTEAD EXEMPTION**, vol. 7, p. 78; **STRIKES**; **SUNDAYS AND HOLIDAYS**.

**Definitions and Distinctions.**—The word "laboring," as used in the statute, implies something more than one mere physical effort; it imports a continuous bodily exertion put forth in a trade or calling, such an exercise of muscular strength as brings on fatigue. *Raines v. Watson*, 2 W. Va. 371. And see the title **SUNDAYS AND HOLIDAYS**.

The making of a contract is not labor, so as to come within the West Virginia statute prohibiting work or labor on the Sabbath day. *Raines v. Watson*, 2 W. Va. 371. And see generally, the title **SUNDAYS AND HOLIDAYS**.

The word "laborer," when used in its ordinary and usual acceptation, carries with it the idea of actual physical and manual toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers. *Farinholt v. Luckhard*, 90 Va. 936, 938, 21 S. E. 817.

Under the above definition, a mail carrier was held to be a laboring man. *Farinholt v. Luckhard*, 90 Va. 938, 21 S. E. 817.

The term "laboring man" in this chapter (ch. 178) shall be construed to include all householders who receive wages for their service. Virginia Code, 1094, § 3657. See generally, the title **HOMESTEAD EXEMPTION**, vol. 7, p. 78.

## **Labor Unions—Right to Combine.**

West Virginia Code, § 413, provides "that no person or persons or combination of persons shall by force, threats, menace, or intimidation of any kind, prevent or attempt to prevent from working in or about any mine, any person or persons who have the lawful right to work in or about the same, and who desire so to work; but this provision shall not be so construed as to prevent any two or more persons from associating themselves together under the name of Knights of Labor, or any other name they may desire, for any lawful purpose, or from using any moral suasion of lawful argument, to induce any one not to work on or about any mine.

**Boycotting.**—Members of a typographical union may be convicted of boycotting, when it appears that they conspired to compel a firm of printers to make their office a union office, and to force them to employ only union printers, and upon the refusal of such firm, they conspired to boycott the firm, and sent circulars to its customers notifying them of the boycott, and that the names of all persons who continued to deal with the firm would be blacklisted, and that those whose names were so blacklisted would in turn be boycotted until they agreed to withdraw their patronage from such firm of printers. *Crump v. Com.*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895. And see generally, the titles **BOYCOTT**, vol. 2, p. 612; **CONSPIRACY**, vol. 3, p. 132.

## **Labor Combinations and Labor Unions.**

See the title **LABOR**, ante, p. 92, and references given.

**LABORING.**—In *Raines v. Watson*, 2 W. Va. 371, 389, it is said: "Working and laboring are convertible terms and mean the same thing. In this connection they mean simply being employed or engaged at, etc., and may as well apply to mental labor as to bodily. For a merchant to sell a yard of tape or a lawyer to prepare the pleadings in his case is as clearly within the meaning of the word **laboring** if done in the course of business, and not from necessity or charity, on the Sabbath, as if the whole day were entirely devoted to the acts and business in question. And it would be equally true of a merchant on that day settling his debts, and taking obligations and contracts to secure them, binding others to pay them who did not owe. Nor is the meaning of the word **laboring** nor the operation of the statute changed or defeated by the fact that it was done publicly or privately." See generally, the title **SUNDAYS AND HOLIDAYS**.

## **LACHES.**

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### CROSS REFERENCES.

See the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 82; AMENDMENTS, vol. 1, p. 316; APPEAL AND ERROR, vol. 1, p. 418; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; ATTORNEY AND CLIENT, vol. 2, p. 144; BILL OF REVIEW, vol. 2, p. 383; CERTIORARI, vol. 2, p. 734; CONTRACTS, vol. 3, p. 307; CONTRIBUTION AND EXONERATION, vol. 3, p. 461; CREDITORS' SUITS, vol. 3, p. 780; DEMURRERS, vol. 4, p. 456; ESTOPPEL, vol. 5, p. 191; EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483; FIRE INSURANCE, vol. 6, p. 60; FRAUD AND DECEIT, vol. 6, p. 448; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540; IMPROVEMENTS, vol. 7, p. 317; INFANTS, vol. 7, p. 461; INJUNCTIONS, vol. 7, p. 512; JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89; JUDGMENTS AND DECREES, vol. 8, p. 161; JUDICIAL SALES AND RENTINGS, vol. 8, p. 648; LANDLORD AND TENANT; LIMITATION OF ACTIONS; LOST INSTRUMENTS AND RECORDS; MARSHALING ASSETS AND SECURITIES; MISTAKE AND ACCIDENT; MORTGAGES AND DEEDS OF TRUST; MUNICIPAL CORPORATIONS; NUISANCES; PARTITION; PAYMENT; PLEADING; PLEDGE AND COLLATERAL SECURITY; PRESUMPTIONS AND BURDEN OF PROOF; RESCISSION, CANCELLATION AND REFORMATION; SEPARATE ESTATE OF MARRIED WOMEN; SPECIFIC PERFORMANCE; SURETYSHIP; TRUSTS AND TRUSTEES; UNDUE INFLUENCE; USURY; VENDOR AND PURCHASER; VENDOR'S LIEN; WILLS.

### I. Scope of Title.

This title is confined to a treatment of the general principles governing the equitable doctrine of laches. For applications of the doctrine in particular cases, reference must be had to the various titles throughout this work wherein the subject has been treated, the most important of which are given in the table of cross references above.

### II. What Constitutes.

#### A. DEFINITIONS.

##### 1. Laches.

Laches is such neglect or omission to do what one should do as warrants the presumption that he has abandoned

his claim, and declines to assert his right. *Wissler v. Craig*, 80 Va. 22, 30; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Coles v. Ballard*, 78 Va. 139, 179; *Armentrout v. Shafer*, 89 Va. 566, 16 S. E. 726.

Laches is inexcusable delay in asserting a right, and is an equitable defense, controlled by equitable considerations. To be a bar, the lapse of time must be so great, and the relation of the defendant to the right such that it would be inequitable to permit the plaintiff to assert it, where he has had, for a considerable period, knowledge of its existence, or might have acquainted himself with it, by the use

of reasonable diligence. *Cresap v. Cresap*, 54 W. Va. 581, 46 S. E. 582.

## 2. Stale Demands.

Bouvier defines a stale demand to be "a claim which has been for a long time undemanded." *Coles v. Ballard*, 78 Va. 139, 146.

Claims are considered "stale" only where gross laches is shown with unexplained acquiescence in the operation of an adverse right. *Bell v. Wood*, 94 Va. 677, 683, 27 S. E. 504; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Coles v. Ballard*, 78 Va. 139.

## B. ELEMENTS.

### 1. In General.

The doctrine of laches rests upon the broadest principles of equity, and implies injury to the party pleading it as a defense. Lapse of time often makes it impossible to discover the truth, and it would be unjust to enforce a demand after many years of delay, especially so where a party has altered his situation, believing he had a right to do so. Delay alone does not necessarily preclude relief, but the defense must be tested on substantial equitable principles. The decided cases show that the most important consideration in support of this defense are: First, the death of parties to the original transaction, or the intervention of the rights of third persons; second, the loss of evidence, rendering it difficult to do justice; and third, the character of evidence by which it is sought to establish the demand, for instance, by parol testimony depending on the mere recollection of witnesses. Where these elements or some of them exist, the courts have denied relief after a lapse of much less than twenty years. *Cranmer v. McSwords*, 24 W. Va. 594.

The application of the doctrine of laches is for the sound discretion of the court, and does not depend on the conviction of the court against the original justice of the claim or on any specific ground of defense, but upon its belief that it is too late to ascer-

tain the merits of the case under the circumstances. *Smith v. Thompson*, 7 Gratt. 112, 54 Am. Dec. 126.

### 2. Knowledge of Rights.

It is a well-settled rule of equity jurisprudence that laches can not be predicated of those who are ignorant of their rights. Such a defense is only permitted in equity to defeat an acknowledged right on the ground that it affords evidence that the right has been abandoned. *Massie v. Heiskell*, 80 Va. 789; *Nelson v. Carrington*, 4 Munf. 332; *Rowe v. Bentley*, 29 Gratt. 756, 763; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861; *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869. See post, "Ignorance of Rights," IV, J.

### 3. Delay.

**Rule as to Delay Constituting Laches.**—It is a general rule in equity that mere lapse of time, unaccompanied by circumstances affording evidence of a presumption that the right has been abandoned, is not considered laches. *Wissler v. Craig*, 80 Va. 22; *Coles v. Ballard*, 78 Va. 139; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Armentrout v. Shafer*, 89 Va. 566, 16 S. E. 726; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861; *Winston v. Street*, 2 Pat. & H. 169; *Cranmer v. McSwords*, 24 W. Va. 594; *Whitlock v. Johnson*, 87 Va. 323, 333, 12 S. E. 614; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Tunstall v. Withers*, 86 Va. 892, 900, 11 S. E. 565; *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741, 42 S. E. 867.

Generally, if the sum sought to be recovered is certain, the transaction has not become obscure, and there has been no such loss of evidence as will be likely to produce injustice, a court of equity will not refuse relief merely because there has been delay in asserting the claim. *Tidball v. Shenandoah Nat. Bank*, 100 Va. 741, 42 S. E. 867.

Laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as to afford a reasonable presumption

of the satisfaction or abandonment of the claim; or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise. *Tazewell v. Saunders*, 13 Gratt. 354.

**Fair Trial Practicable.**—Where there is no room for conjecture, and the pathway is open and plain to a full and fair ascertainment of the rights of the parties, with no obstruction to the attainment of complete justice, under such circumstances the doctrine of laches does not apply. *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. 614.

Delay in prosecuting a suit for seven years and three months, where all the parties are still living and able to defend it, will not warrant its being dismissed on the ground of lack of due diligence in prosecuting it. It takes longer delay, and death of parties or loss of evidence, to call for such dismissal. *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199.

A bill was filed by legatees against the executor and sureties of the testator eleven years after the last one of the plaintiffs had attained full age, asking a settlement of accounts. Notwithstanding the lapse of time, the bill was sustained where it appeared that no obstacles prevented a fair settlement of the accounts, no loss of vouchers or testimony being averred and no difficulties suggested. Under such circumstances it was held that it would be going too far to hold that mere lapse of time should operate as a bar, notwithstanding the death of the executor and his sureties. *Aylett v. King*, 11 Leigh 486. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

#### 4. Death of Parties and Loss of Evidence.

**Statement of Rule.**—While delay alone is not always sufficient to bar a suit in equity, it is well settled that delay coupled with the death of parties and witnesses or the loss of evi-

dence, rendering it difficult to do justice between the parties, is sufficient to induce courts of equity to deny relief. *Cranmer v. McSwords*, 24 W. Va. 594; *Pusey v. Gardner*, 21 W. Va. 469; *Doggett v. Helm*, 17 Gratt. 96; *Smith v. Thompson*, 7 Gratt. 112; *Robertson v. Read*, 17 Gratt. 544; *Morrison v. Householder*, 79 Va. 627; *Kavanaugh v. Kavanaugh*, 98 Va. 643, 37 S. E. 275; *Castleman v. Dorsey*, 78 Va. 342; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Garland v. Garland*, 2 Va. Dec. 351; *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743; *West v. Thompson*, 7 Gratt. 177; *Hillis v. Hamilton*, 10 Gratt. 300; *Winston v. Street*, 2 Pat. & H. 169; *Bargamin v. Clarke*, 20 Gratt. 544; *Perkins v. Lane*, 82 Va. 59; *Turner v. Dillard*, 82 Va. 536; *Dismal Swamp Land Co. v. Macauley*, 85 Va. 16, 6 S. E. 697.

Destruction of records, loss of evidence and death of parties and witnesses are circumstances which will be weighed in connection with the delay. *Stamper v. Garnett*, 31 Gratt. 550.

Where matters sought to be revived have been allowed to sleep unasserted until a generation nearly had passed away, and until, in the nature of things, all recollections of many of the transactions had either been obliterated, or so faded from the memory of the principal actors as to become almost, if not entirely untrustworthy, a court of equity will refuse to interfere for the peace of society to aid in the assertion of such antiquated demands. In such cases the court acts sometimes by analogy to the law, and sometimes upon its own inherent doctrine. *Bell v. Moon*, 79 Va. 341; *Hill v. Umberger*, 77 Va. 653; *Updike v. Lane*, 78 Va. 132; *Coles v. Ballard*, 78 Va. 139.

#### Death of Parties and Witnesses.

Where all the original parties to a transaction are dead and the means of explaining the transaction has been lost, equity will refuse to entertain jurisdiction, if the plaintiff has been

guilty of laches or unreasonable delay in asserting his claim. *Bargamin v. Clarke*, 20 Gratt. 544; *Caruthers v. Lexington*, 12 Leigh 610; *Smith v. Thompson*, 7 Gratt. 112; *Doggett v. Helm*, 17 Gratt. 96; *Robertson v. Read*, 17 Gratt. 544.

**Loss of Evidence Rendering Conclusions Conjectural.**—Where the evidence plainly shows that any conclusion at which the court can arrive must be at best conjectural, and that the danger of doing injustice is almost if not absolutely certain, because of obscurity of the original transactions by time (evidence being probably lost), courts of equity refuse to interfere, regardless of the original justice of the claim. *Dismal Swamp Land Co. v. Macauley*, 85 Va. 16, 6 S. E. 697; *Kavanaugh v. Kavanaugh*, 98 Va. 649, 37 S. E. 275; *Turner v. Dillard*, 82 Va. 536; *Caruthers v. Lexington*, 12 Leigh 610; *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150; *Doyle v. Beasley*, 99 Va. 428, 39 S. E. 152; *Harrison v. Gibson*, 23 Gratt. 212.

**Evidence Unsatisfactory.**—An equitable claim of any kind, and especially one which depends alone upon parol testimony, will not be recognized after a great lapse of time, during which it has been ignored, where no satisfactory reason can be assigned for not making the claim sooner. And this is especially true where the nature of the claim requires explicit evidence to explain it, and such lapse of time renders the evidence unsatisfactory, which might otherwise have been regarded as sufficiently clear and explicit. *Troll v. Carter*, 15 W. Va. 567; *Benjamin v. Clarke*, 20 Gratt. 544; *Phelps v. Seely*, 22 Gratt. 573; *Western Min., etc., Co. v. Peytona, etc., Coal Co.*, 8 W. Va. 406.

##### 5. Prejudice to Adverse Party.

**In General.**—Parties who come into equity to enforce claims must do so within a reasonable time. They must not delay by their negligence until

there can no longer be a safe determination of the controversy, and adversaries will be exposed to the danger of injustice from loss of evidence and information, and means of recourse against others, occasioned by deaths, insolvencies and others untoward circumstances. *Smith v. Thompson*, 7 Gratt. 112, 54 Am. Dec. 126.

Though a creditor's debt was evidenced by a deed, yet where there had been gross laches in its prosecution, and the account could not be settled without injustice to the estate of the debtor, a court of equity did not give the creditor relief. *Tazewell v. Whittle*, 13 Gratt. 329.

**Delay until Defendant's Right to Reimbursement Is Lost.**—The plaintiffs in an action to enforce an indemnity bond showed no equitable right when their suit was brought more than thirty-four years after the original bond was payable, and more than twenty-three years after the date of the bond of indemnity, during which time, for a period of nearly thirteen years, there was an executor for the estate of one of the joint obligors of the original bond. Notwithstanding this, the claim for indemnity was allowed to sleep until the other joint obligor, the original debtor, became utterly insolvent a few years before the institution of this suit. After such great lapse of time and laches on the part of the plaintiff no relief was allowed in equity. *Smith v. Thompson*, 7 Gratt. 112, 54 Am. Dec. 126.

Unnecessary delay in applying for payment of claims for property impressed for public service, whereby the state was deprived of an opportunity of obtaining reimbursement from the general government, was a bar to suit. *Com. v. Banks*, 4 Call 338.

**Change of Value.**—Where a vendor sued to rescind a contract for the sale of land after the property had almost doubled the contract price in value, which suit was dismissed, and he made

no offer to give possession or make a deed, and made no demand for performance until four years after the sale, and three years after the last of the purchase money was due, and when the property had fallen to one-third of the contract price, specific performance will not be enforced at the instance of the vendor. *Gish v. Jamison*, 90 Va. 312, 31 S. E. 521; *Simmons v. Palmer*, 93 Va. 389, 25 S. E. 6. See the title **SPECIFIC PERFORMANCE**.

#### **b. Prejudice to Third Persons.**

##### **Property in Hands of Purchasers.—**

A decree of a court of another state, for the conveyance of land in Virginia, was not enforced in equity against bona fide purchasers without notice, or even against the heirs of a party against whom a decree was rendered, after the lapse of thirty years from the date of the decree before the institution of the suit. *Massie v. Greenhow*, 2 Pat. & H. 255.

A lien on land acquired by virtue of a contract, unrecorded in the county where the land is situated, as against one who acquired title to the land without actual or constructive notice thereof, was barred by laches, where the lien was asserted more than seventeen years after the purchaser acquired title and possession thereunder, and twenty-five years after the lien was created, no reason being given for the failure to assert it earlier. *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150.

The plaintiff was assigned certain purchase money notes secured by a reservation of a vendor's lien on a tract of land. He employed an attorney to enforce the lien, and in April, 1879, a decree directing sale was confirmed. A deed was directed to be made to the purchaser, and the attorney was appointed special commissioner to execute the deed. The plaintiff failed for eighteen years to take any legal steps to collect the money, which had been paid to the attorney,

and in the meantime the land came into the hands of innocent purchasers. By reason of his laches the plaintiff was not entitled to a recovery. *Shields v. Tarleton*, 48 W. Va. 343, 37 S. E. 589.

A creditor secured by a deed of trust purchased the land at a void sale under such deed, and received a deed from the trustee conveying the fee. The purchaser afterwards conveyed by deed the land in fee to another, who held actual possession for the period of the statute of limitations. The fact that the first grantor knew of such sale for at least seventeen years, was sufficient to defeat a suit in equity brought to set aside the sale and conveyance, and redeem and recover the land, by reason of laches and staleness, even if the statute of limitation did not bar it. *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527.

Upon a bill in equity to charge property, which had passed into the hands of third persons without notice of the complainant's claim, the court being called upon to investigate transactions which occurred thirty years before the institution of the suit, and, from lapse of time and the obscurity of the transactions, it was impossible to arrive at the truth of the case, the bill was dismissed. *Page v. Booth*, 1 Rob. 161.

##### **Failure to Sue in Time to Collect Firm Debt from Surviving Partner a Bar to Relief against Deceased Partner.**

—Where the creditor of a partnership fails bona fide to use the ordinary or reasonable diligence to collect his debt, or where measures have been taken to compel payment from the surviving partner, and there has been gross and unaccountable delay in the proceedings adopted, and it is palpable that the consequence of such delay has been to cast upon the estate of the deceased partner a debt, which might certainly have been obtained from the surviving partner, and which it was

his duty to pay, this is such laches as will forbid a court of equity to lend its aid to subject the estate of the deceased partner. *Jackson v. King*, 12 Gratt. 490. See the title PARTNER-SHIP.

### 7. Acquiescence and Abandonment.

**In General.**—Delay in the assertion of a right, when it does not operate as a statutory bar, may operate in equity as an evidence of assent, acquiescence or waiver, unless satisfactorily explained. *Kelley v. McQuinn*, 42 W. Va. 774, 26 S. E. 515; *Pusey v. Gardner*, 21 W. Va. 469, 470; *Bryant v. Grover*, 42 W. Va. 10, 24 S. E. 605; *Trader v. Jarvis*, 23 W. Va. 100; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817; *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46; *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Nelson v. Carrington*, 4 Munf. 332; *Coles v. Ballard*, 78 Va. 139, 147; *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908.

Generally, as to acquiescence, see the title ESTOPPEL, vol. 5, p. 191.

Acquiescence in a transaction may bar a party of the relief in a very short period. Where one has knowledge of an act, or it is done with his full approbation, he can not undo what has been done; and if he stands by and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he can not afterwards have relief. Where his silence permitted or encouraged others to part with their money or property, he can not complain that his interests are affected. *Despard v. Despard*, 53 W. Va. 443, 44 S. E. 448.

**Weight of Presumption.**—The presumption that right has been abandoned arising from delay in suing is never allowed to prevail where it is outweighed by opposing facts and circumstances. Equity is not fond of taking advantage of forfeitures arising merely from a lapse of time. *Nelson v. Car-*

*lington*, 4 Munf. 332; *Coles v. Ballard*, 78 Va. 139, 147.

When lapse of time is sufficient to raise the presumption of assent, acquiescence, or waiver on the part of plaintiff, or those under whom he claims, he can not recover unless he rebuts such presumption by a reasonable and satisfactory excuse for the delay in the assertion of his rights not founded on his own laches or neglect. *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605.

### III. Effect of Laches.

**In General.**—It is undoubtedly true that a court of equity will refuse its aid to enforce stale demands, where the party has slept upon his rights and acquiesced for an unreasonable length of time. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Bell v. Wood*, 94 Va. 677, 683, 27 S. E. 504; *Bradley v. Bradley*, 83 Va. 75, 1 S. E. 477; *Terry v. Clarke*, 77 Va. 397; *Ford v. Euker*, 86 Va. 75, 79, 9 S. E. 500; *Pigg v. Corder*, 12 Leigh 69; *Ross v. Reid*, 8 Gratt. 229; *Parrell v. McKinley*, 9 Gratt. 1; *McCue v. Ralston*, 9 Gratt. 430; *Harrison v. Price*, 25 Gratt. 553; *Henderson v. Hunton*, 26 Gratt. 926; *Slack v. Wood*, 9 Gratt. 40; *Meem v. Rucker*, 10 Gratt. 506; *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548; *Shelton v. Jones*, 26 Gratt. 891; *Bierne v. Mann*, 5 Leigh 364; *Donally v. Ginatt*, 5 Leigh 359; *Walker v. Beauchler*, 27 Gratt. 511; *Winn v. Jones*, 6 Leigh 74; *Dey v. Martin*, 78 Va. 1; *Callaway v. Alexander*, 8 Leigh 114; *Stanard v. Rogers*, 4 Hen. & M. 438; *Burnham v. Jones*, 100 Va. 493, 42 S. E. 292; *Canada v. Barksdale*, 84 Va. 742, 6 S. E. 10; *Citizens Nat. Bank v. Manoni*, 76 Va. 802; *Caskie v. Harrison*, 76 Va. 85; *McCormick v. Wright*, 79 Va. 524; *Mills v. Talley*, 83 Va. 361, 5 S. E. 368; *Green v. Griffin*, 1 Va. Dec. 858; *Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831; *Bland v. Stuart*, 35 W. Va. 518, 14

S. E. 215; *Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260; *Edgell v. Smith*, 50 W. Va. 349, 350, 40 S. E. 402; *Clark v. Gordon*, 35 W. Va. 735, 14 S. E. 255, 261; *Long v. Ohio River R. Co.*, 35 W. Va. 333, 13 S. E. 1010; *Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407; *Medley v. German, etc., Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Mong v. Roush*, 29 W. Va. 119, 11 S. E. 906; *Berry v. Weideman*, 40 W. Va. 36, 20 S. E. 817; *Bloss v. Hull*, 27 W. Va. 503; *Ludington v. Hundley*, 7 W. Va. 267; *Gillespie v. Bailey*, 12 W. Va. 70; *Tefft v. Marsh*, 1 W. Va. 38; *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909; *Bailey v. Calfee*, 49 W. Va. 630, 39 S. E. 642; *Rumsey v. Laidley*, 34 W. Va. 721, 12 S. E. 866; *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245.

"When a man, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, \* \* \* or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." *Mann v. Peck*, 45 W. Va. 18, 30 S. E. 206, 209.

#### IV. Excuses for Laches.

##### A. IN GENERAL.

Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar, is sufficient. *Berry v. Wiedeman*, 40 W. Va. 36, 20 S. E. 817; *Aylett v. King*, 11 Leigh 486.

And a suit will not be dismissed upon the ground of lapse of seven years after its commencement without any further steps having been taken, until the complainant has had an opportunity of explaining the delay, as the delay is

not so great that it may not be explained. *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53.

Where the suit was one of great difficulty in prosecuting, and the plaintiff had not only to encounter the strenuous resistance of the debtor, but the conflicting claims of judgment creditors, these were extenuating circumstances in explaining the seeming neglect in prosecuting the claim. *Mayo v. Carrington*, 19 Gratt. 74.

By deed of February 16, 1849, K. conveyed to L. two acres of land in M., in trust for the exclusive use of E. and her children by her husband, I. In a suit in equity, in which these were the parties, it was decreed that I. should sell the land and invest the proceeds. I. reports the sale and investment, and the court by its decree of March 8, 1863, confirms the report, and decrees that I. shall take a deed from the vendor to I., conveying the land purchased upon the same trusts as those delivered in the deed from K. to L. The vendor in fact conveys the land to I. absolutely. On a bill filed by G., a judgment creditor of I., in June, 1871, to subject the land to the payment of I.'s debts; it was held, that the fact that E. was a married woman, that the children, except perhaps one, were infants when the suit of G. was brought, and the disturbed state of things in March, 1863, when the deed was made, will excuse any laches of E. and her children in not filing their bill to have the deed corrected. *Irvine v. Greever*, 32 Gratt. 411.

**Enforcement of Bond Received as Legacy.**—Testator bequeaths his daughter "all debts due him at his death from his several sons, by bonds, notes or other writings," among which is a bond from his son, J. B., whom he appoints one of his executors; this bond is delivered in 1807 by the executors to the legatee, then sole; in 1808, she marries S. who dies in 1819; and in 1820 she marries M. and dies in 1833; the son

and executor, J. B., early and constantly denies his liability to pay the debt, and this is known to the legatee, and to both her husbands during her coverture but no suit is ever brought or demand made on the bond till 1835, when a suit in equity is brought by M. as administrator of his deceased wife, against the obligor, to compel payment of the bond; in which the obligor is unable to show any exemption from his liability to pay the debt. It was held, that upon the circumstances of the case, accounting for the long delay to prosecute the claim, the plaintiff is entitled to relief notwithstanding the delay. *Baker v. Morris*, 10 Leigh 284, 285.

**Delay in asserting the rights of a distributee** may be accounted for by the succession of death of the distributee, the administration of his widow, an aged lady, and her death, and by the ultimate qualification of the complainant as administrator d. b. n. c. t. a. *Hurt v. West*, 87 Va. 78, 68, 12 S. E. 141.

**Resistance of Similar Claims by State an Excuse for Laches in Asserting Claim.**—An officer of the Virginia navy during the war of the revolution, who became supernumerary and so continued until the end of the war, was entitled under the act of May, 1778, to one-half pay for life, and the lapse of time from 1783 when the claim accrued till 1826, when it was asserted, did not afford any presumption of payment, or of abatement of the claim because during this time all similar claims of other officers were resisted by the state. *Com. v. Lilly*, 1 Leigh 525.

## **B. DISABILITY OF COMPLAINANT.**

### **1. Infancy.**

See the title *INFANTS*, vol. 7, p. 509.

**Suit to Surcharge and Falsify Administration Accounts.**—See the title *EXECUTORS AND ADMINISTRATORS*, vol. 5, p. 674.

**Rescission of Purchase Made by Agent.**—A delay of six years in impeaching a purchase made by an agent was held not to be fatal to the right of the plaintiffs to the aid of equity in rescinding the sale, where no ratification of the purchase appeared and all of the principals were nonresidents, some of them being infants and the others being *femes covert*. *Buckles v. Lafferty*, 2 Rob. 292, 40 Am. Dec. 752.

**Showing Cause against Decree.**—Where an infant proceeds promptly upon attaining his majority, to show cause against a decree, the defense of laches can not be made. *Stewart v. Tennant*, 52 W. Va. 559, 560, 44 S. E. 223. See the title *JUDGMENTS AND DECREES*, vol. 8, p. 161.

### **2. Insanity.**

**Laches Not Imputable to One of Unsound Mind.**—Laches, being an inexcusable delay in asserting a right, is an equitable defense, which implies knowledge or means of knowing one's rights, depending upon the particular facts of each case, and therefore can not be imputed to one of unsound mind. *Trowbridge v. Stone*, 42 W. Va. 454, 26 S. E. 363; *Knight v. Watts*, 26 W. Va. 175.

This principle was applied in a case where land was sold in 1815 by the sheriff to the deputy sheriff for the nonpayment of taxes, at which time the owner thereof was insane and so continued until his death in 1822. In 1833 his heir filed a bill for its recovery, and the delay in bringing the suit was held no bar to the recovery. *Taylor v. Stringer*, 1 Gratt. 158. See the title *INSANITY*, vol. 7, p. 668.

### **3. Coverture.**

**In General.**—Coverture of a woman is, as a general rule, sufficient to repel the imputation arising from lapse of time. *Justis v. English*, 30 Gratt. 565; *Waller v. Armistead*, 2 Leigh 11; *Baker v. Morris*, 10 Leigh 284; *Bedinger v. Wharton*, 27 Gratt. 857; *Wilson v. Branch*, 77 Va. 65; *Irvine v. Greever*, 32 Gratt. 411, 416; *Waldron*



*v. Harvey*, 54 W. Va. 608, 46 S. E. 603; *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 44 S. E. 774. See also, *Buckles v. Lafferty*, 2 Rob. 292. See the titles HUSBAND AND WIFE, vol. 7, p. 178; SEPARATE ESTATE OF MARRIED WOMEN.

**Failure of Legatee to Sue for Legacy.**—The fact of a legatee being under the disability of coverture during a great portion of the time which exists between the accrual of the cause of action and the time when the suit is finally brought, is a circumstance to account for and excuse the delay. *Baker v. Morris*, 10 Leigh 284.

**Impeaching Deeds.**—A female ward made a deed of general release and acquittance to her guardian, without any settlement of accounts, and also made a deed of gift to the infant son of the guardian without having its contents and effect explained to her. She married the same day. Her husband lived for more than twenty years, and then died. The lapse of time during the coverture did not affect the right of the wife to impeach the two deeds in equity. *Waller v. Armistead*, 2 Leigh 11.

**Disaffirmance of Deed Made during Infancy.**—Coverture has been held to excuse a delay of four years in disaffirming a deed executed during infancy, where during that time, laws were in force suspending the statute of limitations. *Bedinger v. Wharton*, 27 Gratt. 857.

Where an infant married woman made a deed, she was allowed to disaffirm within a reasonable time after she became discover, although this was about thirty-two years after she became of age. Such a disability was sufficient to repel the defense of laches. *Wilson v. Branch*, 77 Va. 65. See the titles DEEDS, vol. 4, p. 364; INFANTS, vol. 7, p. 461.

**Enforcing Bond.**—A bond was delivered by the executor to the daughter of the testator in 1807. In 1808, she married and her husband died in 1819.

In 1820 she married again and died in 1833. No suit was ever brought by her administrator. The obligor was unable to show any exemption from liability to pay the bond. The circumstances of the case accounted for the long delay, and the plaintiff was entitled to relief. *Baker v. Morris*, 10 Leigh 284.

**Failure to Sue Husband to Have Deed Corrected.**—The law will not impute laches to a married woman for failing to bring suit against her husband to have a deed corrected, there being no pretense of fraud. *Irvine v. Greever*, 32 Gratt. 411, 416; *Justis v. English*, 30 Gratt. 565. See the title RESCISSION, CANCELLATION AND REFORMATION.

**Recovery of Common-Law Lands.**—Laches can not be imputed to a married woman to defeat her suit for land not her separate estate. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603.

Adverse possession of a married woman's land not her separate estate, beginning during coverture and continuing for the term of the statute of limitations, will bar the wife's and husband's right during coverture; but though the right during coverture is barred, the wife or those claiming under her has five years after the coverture ends to sue for the land. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603. See the title ADVERSE POSSESSION, vol. 1, p. 199.

**Recovery of Separate Estate.**—Under the statutes of this state a married woman being authorized to act in respect to her separate estate as if she were unmarried, she is equally subject to the imputation and consequences of laches as if she were feme sole. *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 44 S. E. 774. See the title SEPARATE ESTATE OF MARRIED WOMEN.

**Wife Nominal Party in Bill.**—Where a wife is merely joined in a bill with her husband as a matter of conformity, the coverture of the wife is no excuse for delay in suing. *Blackwell v.*

Bragg, 78 Va. 529; *Harrison v. Gibson*, 23 Gratt. 212.

#### 4. Slavery.

A will provided that a slave should have his freedom at the testator's death and gave to the negro an annuity to be paid whether he accepted his freedom or not. The testator died in 1856. The negro was kept in slavery and deprived both of his freedom and the bequest to which he was entitled until 1865. The stay law was in existence until 1869. It was held, upon a petition for the legacy filed in 1878, that the claim for the legacy was not barred by laches. *Jones v. Jones*, 92 Va. 590, 24 S. E. 255. See the title SLAVES.

#### C. RELATIONSHIP OF PARTIES.

Mere delay is not always to be considered laches, and it may be explained by the mere kinship of the parties and their friendly relations, and by the inability of the debtor to pay. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861.

A stepfather conveyed to his stepson, when a minor living with him, a slave, purporting to be for value, and he retained possession of the slave and her increase for many years, and until the death of the stepson. After the death of the stepson, who left no children, his widow filed a bill against the stepfather and his wife for distribution of the slaves. This suit was brought a little less than twenty years from the time the stepson ceased to live with the stepfather. The latter having stood in the place of a parent and guardian to the son until the son ceased to live with him, the claim was not barred by lapse of time. *Roberts v. King*, 10 Gratt. 184.

#### D. PENDENCY OF SUIT.

**Presumption of Payment Rebutted by Suit.**—A pending suit against an executor for more than his testator's estate was worth, within twenty years before suit was brought against him by legatees or distributees for their

share of the estate, was held to rebut any presumption of payment arising from lapse of time against their demand, for until the debts were paid they had no claim to the estate. *Winston v. Street*, 2 Pat. & H. 169.

**Pendency of Suit by Ward against Guardian—Effect on Rights of Guardian's Sureties.**—A ward soon after coming of age filed a bill against the administratrix of her guardian for an account. After the suit had lingered for twenty-four years a decree was entered in favor of the ward, but not being able to obtain satisfaction of the decree she filed a bill against the sureties of the guardian. The lapse of time during which the ward was prosecuting her claim against the administratrix of the guardian, furnished no ground for the exoneration of the surety. *Roberts v. Colvin*, 3 Gratt. 358.

**Injunction to Judgment as Excuse for Delay in Enforcing It.**—It was proper for the court to instruct the jury, where a scire facias was brought to revive a judgment, which had been suspended by an injunction for forty-six years, that the pendency of the injunction cause repelled the legal presumption of payment which would have arisen from lapse of time, if said injunction had not been pending. *Hutsonpiller v. Stover*, 12 Gratt. 579. See the title INJUNCTIONS, vol. 7, p. 512.

**Effect of Dismissal of Suit for Want of Jurisdiction.**—Where a cause was removed from the state court to the United States court, where it remained for seventeen years, during which time active litigation was carried on between the parties, and then the cause was remanded to the state court for want of jurisdiction, the defendant could not under the plea of laches take advantage of the delay thus occasioned. *Parker v. Clarkson*, 39 W. Va. 184, 19 S. E. 431. See the title DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 4, p. 683.

**Litigation over Decedent's Estate.**— Apparent tardiness in the prosecution of a claim against a decedent's estate, which may be accounted for by the number and character of the claims asserted, and a protracted litigation over one of them, does not amount to such inexcusable delay on the part of a creditor as would justify a court of equity in refusing to grant him relief in the absence of evidence that his claim has been paid. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

The pendency of a suit by those entitled to an estate, against the administrator and his sureties, to which a creditor of the administrator, who by dealing with the assets of the estate had raised a trust on his part, was not a party, was no excuse for their laches in producing their claim against him. *Morris v. Duke*, 2 Pat. & H. 462.

B., mother of plaintiff, under her father's will owned a life estate in the land in dispute, with remainder in fee to such of her children as might survive her. She died in 1852, and out of seven children, only three survived her, of whom plaintiff was one. By deed in 1817, she relinquished her life estate to her seven children then living, and suit was brought for partition. Pending it, in 1818, a deed was made between the adults (to which plaintiff, being then a minor, was no party), agreeing to abide the partition to be made. The record has been destroyed, but the partition was made between the seven. In 1827 a deed was executed by plaintiff and others, ratifying the partition, but not so far as T. was concerned, neither he nor his wife being party to the deed. She was one of the three survivors, and her interests and the interests of her sister, the remaining one of the three, had passed to T. In 1852, after the death of B., the life tenant, R. conveyed the whole of the land in dispute to D., the defendant. The suit to construe the will was brought within two years after the death of the life tenant, and de-

cided in 1867; and plaintiff brought this suit within three months after that decision for partition of the land held by D. It was held, that the circumstances disclose no laches in plaintiff in bringing his suit. *Davis v. Tebbbs*, 81 Va. 600.

#### **E. ABSENCE FROM JURISDICTION.**

A delay of seventeen years by a specific legatee to sue for his legacy was excused where he left the state two years before he arrived at age, was not heard of for eleven years thereafter, and has ever since been a nonresident. *Nelson v. Cornwell*, 11 Gratt. 724. See also, *Buckles v. Lafferty*, 2 Rob. 292, 40 Am. Dec. 752, and *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. 614.

In a suit to enforce a vendor's lien the assignee of the equitable title filed his answer, and shortly thereafter left without employing an attorney, and remained absent part of the time from the state and the United States. More than eighteen years after the sale of the land he filed a bill attacking the sale as fraudulent, claiming the discovery of fraud shortly before the institution of his suit. His voluntary absence did not excuse his negligence, and his laches prevented him from being heard in a court of equity. *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514.

#### **F. ACT OF DEFENDANT.**

When by the very terms and conditions expressed in the assignment of a bond, which was written by the defendant himself, there was nothing left for the plaintiff to do, and the defendant, as his personal friend and counsel, assumed to do everything needful to collect the bond and to account to the plaintiff, reserving absolute control in the matter, and the right to exercise his own discretion for enforcing payment, it was clear that the equitable doctrine of laches had no application whatever to the case. *Lightfoot v. Green*, 91 Va. 509, 22 S. E. 242.

**G. CONTINUOUS CLAIM.**

Laches is only permitted to defeat an acknowledged right on the ground that it affords evidence of the abandonment to the right. The doctrine, therefore, can have no application to a case where a demand has been continuously asserted and as continuously acknowledged. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570.

**H. RECOGNITION OR ACKNOWLEDGMENT OF RIGHTS.**

**In General.**—Continuous acknowledgment of a right by the defendant will in general excuse delay by the plaintiff in bringing suit in equity to enforce the right. *Southern R. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570; *Griffin v. Macaulay*, 7 Gratt. 476.

No laches were imputed to the plaintiffs so as to defeat their right to recover under a deed, which claim had been acknowledged, and payments to and acquisition of property by them in satisfaction of their claim had been acquiesced in. Under these circumstances there was no necessity for, nor any propriety in the institution of proceedings to assert rights under the deed. *Griffin v. Macaulay*, 7 Gratt. 473.

**Payments as Constituting Acknowledgment of Plaintiff's Right.**—A delay of ten years in bringing suit on a bond was satisfactorily explained where it appeared that it was assigned as collateral security, and the interest on it was regularly paid up to within a short time before the suit was brought, although all the obligors were at that time dead. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. 572.

There was no laches in suing upon a bond where the creditor received payments from the debtor up to 1868, the bond being given in 1849 and payable on demand. When the payments ceased the creditor got judgment and had an execution issued and levied. He died in 1872. In 1874, the assignee of the bond instituted suit. There was no laches or abandonment of the claim

in this course of proceedings. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

**Claim Repeatedly Reported Favorably in Creditor's Suit.**—In 1859 an executor settled his accounts, which showed a balance due by him. He died in 1860 and an administrator d. b. n. c. t. a. was appointed. In 1875 in a creditors' suit against the estate of the executor, such claim was reported favorably as a just debt owed by his estate. Subsequently the same report was repeatedly made and confirmed by the court. It was held, that there was no laches in asserting the claim. *Green v. Griffin*, 1 Va. Dec. 838.

**I. FULFILLMENT OF CONDITIONS.**

Laches can not be imputed to a legatee for failure to sue for a legacy, which is limited upon a future event, until such future event happens. *Effinger v. Hall*, 81 Va. 94.

A surety on a bond can never charge his creditor with laches until he has prompted him in vain to pursue the principal. *Coles v. Ballard*, 78 Va. 139. See the title SURETYSHIP.

**Remaindermen** after a life estate in trust fund may invoke the aid of a court of equity to prevent or remedy a violation of the trust, and to preserve the trust fund, but they are under no legal obligation to do so, and are not chargeable with laches for a failure to assert rights not yet accrued. *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

A contingent remainderman can not be charged with laches in failing to protect the estate, until his remainder vests by the death of the life tenant. *Pettyjohn v. Woodroof*, 77 Va. 507.

**J. IGNORANCE OF RIGHTS.**

**In General.**—Parties are not guilty of laches in asserting their rights where they are wholly unaware of the very existence of those rights, as laches can not be imputed to one who is ignorant

of his rights. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; *Moorman v. Arthur*, 90 Va. 455, 12 S. E. 869; *Johnson v. Black*, 103 Va. 477, 49 S. E. 633; *Lamar v. Hale*, 79 Va. 147, 164; *Rowe v. Bentley*, 29 Gratt. 756, 763; *Massie v. Heiskell*, 80 Va. 789; *Jame-son v. Rixey*, 94 Va. 342, 26 S. E. 861.

Where the plaintiffs were very young when the transactions complained of occurred, and by the untimely death of certain persons they were deprived of persons having an interest in protecting their rights, and who could have informed them what they were, and where they were, removed during their minority beyond the limits of the state, and for a great part of their minority lived abroad, they were not guilty of laches. They had no correspondence or connections in this state, and were utterly ignorant of their rights until a short time before they instituted this suit. As soon as they were informed of their rights they took active and vigorous measures to enforce them. *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. 614.

**Ignorance Must Not Be Result of Negligence.**—"One who would repel the imputation of laches on the score of ignorance of his rights must be without fault in remaining so long in ignorance of those rights. Indolent ignorance and indifference will no more avail than will voluntary ignorance of one's rights. *Craufurd v. Smith*, 93 Va. 623, 629, 630; *Rowe v. Bentley*, 29 Gratt. 756, 763; *Massie v. Heiskell*, 80 Va. 789, 805." *Redford v. Clarke*, 100 Va. 115, 122, 40 S. E. 630.

**Claim against Assignee in Bankruptcy.**—A claim against an assignee in bankruptcy for property vested in him, can not be barred by laches so long as the plaintiff is ignorant of his rights. *Moorman v. Arthur*, 90 Va. 455, 12 S. E. 869. See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

**Suit to Set Aside Subscription to Corporate Stock.**—Where one is fraud-

ulently induced to subscribe to corporate stock, laches will not begin to run against him until he is chargeable with notice that a fraud has been perpetrated upon him. *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168. See the title STOCK AND STOCK-HOLDERS.

**Appropriation of Public Funds by Public Officers.**—Laches can not be imputed to taxpayers for ignorance of the fact that members of a board of supervisors have been misappropriating the public funds. They have the right to assume the contrary, and although the books of the supervisors are open to inspection, no duty of inspection rests upon the taxpayers. Laches will not be imputed to one who is innocently ignorant of his rights. *Johnson v. Black*, 103 Va. 477, 49 S. E. 633.

**Mistake.**—Where a bill was filed to correct a mistake of fact within a year after the mistake was discovered, no neglect nor any degree of what can be termed laches appeared, as it could not be reasonably considered that it ought to have been filed before the mistake was discovered. *Fore v. Foster*, 86 Va. 104, 9 S. E. 497. See the title MISTAKE AND ACCIDENT.

## K. IGNORANCE OF LAW.

"While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity—a court of conscience. In such court, moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it result from ignorance of law." *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817; *Cranmer v. McSwords*, 24 W. Va. 594.

Generally, as to mistake of law, see the title MISTAKE AND ACCIDENT.

## L. LOSS OF PAPERS.

Delay in prosecuting a suit against a trustee to enforce a claim by reason of the temporary loss of papers, and

the improper acts of other claimants, was held no bar. *Griffin v. Macaulay*, 7 Gratt. 476.

A delay of twenty-six years in enforcing a vendor's lien may be explained by the destruction of the court records of the county, the departure of the appellant's former attorney to the Pacific coast, and the destruction of the creditor's books. *Ginter v. Breeden*, 90 Va. 565, 19 S. E. 656. See *Turner v. Dillard*, 82 Va. 536.

### M. SUSPENSION OF REMEDIES BY WAR OR BY STAY LAWS.

**In General.**—The obstruction of legal remedies occasioned by the existence of the civil war, and the subsequent stay laws, which partially suspended legal remedies, was an excuse for failure to sue in equity. *Rowe v. Bentley*, 29 Gratt. 756; *Bedinger v. Wharton*, 27 Gratt. 857, 870; *Updike v. Lane*, 78 Va. 132; *Byrne v. Edmonds*, 23 Gratt. 200; *Jones v. Jones*, 92 Va. 590, 24 S. E. 255; *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Reynolds v. Pettyjohn*, 79 Va. 327; *Jones v. Clark*, 25 Gratt. 642, 666; *Lacy v. Stamper*, 27 Gratt. 42.

A lapse of twenty-eight years between the maturity of a bond and the institution of a suit upon it was repelled and explained by the existence of the civil war, the pendency of the stay law, and an attempt on the part of the creditor during this time to enforce collection of the bond. *Updike v. Lane*, 78 Va. 132.

Where a vendor's lien was reserved on land conveyed in 1860, and suit was brought to enforce this in 1886, it was held, that eliminating the periods of the civil war and also the stay law period, and considering the circumstances of the case, the delay was not sufficient to constitute laches. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565.

**War.**—A delay of nine years in bringing a bill to correct a decree was satisfactorily explained by the case requiring the intervention of legislative

authority to give relief, and the interruption of judicial proceedings by the existence and continuance of the civil war. *Byrne v. Edmonds*, 23 Gratt. 200.

An administrator who qualified as such in New Kent county in 1862, not held liable for failing to sue in that county during the war, in cases in which he knew there would be defenses, there having been but one court held in the county during the war, and the enemy either encamping or passing through it constantly. *Lacy v. Stamper*, 27 Gratt. 42.

**Stay Laws.**—Where a woman failed to disaffirm a contract made by her while an infant until four years after attaining her majority, it was held that she was not barred, where, during that time, acts were in force suspending the operation of the statute of limitations. *Bedinger v. Wharton*, 27 Gratt. 857, 870.

The operation of the stay law, which went into effect in April, 1861, and continued until January, 1869, excused a delay on the part of a receiver in collecting bonds. *Reynolds v. Pettyjohn*, 79 Va. 327.

A fiduciary can rely upon the staleness of a demand, or upon any presumption of payment, or satisfaction, arising from lapse of time, which will prevent a legatee from asserting his claim. But where a slave was kept in slavery and deprived of both his freedom and the bequest to which he was entitled until the year 1865, and the stay law was in existence until 1869, he was not prevented from filing his petition in 1878. *Jones v. Jones*, 92 Va. 590, 24 S. E. 255.

### V. Exceptions to Operation of Doctrine of Laches.

**Laches Not Imputable to State.**—It has been held, that the doctrine of laches is not imputable to the state. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283. See the titles LIMITATION OF ACTIONS; STATE.

**Trusts.**—Express trusts, cognizable only in equity, are alone free from limitations created by laches or statute. All other trusts, whether legal or equitable, are subject to the statute of limitations or liable to be barred by laches. *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309.

"It is often suggested that the lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestui que trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the cestui que trust. But, when this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief, upon the ground of lapse of time, and its inability to do complete justice. This doctrine will apply even to cases of express trust, and, a fortiori, it will apply with increased strength to cases of implied or constructive trusts." *Bargamin v. Clarke*, 20 Gratt. 544, 553. See the title TRUSTS AND TRUSTEES.

## VI. Pleading and Practice.

### A. BILL.

#### 1. Availing Excuses for Delay.

A bill in equity to enforce a claim which is apparently stale, but which the complainant is entitled to enforce because of the existence of a valid excuse for the delay, should set forth such excuse. *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908; *Jarvis v. Martin*, 45 W. Va. 347, 31 S. E. 957; *Jackson v. Hull*, 21 W. Va. 601.

Where ignorance of rights is relied on by the complainant as an excuse for delay, the bill should set forth specifically what were the impediments to an

earlier prosecution of the claim; what means were used to fraudulently keep the plaintiff in ignorance, and how and when she first acquired knowledge of the facts alleged, and these charges, when made, should be sustained by proper proof. *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908.

Where the presumption of payment arises by reason of lapse of twenty years of time, a bill seeking enforcement of such stale demand must set up facts and circumstances sufficient to rebut such presumption or it will be demurrable. *Jarvis v. Martin*, 45 W. Va. 347, 31 S. E. 957; *Jackson v. Hull*, 21 W. Va. 601.

#### 2. Amendment of Bill.

Where the plaintiff is not entitled to the relief sought, by reason of laches is filing his bill, he will not be allowed to amend his original bill, unless he offers some legal excuse for the delay; and especially is this the case if the amendment is not asked until the case has been submitted to the court, and a decision adverse to him has been announced. *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514.

Where a demurrer to a bill was sustained upon the ground of laches, which was suggested by the court without being urged by counsel, whereby the plaintiff was taken by surprise, and on a subsequent day of the same term he moved the court to set aside the decision upon the demurrer and to allow him to file an amended bill, it was the manifest duty of the court to grant said motion. The amended bill explained satisfactorily every thingavoring of laches and acquiescence. *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754. See the title AMENDMENTS, vol. 1, p. 316.

### B. METHOD OF RAISING OBJECTION.

Where laches is apparent from the face of a bill in equity, the bill is demurrable for that reason, unless suffi-

cient facts are set forth in it to avoid laches. *Woods v. Douglass*, 52 W. Va. 517, 44 S. E. 234; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625; *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514; *Woods v. Campbell*, 45 W. Va. 203, 32 S. E. 208; *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765; *Jackson v. Hull*, 21 W. Va. 601; *Trader v. Jarvis*, 28 W. Va. 100; *Bailey v. Calfee*, 49 W. Va. 630, 39 S. E. 642; *Thompson v. Whittaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *Jarvis v. Martin*, 45 W. Va. 347, 31 S. E. 957; *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 44 S. E. 774. See the title **DEMURRERS**, vol. 4, p. 456.

The defense of laches and stale demand being proper grounds for demurrer, a bill setting up a stale demand without alleging any reasonable excuse for delay in the assertion thereof, should be dismissed for want of equity, unless properly amended. *Jarvis v. Martin*, 45 W. Va. 347, 31 S. E. 957.

The defendant, a creditor of the father of the plaintiff, purchased a farm of his debtor which was sold under a judgment, and as part payment was credited with two judgments against the father for less than \$300, which the plaintiff, by her father, had assigned to the defendant. The plaintiff was allowed, together with her father, to occupy the land free from rent for ten years and until the latter's death, during which time the plaintiff realized over \$600 from the sale of ties and shingles cut from the place. After her father's death the plaintiff sued the defendant for the amount of the judgments, claiming they had been fraudulently assigned without her consent.

In the absence of allegations and proof of specific facts showing an adequate excuse for the plaintiff's delay in asserting her alleged rights, the bill could not be maintained. *Eubank v. Barnes*, 93 Va. 153, 24 S. E. 908.

By a decree confirming a sale of land, two commissioners are appointed to collect and disburse the purchase money on the claims thereto, fixed and determined by a former decree. One of the commissioners permits the other, who is the attorney for the claimants, to collect and disburse the purchase money, while he remains passive. Ten years after the death of the active commissioner, twenty-seven years after the date of their appointment, and thirty-one years after the decree fixing the claims and liabilities, the inactive commissioner files a bill to ascertain whether any of the purchase money remains unpaid, and, if so, to resell the land, but fails to allege or show that any of the purchase money remains unpaid, or that any of the claims against the same remain unsatisfied. Such bill is demurrable for want of equity. *Woods v. Campbell*, 45 W. Va. 203, 32 S. E. 208.

### C. BURDEN OF PROOF.

The burden of proving that a party had notice of his rights and was therefore guilty of laches in asserting his claim is upon the defendant. *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168; *Evans v. Spurgin*, 11 Gratt. 615. See the title **PRESUMPTIONS AND BURDEN OF PROOF**.

### VII. Application of Statute of Limitations in Equity.

See the title **LIMITATION OF ACTIONS**.

## Lading, Bill of.

See the title **CARRIERS**, vol. 2, p. 677.

**Laid Off.**—See *Building and Loan Association v. Sohn*, 54 W. Va. 101, 113, 46 S. E. 222.



## LAKES AND PONDS.

### CROSS REFERENCES.

See the titles MILLS AND MILLDAMS; NAVIGABLE WATERS; WATERS AND WATERCOURSES.

Owner of dam in stream of water can not enjoin prior owner of dam above his from damming back the water for purpose of raising a pond sufficient to supply his mill with water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water. *Mumpower v. City of Bristol*, 90 Va. 151, 17 S. E. 853. See the titles MILLS AND MILLDAMS; WATERS AND WATERCOURSES.

**LAND.**—See the titles CONVERSION AND RECONVERSION, vol. 3, p. 498; FRAUDS, STATUTE OF, vol. 6, p. 522.

In *Stuart v. Pennis*, 91 Va. 688, 691, 22 S. E. 509, it is said: "**Land** includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the **land** just as are the coal, the iron, the gypsum, and the building stone which enter so largely into the business of commerce. Attached to the soil, they pass with the **land** as a part of it. A conveyance of the **land** carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of the ancestor they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not treated as personalty. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in, or are a part of, the **land**, and must be so treated by the courts."

In *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 332, 336, 24 S. E. 1020, it is said: "**Land** includes everything belonging or attached to it. It includes the surface; and whatever is contained within or beneath the surface. It includes the minerals buried in its depths, or which crop out of its surface, and the woods and trees growing upon it. 2 Blackstone's Com., 17-19; 2 Minor's Inst., 4; and *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509."

In *Steinman v. Vicars*, 99 Va. 595, 600, 39 S. E. 227, it is said: "By the Virginia statute **land** is declared to include 'lands, tenements and hereditaments and all rights thereto and interest therein other than a chattel interest therein.' Code of Virginia, ch. 2, § 2, subsec. 10. See also, *Ib.*, § 2443."

**Suit for Land.**—A suit to enforce satisfaction of a judgment lien against **land** is not a suit brought for the **land**. *Buckner v. Metz*, 77 Va. 107, 125.

**Land and Estate Distinguished.**—In *Wyatt v. Sadler*, 1 Munf. 537, 544, it is said: "An '**estate**' is defined to mean 'such interest in **lands** as the tenant hath there' (Doug. 354; Cowp. 240); whereas the term '**land**' only imports the thing, or the specific property devised."

**Restricted Meaning.**—The word "**land**" in § 1, ch. 94, Code, is used in a restricted sense to denote agricultural or farming **land**, and not town lots used for building purposes alone. *Shufflin v. House*, 45 W. Va. 731, 31 S. E. 974. The court said: "The word '**land**' in this section was no doubt used in a restricted sense to denote agricultural **land** rented for an annual rental, for the

purpose of encouraging agriculture and securing to the tenant the harvest that he might sow. 2 Minor Inst., pp. 101, 102. Where the reason of the law fails, the law itself is at an end. 'The word "land" has two senses, one general and one restricted. If it occurs accompanied with other words which either in whole or in part supply the difference between the two senses, that is a reason for taking it in its less general sense; e. g., in a grant of lands, meadows, and pastures, the former word is held to mean only arable land. Burt, Real Prop. 183; Cro. Eliz. 476, 659; 2 And. 123; Van Gordon v. Jackson, 5 Johns. 440.' Bouv. Law Dict. The reason for taking the word 'land' in its less general sense as farming or agricultural land is from the context and the true purpose of the enactment, being to secure to the person who sows and cultivates the right to reap and enjoy."

**Reversion.**—Testator had given his son, Daniel, a life estate in a certain lot of ground, and in the third clause of his will says: "I direct that all my stocks of whatever kind, and all my lots or other ground not otherwise disposed of by will or deed, including all ground or land owned by me and lying within the county of Belmont, in the state of Ohio, be sold by my executors, and out of the sales, or money thus raised, that all of my just and lawful debts be paid, and the residue after the payment of my just and lawful debts, as aforesaid, I give and bequeath to my daughter, Indiana, wife of Aaron McSwords." Held, the reversion in the ground devised to Daniel for life passed by the residuary clause in the will. *Irwin v. Zane*, 15 W. Va. 646. The court said: "We have before seen that a devise of land by a testator includes all interest he had in the land, reversionary or otherwise. He seems to have used the terms ground, lots and land indiscriminately, and it is evident he was not using technical language, and must be understood to have included in his residuary clause, all his interest in real estate not disposed of by will or deed, and the language was general enough to pass the reversion in the ground, or land, in which Daniel F. Zane was given a life interest, unless by necessary implication it was excluded from its operation."

**House.**—The description, in a summons of unlawful detainer, of premises, as "a certain house and appurtenances;" import land within the meaning of ch. 134 of the Code of 1860, to the extent of the land on which the house stands and the garden attached to it, but no further. *Hawkins v. Wilson*, 1 W. Va. 117.

**Trees are land.** *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521.

**Minerals.**—See also, the title MINES AND MINERALS.

A mineral right is land. *Low v. County Court*, 27 W. Va. 785, 789. See also, *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 332, 336, 24 S. E. 1020; *Stuart v. Pennis*, 91 Va. 688, 691, 22 S. E. 509; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688.

Where land is sold, without reservation of any kind, it embraces the underlying minerals. *Steinman v. Vicars*, 99 Va. 595, 39 S. E. 227.

**Oil.**—In *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 784, it is said: "The question is whether petroleum oil, as it is found in the rock beneath the surface, is part of the real estate in which it is found; and the same law that applies to the ownership of the surface and soil applies to it. This question has been passed upon by the courts of last resort in different states. Gould, in his valuable work on Waters, in § 291, says: 'Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word "land" and is a part of the soil in which it is found. \* \* \* A lease of land, for the purpose of mining oil, coal, rock, or carbon oil, passes a corporeal inter-

est which is the proper subject of an action of ejectment; and a proportionate share of the oil to be produced by an oil well is an interest in **land**, a parol sale of which is void under the statute of frauds.'" See also, *South Penn Oil Co. v. McIntyre*, 44 W. Va. 296, 28 S. E. 922.

In *Lee v. Smith*, 54 W. Va. 89, 99, 46 S. E. 352, it is said: "In *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, it is held, that 'petroleum oil as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word **land**.'"

### **Land Agents.**

See the title LICENSES.

### **Land Books.**

See the title TAXATION.

### **Land Bounty.**

See the title BOUNTIES, vol. 2, p. 611.

### **Land Entry and Land Grants.**

See the title PUBLIC LANDS.

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COMING AND DELIVERY BONDS, vol. 6, p. 411; GROUND RENTS, vol. 6, p. 769; GUARDIAN AND WARD, vol. 6, p. 782; IMPROVEMENTS, vol. 7, p. 317; INTOXICATING LIQUORS, vol. 8, p. 1; JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89; LICENSE (REAL PROPERTY); LIMITATION OF ACTIONS; MINES AND MINERALS; MORTGAGES AND DEEDS OF TRUST; NUISANCES; PERPETUITIES; PUBLIC LANDS; RAILROADS; TAXATION; TRESPASS; VENDOR AND PURCHASER; VENUE; WASTE; WITNESSES.

As to judicial rentings, see the title JUDICIAL SALES AND RENTINGS, vol. 8, p. 648.

## I. Kinds of Tenancies.

### A. TENANCY FROM YEAR TO YEAR, ETC.

See the title ESTATES, vol. 5, p. 187.

#### 1. Definition.

The tenancy from year to year is a qualified tenancy at will, introduced to obviate the inconveniences of that kind of estate; and the qualification requires the determination of the will to be prospective, to take effect at the end of a current year of the tenancy, and upon a reasonable notice to quit, regulated by statute. *Crawford v. Morris*, 5 Gratt. 89, 107. See post, "Necessity for Notice to Quit," VI, B, 9, d.

#### 2. Creation.

"Such a tenancy, unless provided for by the terms of the contract, being a mere modification of the ancient tenancy at will, can arise only where the duration of the tenancy is originally indefinite, or where being definite, the tenant with the consent of the landlord, holds over after the expiration of the term." *Crawford v. Morris*, 5 Gratt. 89, 107. See post, "Tenancy Implied from Holding over," II, B.

**Unlimited Lease Reserving Quarterly Rent.**—A lease without limitation as to time of duration, reserving a rent payable quarterly under the name of a commutation to prevent forfeiture, is a lease from year to year at the option of the lessee. *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101.

**Payment of Periodical Rent under Void Lease.**—Where one enters into

possession under an unsealed written lease for a term greater than five years, if he pays periodical rent, the tenancy is by law from year to year, and he must pay rent accordingly. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

"Mere entry into possession under such a lease creates what technically is a tenancy at will, but payment of rent periodically makes the tenancy a periodical one, not one merely at will, and further, the authorities say that the law implies a tenancy from year to year, or quarter to quarter, or month to month, as the case is." *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

"Our own court in *Allen v. Bartlett*, 20 W. Va. 46, said 'although a parol lease for more than one year is invalid under the statute of frauds, yet if a person enters into possession under a parol lease for four years, and holds over into a second year, he becomes a tenant from year to year upon the terms of the parol lease and so continues as long as he remains in possession without any new or other agreement.'" *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149. See post, "Invalid Lease in Evidence," III, E, 6.

**Tenancy without Fixed Term.**— "Where there is an intent to create a tenancy, and no term is fixed, it is a tenancy from year to year, generally, but there must be such intent." *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 277. See post, "Tenancy at Will or by Sufferance," I, C.

**Yearly Rent Payable Monthly Not Monthly Tenancy.**—Where the lease covenants for rent of "\$700 per annum for each and every year commencing from and after the 1st day of April, 1896, payable in equal monthly installments," this is a yearly rent, payable monthly, and does not make it a monthly tenancy, in the face of another clause making the term begin January 1st. *Arbenz v. Exley*, 52 W. Va. 476, 482, 44 S. E. 149.

**Privilege of Refusal Construed.**—A lease which provides that the tenant may have the refusal of the premises from month to month so long as the tenant may desire to occupy the premises, is a grant of preference over other proposed tenants if the landlord continues to rent the property. *Drinkard v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72.

Such lease terminates at the end of each month, and no notice to quit is necessary. A demand for the possession of the property is sufficient to prevent a renewal of the tenancy and give the landlord the right to sue for possession at the end of the current month. There is no obligation on him to renew indefinitely. *Drinkard v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72.

So, where the original lease is for a year, and the preference each succeeding year afterwards is given. *Crawford v. Morris*, 5 Gratt. 89.

**Implied from Holding over.**—See post, "Implied Tenancies," II.

**Cropper as Tenant.**—See the title CROPS, vol. 4, p. 98.

## B. TENANCY FOR YEARS.

See the title ESTATES, vol. 5, p. 187. Notice, also, that the major part of this article treats of tenancies for years.

## C. TENANCY AT WILL OR BY SUFFERANCE.

See generally, the title ESTATES, vol. 5, p. 187, et seq., where this topic is treated.

### 1. What Constitutes.

**Agreement to Surrender.**—Where a tenant agrees by writing under seal that he will surrender possession when requested by purchaser from the landlord, he becomes a mere tenant at will or by sufferance. *Harrison v. Middleton*, 11 Gratt. 527.

### Possession of Grantor in Trust Deed.

—The possession of a grantor in a deed of trust, after the execution of the deed, is not adverse to the title of the trustee, but he holds as his tenant at will or sufferance, and he can be ejected without notice; or the trust subject may be conveyed to a purchaser, whose tenant at will or sufferance the grantor then becomes, by whom he may also be ejected without notice. *Creigh v. Henson*, 10 Gratt. 231.

And a person who purchases the trust subject, or any part of it, from the grantor, with notice of the deed of trust or after its due registration, stands in the place of the grantor, and bears the same relation that he does to the trustee and the purchaser from him. *Creigh v. Henson*, 10 Gratt. 231, 233.

### Possession of a Mortgagor or Assignee.

—The possession of a mortgagor or his assignee is not adverse to the mortgagee, and they are tenants at will, unless the assignee takes a conveyance without notice. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766. See the title MORTGAGES AND DEEDS OF TRUST.

### Executory Lease Terminable at Any Time.

—An executory gas and oil lease, which provides for its surrender at any time without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be determined at any time by the lessor before it is executed by the lessee. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923. See *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

**Occupancy without Lease.**—"Every person who occupies the land of another as tenant, is in law a tenant at will, unless he can show a lease of his lands, whereby his term is rendered certain." *Jones v. Roberts*, 3 Hen. & M. 436. See *Jones v. Roberts*, 6 Call 187; *Kelly v. Jones*, 6 Call 204, 207.

And if he dies, or leaves the premises, the landlord may enter as owner of the soil, and not merely as occupant. *Kelly v. Jones*, 6 Call 204, 207.

But see *Hanks v. Price*, 32 Gratt. 107, 112, where it is said, that whether an occupancy by permission of the owner is a tenancy from year to year, or a mere tenancy at will, depends upon the circumstances of the case. See ante, "Tenancy from Year to Year, etc.," I, A.

**Holding over after Expiration of Lease.**—See post, "Implied Tenancies," II.

A mere holding over after expiration of a lease, where there is no intent to create a new tenancy of any kind, is merely a tenancy at sufferance of the owners. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Crawford v. Morris*, 5 Gratt. 89, 107.

Such is the inference where the lessor does no act from which it may be inferred that he intends to recognize the tenancy as still existing. *Emerrick v. Tavener*, 9 Gratt. 220.

**Occupancy under Invalid Lease or Contract.**—One who enters into possession under a written lease without seal for a term greater than five years is a tenant at will. Or under a parol lease for two years, void by the statute of frauds, there being no evidence of a yearly tenancy. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

And a party who is in possession under a contract, but who avoids the contract, in a suit to enforce payment of bonds under it, by reason of its being founded on confederate treasury notes, an illegal currency, is in possession thereafter wrongfully, and is a

tenant at sufferance. *McClung v. Echols*, 5 W. Va. 204; *Williamson v. Paxton*, 18 Gratt. 475.

So with possession under an agreement of purchase, written or parol, after default made. *Williamson v. Paxton*, 18 Gratt. 475, 491; *Twyman v. Hawley*, 24 Gratt. 512; *Jones v. Temple*, 87 Va. 210, 12 S. E. 404. See the title **VENDOR AND PURCHASER**.

**Admission in Bill and Answer.**—Where the parties to a mining lease agree that it was intended as a lease at will, as admitted by their bill and answer, the lease must be so treated. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. 439.

## 2. Incidents.

See the title **ESTATES**, vol. 5, p. 187, et seq. See post, "Duration and Termination of Tenancy," VI.

## D. TENANCY FOR LIFE.

See the title **ESTATES**, vol. 5, p. 182, et seq., for full treatment. See also, the titles **MINES AND MINERALS**; **REMAINDERS**, **REVERSIONS** AND **EXECUTORY INTERESTS**.

# II. Implied Tenancies.

## A. IN GENERAL.

**From Occupancy.**—"In general the law will imply a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other, for in all of such cases it will be presumed that the occupant intended to pay for the use of the premises." *Hanks v. Price*, 32 Gratt. 107, 111. See ante, "Tenancy at Will or by Sufferance," I, C.

"While it is true that mere occupancy of land does not necessarily imply the relation of landlord and tenant, yet if the occupant acknowledge the title of the owner, and continue to occupy the land by his leave and license, he ceases to be a mere trespasser, and his possession is that of him whose title he has acknowledged." *Wilcher v. Robertson*, 78 Va. 602, 619.

**From Payment of Rent.**—The relation of landlord and tenant may be proved by very slight evidence, and it has been held, that the payment of rent by an alleged tenant to the owner, is sufficient evidence to establish the relation. *Virginia Mining, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. 689. See post, "Promise to Pay or Payment of Rent," III, B, 2.

## B. TENANCY IMPLIED FROM HOLDING OVER.

See post, "Duration," VI, A.

### 1. From Year to Year.

**In General.**—Where a tenant holds over after the expiration of his lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act, from which it may be inferred that he intends to recognize him still as tenant, he becomes thereby a tenant from year to year upon the conditions of the original lease. *Allen v. Bartlett*, 20 W. Va. 46; *Emerick v. Tavener*, 9 Gratt. 220, 58 Am. Dec. 217; *Williamson v. Paxton*, 18 Gratt. 475; *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86.

The law favors such a tenancy, and infers it from such a holding over, in the absence of evidence to the contrary. *Williamson v. Paxton*, 18 Gratt. 475, 497.

**Absence of New Agreement—Presumption.**—Where a landlord allows a tenant for a term of years to hold over after the expiration of his term without any new agreement, he becomes a tenant from year to year, and the law presumes the holding to be upon the terms of the former lease so far as they are applicable to the new situation. *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392; *King v. Wilson*, 98 Va. 259, 35 S. E. 727; *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771; *Richmond v. Duesberry*, 27 Gratt. 210, 214; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

"Upon the implied contract growing out of the defendant's holding over,

he was only bound to perform, and the plaintiff was only entitled to exact from him, the performance of those obligations imposed by the original lease. And, it being admitted that such obligations had been discharged, the plaintiff was not entitled to recover in this case." *Peirce v. Grice*, 92 Va. 763, 767, 24 S. E. 392.

And this rule is not affected by the fact that the buildings on the leased premises were erected by the lessee under the terms of his original contract. *Peirce v. Grice*, 92 Va. 63, 24 S. E. 392.

**Option to Renew on Conditions—Amount of Rent.**—Land was leased for a period of ten years, with an option for an additional period, provided the lessee should build thereon a store-room of a certain value, but if the lease was not continued after the expiration of the first term, then the lessor should pay the lessee the full value of the building. After the expiration of the second term the lessee continued in possession without any additional agreement. In an action for the use of the building the lessee was held only chargeable for the amount of annual rent as fixed by the original agreement, which had been paid, and verdict was for defendant. *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392. See post, "Removal of Buildings and Payment Therefor," VI, C, 2.

**Extraordinary Conditions Requiring Readjustment of Rent.**—The assignees of the lessees of certain salt works held under a lease by the court to P. at \$22,000 per annum, which terminated January 1st, 1861; and, in 1859, P. had leased to the assignees for ten years, commencing in 1859 at \$20,000. The assignees held over after January, 1861, until 1869. In the suit by the assignees to enjoin the part owner from interfering with their possession, on appeal to the special court of appeals at Abingdon, that court, after reinstating the injunction, and direct-

ing the cause to be heard with the case between the joint owners, says that the circuit court may determine whether the assignees shall be charged according to the lease to P. or P.'s lease to them, or hold them responsible for such other reasonable rent for the property as the court may determine to be right. Held, the decree of the special court of appeals not having been appealed from, the parties are bound thereby; and the circuit court may direct a commissioner to ascertain and report what would be a reasonable rent of the property from January 1st, 1861, to January 1st, 1869. *Stuart v. White*, 25 Gratt. 300.

The court may require said assignees to produce before the commissioner, on oath, all contracts in their possession or power to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and all books and accounts and papers in their possession or power, showing the quantity of salt manufactured during said period, and delivered to them by their sublessees, or those to whom such privileges were granted under such contract. *Stuart v. White*, 25 Gratt. 300, 301.

**Option of Landlord.**—A tenant for years, who holds over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

"Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election, and make the occupant his tenant. But the tenant has no such election; his mere continuance in possession fixes him as tenant for another year, if the landlord thinks proper to insist upon it." *Voss v. King*, 38 W. Va. 607, 18 S. E. 762, 764.

**Presumption Rebuttable.**—It is a

mere presumption of law, in the absence of evidence to the contrary, that a tenant who holds over after the expiration of his term, by permission of the lessor, is a tenant from year to year. And this presumption may be repelled by evidence which may show that the holding over, though by the permission of the lessor, is not as tenant from year to year, but in some other character, or for some other purpose. *Williamson v. Paxton*, 18 Gratt. 475, 476.

Thus, where an agreement of lease provided as follows: "M. is to get the house at the price herein stated, for one year after his present year expires, and is to have the preference each succeeding year thereafter," this did not create a tenancy from year to year, and so entitle the tenant to the legal notice to quit. *Crawford v. Morris*, 5 Gratt. 89. See *Drinkard v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72.

And where a contract for the purchase of land provides for the payment by vendee in cash of a sum of money, and that if vendee fails by a day certain within the year to do a certain act, that he shall hold for a year, and the sum paid shall be the rent for the year; vendee having failed to do the act, and holding as tenant for the year, and then holding over, does not thereby become tenant from year to year, and so entitled to the legal notice to quit. And though during the second year the purchaser paid rent for that year, it would not of itself constitute him tenant from year to year, so as to entitle him to notice to quit. *Williamson v. Paxton*, 18 Gratt. 475.

## 2. At Will or by Sufferance.

Where, however, the lessor does no act recognizing a continued tenancy, the tenant holding over is but a tenant at sufferance, and not entitled to notice to quit. *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86; *Emerick v. Tavener*, 9 Gratt. 220, 236. See ante, "Tenancy at Will or by Sufferance," I, C.

### 3. No Disseisin of Landlord.

The possession of a tenant is the possession of his landlord, and his continuing in possession after the expiration of his term creates an implied tenancy and is no disseisin of the landlord. *Emerick v. Tavener*, 9 Gratt. 220, 237.

## III. Lease or Contract of Rental.

### A. CLASSIFICATION AND DISTINCTIONS.

#### 1. Conditional Lease.

"Technical words are unnecessary to raise a condition. If a fair and reasonable construction of the instrument shows that a lease shall depend upon the doing or not doing something essential to the purposes of the contract, the law implies the condition." *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 592, 42 S. E. 655.

#### 2. Joint and Several Lease.

See post, "Renewal in General," VI, A, 2.

Where an inspection of the lease shows that two tracts are leased as one jointly by the two owners, being mentioned separately merely for convenience of description, and then described as a whole, with the rent reserved to the lessors jointly, it is a joint lease of a single tract. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

#### 3. Lease or Contract for Lease.

**Words of Present Demise.**—Words of present demise will generally make an actual lease, if no future or more formal document appears to have been intended. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457.

But if, though fully agreed, they do not intend to be bound until a formal contract is prepared and executed, then there is no lease. and the fact that a

formal lease is to be executed is strong evidence to show that they do not intend the previous negotiations to amount to an agreement. It is a question of intention. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457. See *Bohn v. Newton*, 81 Va. 480.

And an agreement signed by the parties which designates the property to be leased, the price to be paid, and the duration of the term, but concludes, "The above to be covered by a regular lease subject to approval by all parties," is not a concluded contract, but merely an executory agreement for a lease. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457. See post, "Invalid Lease in Evidence," III, E, 6.

**Subsequent Declarations as Evidence.**—And evidence to the effect that the deceased owner had stated subsequently that he had rented the property, at the same time charging the witnesses not to say anything about it, is insufficient to affect or alter the language used by the parties in the writing signed by them. *Boisseau v. Fuller*, 96 Va. 45, 48, 30 S. E. 457.

**Privilege of Additional Lease on Giving Notice.**—Where a lease is made for five years, with the privilege at the end of the term to extend the lease for an additional five years by giving six months' notice, this does not constitute a present lease for ten years. *James v. Kibler*, 94 Va. 165, 26 S. E. 417. See post, "Duration," VI, A.

**Executory Lease Creating Mere Right of Entry.**—An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere right of entry, which is subject to termination at the will of either party. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

**Agreement for Lease and Lease Construed to Convey Same Interest.—**

Where a joint owner of property executed an instrument agreeing to unite in a lease of the property "to the extent of their interest" for a term of years, the entire interest of such joint owner passed under such lease, when executed, as well as a certain interest in litigation at the time and undetermined, as his undisputed interest. *White v. Stewart*, 76 Va. 546, 569.

**Specific Performance of Contract for Lease.—**See the title SPECIFIC PERFORMANCE.

**4. Lease or License.**

See the titles LICENSE (REAL PROPERTY); MINES AND MINERALS.

"Very frequently it is a matter of great difficulty to determine whether the agreement under which the tenant holds is technically a lease or a mere license. The decisions on this subject are numerous and extremely difficult to reconcile." *Hanks v. Price*, 32 Gratt. 107, 110.

**5. Lease or Joint Tenancy in Crops.**

See the titles CROPS, vol. 4, p. 94; JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89.

"Still greater difficulties often occur in deciding whether the agreement constitutes the tenant a lessee of the land, or a mere joint tenant of the crops. *Lowe v. Miller*, 3 Gratt. 196, is one of that class of cases in which this court, after much deliberation, held, that under the contract, there was no lease but a mere joint tenancy in the crops raised on the land." *Hanks v. Price*, 32 Gratt. 107, 110.

A party in possession of land, but having no title thereto, was authorized by the owner to rent it on shares. This was not considered a lease, as the reservation of a part of the crop was not incident to the reversion, and thus gave no right of distress. *Lowe v. Miller*, 3 Gratt. 202, 205, 46 Am. Dec. 188.

For the occupant of the land, where the specific crops produced are to be divided, has no interest in the soil (which is necessary in order to make him a tenant), and notwithstanding the landowner's part may be, in the contract, denominated rent, it is not to be so regarded; the lands are in the sole possession of the landowner, and the parties are tenants in common of the crops produced. The arrangement is only a mode of paying for labor or services of the occupant. 2 Min. Inst. (4th Ed.) 186, citing 1 Washb. R. Prop. 365; *Lowe v. Miller*, 3 Gratt. 202, 205; *Hanks v. Price*, 32 Gratt. 107, 110; *Parrish's Case*, 81 Va. 17.

**6. Lease or Assignment.**

See the title ASSIGNMENTS, vol. 1, p. 745.

"An assignment differs from a lease in this, that by a lease a lessor grants an interest less than his own, reserving to himself a reversion; but by an assignment, he parts with the whole property. If a man convey the whole of his interest by deed, it is an assignment, not a lease, although by the deed he reserves rent to himself, and the deed contain covenants which are not in the original lease or conveyance to him." *Scott v. Scott*, 18 Gratt. 150, 177.

**7. Lease or Sale.**

See the titles HAWKERS AND PEDDLERS, vol. 7, p. 38; SALES.

**In General.**—A contract between two persons that one should have certain land and negroes during the life of the other, paying annually a certain sum therefor, is not a sale but is sufficient to constitute a lease. *Mickie v. Lawrence*, 5 Rand. 571.

Whether a written instrument is on its face a contract of sale or a contract of lease is a question of law for the court, whose duty it was to construe the instrument and determine its legal effect. *State v. Emblem*, 44 W. Va. 521, 29 S. E. 1031.



**Acceptance of Lease by One in Possession under Contract to Purchase.**—

The possession under a contract of purchase may be determined by the acceptance of a lease, and thereafter the relation of landlord and tenant exists between the parties. *Locke v. Frasher*, 79 Va. 409.

**8. Lease or Surrender.**

E. owns an estate for her life in property, both real and personal, including slaves; and S. owns the remainder in fee therein; and E. and her trustee enter into a contract called by the parties a lease, by which they convey to S. the life estate of E. in the whole of the property, and S., in consideration thereof, undertakes to pay E. annually for her life seven hundred dollars as rent, and to pay all taxes and legal charges on the estate; and the usual remedies for the recovery of these annual sums were reserved. S. was put into possession of the property, and held and treated it as his own. Held, that though the instrument was called a lease, and the sum reserved called a rent, the contract was a surrender, and the life estate of E. was merged in the estate of S. *Scott v. Scott*, 18 Gratt. 150.

The instrument not being under seal, it was not, as to the land, an express surrender; but it was a contract for a surrender, which was carried out by the parties, by the delivery of possession and the payment of money under it; and it, therefore, has all the legal effect of an express surrender by deed. As to the personal property, no deed was necessary. *Scott v. Scott*, 18 Gratt. 150.

The slaves having been emancipated by the proclamation of the president of the United States, this did not entitle S. to any abatement from the amount of the annual payments which he contracted to make. *Scott v. Scott*, 18 Gratt. 150.

**Lease or Contract for Services.**—  
Complainant owned an ore bank, and

agreed to deliver ore to company at certain price per ton. A contract under seal, reciting the lease of the ore bank on condition that the lessee mine, prepare and deliver to a third party a certain quantity of ore per week, and for each ton, as shown by that party's receipt, lessor was to receive two-sevenths and lessee five-sevenths of the price, is not a lease of realty, but for personal acts and services, for the breach whereof there is adequate remedy at law. *Campbell v. Rust*, 85 Va. 653, 8 S. E. 664.

**9. Lease or Covenant.**

See post, "Breach of Covenant, as to Use of Part of Premises," VI, B, 10, a, (6).

T. owns a warehouse, and also a lumber yard, with office and shed attached to it, adjoining the warehouse, both fronting on a wharf owned by her which runs the whole length between them and Elizabeth river, at Norfolk. In December, 1865, she leases to H., for five years, the lumber yard, and office, and shed, together with the use of the wharf in front of the lumber yard, for purposes required in carrying on the lumber business, etc. But H. is not to have the privilege of collecting wharfage, either on vessels or goods landing, or shipping for other parties. In September, 1867, T., by deed, demises to G. the warehouse, with the appurtenances thereto belonging, for the year 1868, for a rent of \$1,525, payable quarterly; and in a separate clause it is agreed that G. is to have the entire privilege and control of the entire wharf to said warehouse and the lumber yard, except that H. shall have permission to use the wharf in front of the lumber yard in carrying on his business in landing and loading with lumber, etc.; but on no account shall H. be allowed to let anything whatever remain on the wharf; but it is to be taken away as soon as put upon it; otherwise, G. will charge the usual wharfage on all such mer-

chandise, lumber, etc. G. is put into possession of the warehouse and wharf, but H. uses the wharf in front of the lumber yard for his business, sometimes piling his lumber thereon, so that G. can not make much use of it, and H. refuses to pay wharfage; but G. gives no notice of this to T., and when three-quarters of his rent is due, refuses to pay anything, on the ground that he has been ousted of a part of the demised premises by T.'s use of the wharf. It was held that under the demise to G. of the warehouse and the appurtenances thereto belonging, the wharf did not pass. *Tunis v. Grandy*, 22 Gratt. 109, 110.

For the provision in the lease to G. in relation to the wharf is not a demise of the wharf, but a covenant. *Tunis v. Grandy*, 22 Gratt. 109, 110.

"There being a distinct and separate lease of the warehouse and appurtenances by formal words in the first part of the indenture, the fair presumption is, that if the wharf had been intended to be a part of the demised premises, it would have been expressly embraced in the first part in connection with the warehouse. Instead of that, we find it embraced in a separate and subsequent part of the indenture, and expressed in language more appropriate to a case of privilege, license, or covenant, than to a demise. It is reasonable to presume, therefore, that as to the wharf it was intended by the parties to be made a subject of covenant, and not of demise." *Tunis v. Grandy*, 22 Gratt. 109, 123.

If the provision as to the wharf makes it a demise of the wharf to G., the interest thus vested in G. is in entire accord with the previous lease to H.; and the interest previously vested in H. was not demised to G. *Tunis v. Grandy*, 22 Gratt. 109, 110.

#### 10. Oil, Gas and Mineral Leases.

See the title MINES AND MINERALS.

#### 11. Lease of Land in Receiver's Hands.

See the title RECEIVERS.

#### 12. Leases of Railroads.

See the title RAILROADS.

#### 13. Leases by Executors.

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

### B. ESSENTIAL ELEMENTS.

#### 1. Execution and Acknowledgment.

##### a. No Particular Words Necessary.

No set form of words is necessary to constitute a lease, and in doubtful cases the nature and effect of the instrument must be determined in accordance with the intention of the parties, as gathered from the whole instrument. *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. 195; *Mickie v. Lawrence*, 5 Rand. 571. See *Scott v. Scott*, 18 Gratt. 150, 178.

The mere signing of an agreement does not establish the relation, although it may create a right of action for damages for a breach of the contract; or for a specific performance of it. *James v. Kibler*, 94 Va. 165, 174, 26 S. E. 417.

##### b. Reservation of Part of Crop Does Not Create.

See ante, "Lease or Joint Tenancy in Crops," III, A, 5.

##### c. Signature Unnecessary.

See post, "Delivery of Possession and Entry," III, B, 5.

**By Lessee.**—Where a lessee accepts a lease executed to him, places it on record and takes possession of the premises, it constitutes an acceptance of the lease and he is bound by its stipulations and covenants, although he never signed the lease. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696. See *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482.

**By Lessor.**—The acceptance of a writing containing an agreement to rent property and pay for it for a certain time, although it is not signed by the owner of the property, constitutes a lease by him of the property. After accepting it he can not deny the lease, though he did not sign it. *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. 487.

#### d. Lease Executed by One Partner for Firm.

M., a partner of the mercantile house of K. & M., takes a lease from R. to K. & M. of a tenement for a term of five years, at a yearly rent of \$1,000. The lease is by deed, signed and sealed by M. in the name of K. & M. without authority from his copartners to execute any deed binding them; the tenement is used and occupied for the partnership purposes, for two years of the term, and the yearly rents are credited to the lessor on the books of the partnership; then M. dies; his surviving partners abandon the tenement; the executor and devisee of the lessor file a bill in equity, against the surviving partners and the administratrix of the deceased partner, for specific execution of the agreement for the lease for the use of K. & M., which the deed executed by M. alone was intended to evidence, and for a decree against the surviving partners for the rents for the residue of the term, without alleging that the estate of M., the deceased partner, is insolvent. Held, that the case is properly relievable in equity. *Kyle v. Roberts*, 6 Leigh 495.

Though the deed of lease, and covenants therein contained, executed by M. alone, in the name of K. & M., was not obligatory on his partners, yet the agreement for the lease for the use of the partnership, of which the deed was intended as evidence, was binding on the partnership, and was not extinguished by the deed; and, as the partnership took the benefit of the lease, the surviving partners shall execute the agreement, and pay the rents for the whole term. *Kyle v. Roberts*, 6 Leigh 495.

It seems, the deed signed by M. in the name of K. & M. is a sufficient note in writing of the agreement for the lease to the partnership, to take the case out of the statute of frauds, as to them. *Kyle v. Roberts*, 6 Leigh 495.

#### e. Statute of Frauds.

See ante, "Kinds of Tenancies," I.

See the title FRAUDS, STATUTE OF, vol. 6, p. 516.

"Where a lease is void by reason of the provisions of the statute, that does not render the contract an illegal or unlawful one, if the parties choose to perform it. If the lease is verbal, and the term is longer than one year, it is void in the limited sense that neither party can compel the other to perform it. The landlord need not, in such case, give the tenant possession of the premises, if he choose not to do so; and no action will lie by the tenant against the landlord in consequence thereof. Nor need the tenant take possession in such case. No action will lie against him, if he does not. The parties may, however, go on and perform the agreement, though they could not be compelled to do so." *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

#### 2. Promise to Pay or Payment of Rent.

See ante, "In General," II, A; post, "Rent," IV.

Neither the actual payment of rent, nor an express contract to pay it, is essential to the existence of a tenancy. *Hanks v. Price*, 32 Gratt. 107.

#### 3. Necessity for Consideration.

See the titles CONTRACTS, vol. 3, p. 307; SEALS AND SEALED INSTRUMENTS.

The fact of a lease being under seal, will not, in equity, obviate the necessity for a consideration. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

"Inadequacy of consideration is not alone sufficient to invalidate a lease, although where it is grossly inadequate it is regarded as proof of fraud." *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101.

#### 4. Certainty and Mutuality.

##### a. Certainty in Description.

A lease is not void for uncertainty in description, which described the premises as a tract adjoining a certain farm, and formerly occupied by a certain person, containing a specified

number of acres. *Emerick v. Tavener*, 9 Gratt. 220.

**b. Necessity for Mutuality.**

See ante, "Tenancy at Will or by Suffrance," I, C.

An executory lease, the covenants and stipulations of which are not binding upon the lessee, being optional with him, he having the reserved right to vacate the lease at any time and escape its obligations, is necessarily not binding upon the lessor either for lack of mutuality. It creates a mere right of entry, to be terminated at the will of either party while still executory. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

And a part performance by the lessee in such a lease, after the lessor has exercised his right to vacate it, will not validate it. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

**5. Delivery of Possession and Entry.**

See ante, "Signature Unnecessary," III, B, 1, c.

**In General.**—The mere signing of a contract of lease by the lessor and lessee, without delivery of possession by the lessor, or entry of the lessee, does not constitute the relation of landlord and tenant. *James v. Kibler*, 94 Va. 165, 26 S. E. 417.

**Entry and Occupation by Enurement.**—Where one of six joint lessees enters upon and occupies certain premises under a written agreement made with the owner of the premises, and signed by all of them, and makes the entry at the time designated in the agreement for the commencement of the occupancy, and the other five do not make actual entry upon and occupy the premises, the occupancy of the one was the occupancy of all six, and upon the terms designated in the agreement, and all six are lessees of the landlord whatever might be their relations inter se. *Howell v. Behler*,

41 W. Va. 610, 24 S. E. 647; *Goshorn v. Steward*, 15 W. Va. 657, 664.

**C. CONSTRUCTION.**

See ante, "Classification and Distinctions," III, A.

**Lease as Entire Contract.**—A contract by a lessor to build and equip by a given date a warehouse, which the lessee agrees to lease for a period of two years, with the privilege of extending the lease three years longer, is an entire contract, and the lessee can maintain but one action for the breach of the lessor's covenants to complete by a given time and equip in a specified manner. If action be brought by the lessee before the termination of the lease, he may recover therein not only the damages actually sustained down to the trial, but those to ensue thereafter, if they are imminent and reasonably certain. *Hancock v. Whitehall Tobacco Co.*, 102 Va. 239, 46 S. E. 288.

**The value of a lease for years** is the price it would have produced if it had been sold at the time; and not according to an estimated rent, valued upon the principle of annuities. *Cary v. Macon*, 4 Call 605.

**D. COVENANTS.**

**1. Covenants as to Use of Premises.**

See post, "Restrictions as to Use," V, A, 4.

**2. Covenants to Repair, etc.**

See post, "As to Repairs," V, A, 6.

**3. Covenants to Pay Taxes, Assessments, etc.**

See the titles SPECIAL ASSESSMENTS; TAXATION.

**4. Implied Covenants.**

**a. In General.**

"Upon this question as to the existence and extent of implied covenants, Mr. Justice Swayne, in delivering the opinion of the court in the case of *Sheets v. Selden*, 7 Wall. 423, says: 'The tendency of modern decisions is not to imply covenants which might and ought to have been expressed if intended. A covenant is

never implied that the lessor will make any repairs.'" *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

#### b. Covenant for Fitness of Premises.

There is no implied covenant that demised premises are suitable or fit for the particular use for which they are intended by the tenant. Thus, where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; *Scott v. Scott*, 18 Gratt. 150, 174.

The recitals contained in said lease as to the number of salt wells included in the premises, after the lease has been accepted and acted on for more than two years by the lessee, with ample opportunity of knowing, not only the contents of the lease, but the character and quality of the property leased, must be regarded as conclusive of the fact between the parties to said lease. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

#### c. Covenant for Quiet Enjoyment.

See post, "Mere Failure to Deliver Possession," VI, B, 10, a, (4).

**In Freehold Leases.**—In a conveyance of freehold estates, words of lease do not amount to a covenant for quiet enjoyment. *Black v. Gilmore*, 9 Leigh 446, 33 Am. Dec. 253. See *Scott v. Scott*, 18 Gratt. 150, 174.

Thus, where the defendant by an indenture rented and leased to the plaintiff a tract of land, to have and hold the same so long as she should live, and the defendant entered on the possession of the plaintiff, expelled and removed him, in an action of covenant thereon, it was held on a general de-

murrer no covenant for quiet enjoyment was implied from the words "rent" and "lease." *Black v. Gilmore*, 9 Leigh 446, 33 Am. Dec. 253.

**Otherwise in Leases for Years.**—"Every lease for years, though it does not expressly covenant for quiet enjoyment of the premises by the lessee, implies and imports such covenant; that is, that he shall enter and enjoy the premises for the term without the permission of any one." *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 901; *Black v. Gilmore*, 9 Leigh 446; *Scott v. Scott*, 18 Gratt. 150, 174. See *Tunis v. Grandy*, 22 Gratt. 109, 120; *Briggs v. Hall*, 4 Leigh 484.

For when one makes a lease to another, he impliedly covenants that the lessee shall enter into the possession, and quietly enjoy that possession. It implies that the demised premises shall be open to entry by the lessee at the time fixed for taking possession. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 901.

"In leases for years, the words lease and demise are used as words of contract rather than as words of transfer, and, as such, import a covenant that the lessee should possess and enjoy. But in a lease for life, it is otherwise. That is the creation of an estate of freehold, not a mere contract for the possession. The words of lease and demise are therefore used as words of conveyance, and not of covenant." *Black v. Gilmore*, 9 Leigh 446, 448.

And if the lessor refuse to admit the lessee into possession—if he withhold possession from him—he violates his covenant. Authority sustains this position. *Hubble v. Cole*, 88 Va. 236, 13 S. E. 441; *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 902.

#### 5. Covenants Running with Land.

See the title COVENANTS, vol. 3, pp. 750, 754.

A landlord may, by contract under seal, impose on the lands which he leases, burdens, which will not only be

binding on the tenant but also on subtenants, they being covenants real running with the land. But except between landlord and tenant no burdens can be imposed on lands by any covenant of the owner which will run with the land and bind any grantee of the land; for such covenants are personal and are not covenants real running with the land. *West Virginia Transportation Co. v. Pipe Line Co.*, 22 W. Va. 601.

#### 6. Remedy for Breach of Covenant.

See ante, "Construction," III, C. See the title COVENANTS, vol. 3, p. 768, et seq.

**Breach of Implied Covenant.**—See post, "Duty to Put Lessee in Possession," V, A, 1, b.

The remedy of a lessor for breach of an implied covenant in the lease is not by way of forfeiture, but by an action or proceeding for damages caused by such breach. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

**Against Executor for Breach by Testator.**—See the title COVENANTS, vol. 3, p. 768, et seq.

An action can be maintained against an executor for breach of covenant of a lease committed by his testator. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

**Liability of Assignee or Mortgagee.**—See post, "Assignment and Subletting," VII.

#### 7. Covenant to Improve Construed Not to Be Continuing.

The covenant to improve is satisfied by the erection of the first buildings, and is not a continuing covenant, binding the parties to renew the buildings from time to time, in case they should be destroyed by flood or fire. The language of the covenant affords no ground for this latter construction. *Farmers' Bank v. Mutual Ass'n Society*, 4 Leigh 69, 84.

### E. PROOF OF LEASE AND TENANCY.

See the titles EVIDENCE, vol. 5, p. 295; PAROL EVIDENCE.

#### 1. Extrinsic Evidence Generally.

**Sufficiency to Establish Lease.**—A party who had signed an agreement to lease, told a third person that he had rented his property, and requested him not to say anything about it, presumably because he did not want it known until it was all arranged. This evidence was held insufficient to prove the writing to be an actual lease. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457.

**To Prove Owner.**—In an action of debt on a bond given for the lease of certain premises, evidence is admissible to prove who is in fact the true owner of the land. *Barley v. Barley*, 1 Va. Dec. 103.

**Identification of Premises.**—If it can not be ascertained by the written contract of lease whether a parcel of the demised premises is included therein, it is permissible to show this by extrinsic evidence. *Crawford v. Morris*, 5 Gratt. 89, 90.

#### 2. Parol Proof of Contents Where Destroyed.

K. leased to M. a house and lot in the city of A., for four years; but there was a stipulation in the lease, that if K. sold the property before the time ran out, upon a proper notice of such sale M. should deliver up possession of the premises. The lease had been destroyed, and the contents were proved by parol evidence. K. did sell the property before the four years expired, and gave a notice to M. to deliver possession. It was for the jury to ascertain from the evidence what were the terms of the contract, and to determine, under such instructions as the court might give for their information and guidance, what was their legal effect. *Millan v. Kephart*, 18 Gratt. 1.

#### 3. Parol Evidence to Explain Lease.

Parol evidence of a usage for the off-going tenant to have the way-going crop is not admissible to explain a written contract of lease for a fixed

and certain period. *Harris v. Carson*, 7 Leigh 632.

Nor is parol evidence admissible to vary or contradict the unambiguous terms of a lease, providing for the surrender of the buildings on the leased property at the end of the term by the lessee, no fraud or mistake being alleged. *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697. Or to engraft thereon a verbal understanding or contract contemporaneous therewith. *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11.

#### 4. Proof of Tenancy by Parol Evidence.

It is well settled in England that the existence of a tenancy between the parties may be shown by parol, though the demise be in writing. *Taylor v. Peck*, 21 Gratt. 11, 19.

If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. *Taylor v. Peck*, 21 Gratt. 11, 19.

#### 5. Proof of Tenancy by Receipts for Rent.

Though a tenant holds under a written lease, he may, in an ejectment by his landlord against him, without producing the lease or accounting for its nonproduction, introduce receipts of his landlord for rent, showing that at the time the action was instituted, he held as tenant and his year was not out. *Taylor v. Peck*, 21 Gratt. 11.

And a receipt for rent is admissible to prove the fact of tenancy as a parol admission by a party to a suit, which is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be di-

rectly in issue in the cause. *Taylor v. Peck*, 21 Gratt. 11, 20.

#### 6. Invalid Lease in Evidence.

See ante, "Kinds of Tenancies," I.

**Under Statute of Frauds.**—A lease which is invalid by the statute of frauds, is admissible in evidence, not to pass a term, not to give title for the term it names, but to show some kind of a tenancy exists and to show its terms and conditions. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

Thus, upon the trial of a writ of unlawful detainer, defendant sets up title in himself. Plaintiff may prove that the defendants entered on the premises under a parol lease from himself; though the lease proved was to continue more than one year. *Adams v. Martin*, 8 Gratt. 107.

**Proof of Occupation by Unsealed Lease.**—In an action of assumpsit for use and occupation of land, occupation by permission of the plaintiff may be proved directly by the production and proof of a written lease, not under seal, if one has been entered into. *Goshorn v. Steward*, 15 W. Va. 657.

**Proof of Amount of Recovery by Unsealed Lease.**—In an action of assumpsit for the use and occupation of land, the agreement not being under seal and being fully executed on the part of the plaintiff, he is entitled to introduce the written agreement, which fixes the rent, in evidence of the amount of recovery in the action. *Goshorn v. Steward*, 15 W. Va. 657; *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. 834.

**Agreement for Lease.**—A mere memorandum of an agreement, to be afterwards substituted by a more formal lease, is nevertheless admissible in an action for breach thereof, in behalf of the plaintiff. *Bohn v. Newton*, 81 Va. 480.

**Proof of Invalid Partnership Lease by Valid Agreement Therefor.**—See ante, "Lease Executed by One Partner for Firm," III, B, 1, d.

**Proof of Contract by Lessor to Repair.**—See post, "Lessor's Duty to Repair or Rebuild," V, A, 6, a.

**7. Lease as Evidence in Unlawful Detainer.**

See the title **FORCIBLE ENTRY AND DETAINER**, vol. 6, p. 156.

**F. RECORD AND NECESSITY THEREFOR.**

See the title **RECORDING ACTS**.

**IV. Rent.**

**A. DEFINITION.**

Rent signifies a compensation or return, being in the nature of an acknowledgment given for some corporeal inheritance, and though of late years it usually consists of money, yet formerly it consisted of, and still may consist of, things incapable of any profit, or in services or manual operations. *Newton v. Wilson*, 3 Hen. & M. 470, 483.

No set form of words is necessary to constitute a lease; and under a contract between two persons that one should have, during the life of the other, land, negroes, etc., he paying therefor a stipulated annual sum, such payment is not a sale, but a rent. *Mickie v. Lawrence*, 5 Rand. 571.

Such a contract does not lose its character of a rent, by slaves and other personal property being included in the contract. *Mickie v. Lawrence*, 5 Rand. 571; *Newton v. Wilson*, 3 Hen. & M. 470.

**Provisions for Payments to Save Forfeiture.**—The provisions in an oil lease whereby the lessee may save the lease from forfeiture in a certain event by the payment of certain periodical sums, do not constitute a contract to pay rent, and can not be enforced as such against the lessee. *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820; *Fluharty v. Beatty*, 4 W. Va. 514; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271.

**B. QUIT RENTS OR RENTS CHARGE.**

See the title **GROUND RENTS**, vol. 6, p. 769.

The rents of five shillings sterling, reserved by Lord Fairfax, upon lots in the town of Winchester, were not quit rents, but rents charge. *Marshall v. Conrad*, 5 Call 364.

For quit rents in fee require composition, and must be payable to the lord in his seignorial character. *Marshall v. Conrad*, 5 Call 364.

Therefore, no fee rents, but the shilling for every fifty acres of waste land reserved in grants from the crown, and the one shilling sterling reserved for each fifty acres granted by lord Fairfax, were quit rents. *Marshall v. Conrad*, 5 Call 364.

None of the rents in the Northern Neck, were destroyed by any of the acts of assembly for abolishing quit rents, passed during the revolutionary war, except those of one shilling sterling for every fifty acres granted by the proprietor. *Marshall v. Conrad*, 5 Call 364.

**Changed to Socage Tenures.**—The act of 1752, for establishing the town of Winchester, broke the seignory as to lands lying within the town, and turned them into socage tenures. *Marshall v. Conrad*, 5 Call 364.

**Recoverable by Assignee.**—See post, "Assignment Carries Remedy," IV, H, 2.

The deed from Denny Martin Fairfax to James M. Marshall, conveyed all the lands and rents belonging to the former in the Northern Neck, except the tracts expressly reserved and the quit rents. *Marshall v. Conrad*, 5 Call 364.

Therefore, the rents of five shillings sterling, upon lots in the town of Winchester, passed by that deed; and the grantee, after demanding the arrearages, and refusal by the tenant to pay, might maintain ejectment to recover the lot for the forfeiture on account



of the nonpayment, if there was no distress on the premises whereof the rent could be levied. *Marshall v. Conrad*, 5 Call 364.

### C. RENTAL VALUE OF LAND.

The true annual rental value of the land is not the value of all the farm products which can possibly be realized from its use, when the land is stocked, farmed, and managed with the greatest skill and industry, but it is the price which a prudent and industrious farmer can afford to pay for its use, after taking into consideration the probable amount and the market value of his crops, and the probable injuries thereto, resulting from the ordinary changes of climate and season. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572.

And, in estimating the rents and profits of land, which has been wrongfully held by the vendor in a contract for its sale, the annual value of the land in the hands of a prudent and discreet tenant upon a judicious system of husbandry is the proper rule in the case, which should be influenced in some measure by the mode of treatment by the occupant. *Bolling v. Lersner*, 26 Gratt. 36. And see the titles IMPROVEMENTS, vol. 7, p. 316; JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89.

### D. LIABILITY FOR RENT.

#### 1. In General.

##### a. Follows upon Enjoyment.

If the tenant has enjoyed the land, he can not repel the landlord's claim of rent, by saying "he has nothing in the land;" or, that the conveyance was void. *Watson v. Alexander*, 1 Wash. 340; *Ross v. Gill*, 1 Wash. 87; *Thompson v. Pendell*, 12 Leigh 591, 601.

"The quiet enjoyment of the premises, without any molestation on the part of the landlord, is an implied condition, on which the tenant is bound to pay rent." *Tunis v. Grandy*, 22 Gratt. 109, 120.

#### Right to Enter and Enjoy Sufficient.

—Thus, a person who accepts an oil or gas lease, with a stipulation therein contained to pay a monthly rental until a well is completed, or until the termination of a certain fixed term, is bound to pay such rental, although he does not within such term enter upon the land and complete the well, unless he was prevented from doing so by the plaintiffs and not by mere personal default. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344.

**Liability of Vendee for Rent of Land Sold by Mistake.**—See the title VENDOR AND PURCHASER.

**Liability of Tenant Holding c. r.**—See ante, "Tenancy Implied from Holding over," II, B.

#### b. Apportionment and Abatement.

##### (1) In General.

**Rent Charge and Rent Service.**—"It seems clear from the books, that there shall be no apportionment of a rent charge, in some cases in which a rent service may be apportioned." *Newton v. Wilson*, 3 Hen. & M. 470, 479.

"As if A., having a rent service, purchase part of the lands, the rent shall be apportioned; but if he had had a rent charge to him and his heirs, and had purchased a part of the lands, the whole rent should have been extinguished. But if the rent service be indivisible, as a horse, or a hawk, there could be no apportionment; but if the lessor purchase a part, the whole was thereby extinct." *Newton v. Wilson*, 3 Hen. & M. 470, 479.

"In general, a rent service might be apportioned, either by a grant of a part of the reversion; or, by a devise to two or more persons; (a) or by a surrender of part of the lands, or forfeiture of part; (b) or by the lessor's taking a lease of part; (c) or where a part is lost by the act of God; as in case of overflowing, or of willfire; (d) or by act of law; as, if a moiety of the reversion be extended by elegit; or dower be assigned therein; or a

part of the land be evicted by a stranger." (c) And this apportionment shall be made by a jury, and upon the plea of nil debet. *Newton v. Wilson*, 3 Hen. & M. 470, 479. See *Scott v. Scott*, 18 Gratt. 150, 172, approving *Newton v. Wilson*, 3 Hen. & M. 470, but distinguishing it as a case of loss due to lessor's default.

**Evidence under General Issue.**—In an action of debt for rent, on the plea of the general issue the defendant may give in evidence special circumstances showing that the rent ought to be apportioned. *Newton v. Wilson*, 3 Hen. & M. 470. See *Scott v. Scott*, 18 Gratt. 150, 172.

**Abatement for Improvements and Taxes.**—See post, "Purchaser under Contract Held Void," IV, D, 4.

## (2) By Act or Agency of Lessor.

**Partial Eviction by Landlord Suspends Entire Rent.**—An eviction of the tenant by the landlord from the whole or any portion of the premises suspends the payment of the entire rent during the continuance of the eviction. *Tunis v. Grandy*, 22 Gratt. 109; *Briggs v. Hall*, 4 Leigh 484.

For if a tenant be at any time deprived of the leased premises by the landlord's agency, the obligation to pay rent ceases. *Tunis v. Grandy*, 22 Gratt. 109; *Briggs v. Hall*, 4 Leigh 484.

And the reason why there should be no apportionment of the rent is, that it is done by the wrongful act of the landlord himself, and no man should be encouraged to disturb a tenant in the possession of that which, by the policy of the feudal law, he ought to protect and defend. He can not apportion his own wrong. *Tunis v. Grandy*, 22 Gratt. 109, 120; *Briggs v. Hall*, 4 Leigh 484.

**Sale during Term without Actual Eviction.**—See post, "Of Purchasers from Lessor," IV, E, 2.

Where there is no actual eviction from any part of the demised premises, there can therefore be no apportion-

ment at law, but equity may give relief by enjoining an inequitable excess, where there has been a deprivation of enjoyment. *Mason v. Moyers*, 2 Rob. 606, 618.

**Crop of Hay Mowed and Taken Away.**—A landlord entered upon a part of leased premises, and mowed and carried away the hay without the consent and against the will of his tenant, who nevertheless continued to occupy the premises until the end of the year. In an action of assumpsit for the use and occupation of the land it was held, that by such entry the landlord lost the benefit of the entire contract, and was not entitled to recover any portion of the rent. *Briggs v. Hall*, 4 Leigh 484, 26 Am. Dec. 326.

**Covenant to Deliver Possession on Sale without Actual Surrender.**—Land was leased for a term of years with the understanding that if the lessor sold the premises during the term the lessee should give possession at the end of the current year. The lessee assigned the lease with a similar provision, and the assignee, the plaintiff, assigned the term to the defendants, reserving a yearly rent to be paid as long as the lease lasted, with the provision that if the original lessor should sell the property agreeably to the original contract between him and his lessee, then the latter contract should expire. It was held, that the defendant was not relieved from his covenant to pay rent by the sale of the premises, if there was no surrender. *Dudley v. Estill*, 6 Leigh 562.

**Second Lease—Partial Eviction by First Lessee.**—If a tenant, under a second lease, is put into possession of the whole of the demised premises, and is afterwards evicted from a part thereof by the lessee under the first lease, then the rent will be apportioned, and the lessor may distrain for it; but if the lessee under the first lease is in possession, so that the lessee under the second lease can not get possession of a part of the premises demised to him,

then the second lease, as to this part, is void, and the lessor can not distrain for a proportion of the rent, though he may recover the fair value of the balance of the premises, in an action for use and occupation. *Tunis v. Grandy*, 22 Gratt. 109, 110. See ante, "Lease or Covenant," III, A, 9.

**For Loss of Services of Slave Miller.**

—A lease was made of a mill, together with a tract of land adjoining, and a black man as a miller, for a term of years, rendering an annual rent; the miller had, previously to the lease, been emancipated by the lessor, by a deed entered of record, and, before the expiration of the first year, left the service of the lessee. It was held, that the lessee was entitled to an apportionment of the rent. *Newton v. Wilson*, 3 Hen. & M. 470, approved and distinguished in *Scott v. Scott*, 18 Gratt. 150, 172, as a case of loss due to lessor's default.

**Recovery by Title Paramount.**—If the land be recovered by a third person, by title superior to that of the lessor, the tenant is discharged from the payment of rent after eviction by such recovery. *Tunis v. Grandy*, 22 Gratt. 109; *Mickie v. Lawrence*, 5 Rand. 571, 575; *Briggs v. Hall*, 4 Leigh 484.

In case of a lease the tenant, upon eviction by paramount title, would be discharged from that liability, or it would have been apportioned according to the circumstances of the case. The intention of the parties is to be considered; and the nature of the property, and the terms of the contract. *Mickie v. Lawrence*, 5 Rand. 571, 575.

For even when the loss is by title paramount, the lessor at the time of the lease did not have the title he undertook to convey, and therefore the loss of enjoyment is really due to him. *Scott v. Scott*, 18 Gratt. 150, 172, 174; *Tunis v. Grandy*, 22 Gratt. 109, 120.

**Partial Recovery under Title Paramount.**—If part only of leased land is recovered by a third person by a title

paramount to that of the lessor, such an eviction is a discharge of so much of the rent as is in proportion to the value of the part evicted. *Tunis v. Grandy*, 22 Gratt. 109; *Briggs v. Hall*, 4 Leigh 484.

**Surrender without Eviction.**—In a suit between third persons and a lessor, to which the lessee is not a party, a decree is made directing the sheriff to rent out the demised premises. The premises are rented out, and the lessee yields possession of the premises. Held, that as the decree did not direct the sheriff to evict the lessee, and there was no paramount title under which the lessee might have been evicted, his surrender of the possession was not an eviction, so as to release him from the payment of rent. *Caldwell v. Pennington*, 3 Gratt. 91.

And the abandonment of a wharf by a lessee thereof can not amount to an eviction, whatever may have been the extent of a prior lessee's right to the use of the wharf under his lease, or however that right may have conflicted with the right of the subsequent lessee to its use under his. *Tunis v. Grandy*, 22 Gratt. 109, 110.

**Deprivation of Crops by Threats.**—While a suit was pending by creditors of a deceased person to subject land to the payment of their debts, it was rented by the owners for three years with the agreement that if it should be sold during the term then the lease should terminate on April 1st following the sale. In June of the last year of the term it was sold, and in consequence of the threats of the purchasers, one of whom was one of the lessors, to reap any crops that might be sowed, the lessee did not sow any fall crops. It was held, that he was entitled to a deduction from his rent on that account. *Mason v. Moyers*, 2 Rob. 606, cited approvingly in *Scott v. Scott*, 18 Gratt. 150, 170.

**Releasing by Landlord.**—See post, "Rental by Lessor with Sublessee's Consent," VI, B, 10, a, (8).

**(3) Loss Not Due to Lessor Directly or Indirectly.**

**(a) Destruction of Leased Premises.**

**aa. Common-Law Rule.**

**aaa. Under Express Covenant to Pay Rent.**

"The rule would seem to be, according to the English authorities, that no accident to the leased tenement, whether by fire, or tempest, or through the casualties of war, will relieve the lessee from his express covenant to pay rent, unless he has protected himself by a saving clause in the lease." *White v. Stewart*, 76 Va. 546, 563. See *Scott v. Scott*, 18 Gratt. 150, 165; 2 Minor's Inst. 762; *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149; *Ross v. Overton*, 3 Call 309; *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 472, 49 S. E. 650; 2 Minor's Inst. 60; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

It is settled that to hold the lessee to be exempt in such a case, would be to interpolate a term in the contract. *Scott v. Scott*, 18 Gratt. 150, 175; *Thompson v. Pendell*, 12 Leigh 591, 601.

The reason the tenant is held liable for the rent, notwithstanding the destruction of the property, is, that by his own express covenant to pay rent he has created a duty or charge upon himself which he is bound to make good even against inevitable accident. Where, however, the law creates a duty or charge, and the party is disabled from performing it, without his fault, a different rule prevails. *White v. Stewart*, 76 Va. 546, 564.

The rule of equity is the same as that at law on this subject, for equity can not alter contracts. *Scott v. Scott*, 18 Gratt. 150, 169.

**Covenants to Pay Rent or Leave in Good Repair.**—At common law, if a lessee covenanted or promised to pay rent or leave the premises in good repair, he was held bound to fulfil his undertaking, notwithstanding the build-

ings on the premises were destroyed during the term by fire or otherwise, without fault or negligence on his part, unless it was stipulated to the contrary in the lease. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 243, 37 S. E. 851; *Ross v. Overton*, 3 Call 309. See post, "As to Repairs," V, A, 6.

**Where Lessee Agrees to Make All Except "Heavy Repairs."**—It was agreed in the lease of a mill that the lessee should keep it in repair, except that heavy repairs, as injury by floods to the dam or forebay, or if the main shaft or wheel should give away, requiring a new one, should be made by the lessor in a reasonable time, which should not operate to suspend the rent. The mill was completely destroyed by an accidental fire, and the lessor refused to rebuild. The rent was held to be suspended from the time of the fire. *Thompson v. Pendell*, 12 Leigh 591.

**bbb. In Absence of Express Covenant.**

In absence of express covenant to pay rent, tenant is not liable for same, where the premises are destroyed, whatever the rule may be in case of such express covenant. *White v. Stewart*, 76 Va. 546.

**ccc. Where Lease Carries No Interest in Land.**

"Where the lease carries no interest in the land, but is a room or apartment merely, total destruction of the thing leased discharges the tenant from future rent." *Arbenz v. Exley*, 52 W. Va. 476, 478, 44 S. E. 149.

**bb. Statutory Modifications.**

**aaa. Changed in Virginia but Not in West Virginia.**

Section 2455 of the Code of Virginia, 1904, modifies the common-law rule so as to allow a reduction of the rent on account of the destruction of buildings where they were destroyed without fault or negligence on the part of the tenant. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 472, 49 S. E. 650;

*Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

The change in the common law effected by § 2455, Va. Code, 1887, as to abatement of rent in case of destruction of buildings, was proposed by the revisors in the revision of 1849, but was not adopted. That revision merely changed the rule as to the effect of a covenant to leave the premises in good repair. The common-law rule was not otherwise affected. *Scott v. Scott*, 18 Gratt. 150, 167. See *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851. It has never been changed in West Virginia. See W. Va. Code, ch. 72, § 22, which is the same as the provision of the Virginia Code of 1849.

West Virginia Code, ch. 72, § 22, that "No covenant or promise by a lessee that he will leave the premises in good repair shall have the effect, if the buildings are destroyed by fire or otherwise, without fault or negligence on his part, of binding him to erect such buildings again, or to pay for the same or any part thereof unless there be other words showing it to be the intent of the parties that he should be so bound," was meant to change the common-law rule that bound the tenant in case of destruction by fire to rebuild. if the lease bound him to leave the premises in good repair. (*Ross v. Overton*, 3 Call 309; *Maggort v. Hansbarger*, 8 Leigh 532; *Thompson v. Pendell*, 12 Leigh 591.) It does not change the common law as to rent. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

The words "or to pay for the same or any part thereof" in the section plainly in terms refer to "buildings," not rent. It does not deal with rent. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

And a tenant of land in West Virginia, not merely of a room or apartment, must pay rent for his term, though a building on it included in the

lease, without fault on his part, is totally destroyed by fire, unless the lease otherwise provide. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

**Effect on Covenant to Keep in Repair.**—See post, "As to Repairs," V, A, 6.

#### bbb. Tenant Must Be Free from Negligence or Fault.

**Rule Stated.**—It is not sufficient, to entitle him to a reduction in the rent, that the buildings on the leased premises have been destroyed, but it is made a condition to that right that they were destroyed without fault or negligence on his part. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 473, 49 S. E. 650; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

**Averment and Proof.**—It was, therefore, necessary for the tenant in its pleadings to aver (as it does), and prove that fact. That it was required to prove a negative does not affect the question, since the existence of that fact was necessary to the relief sought. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 473, 49 S. E. 650. See also, *Reusens v. Lawson*, 91 Va. 226, 253, 21 S. E. 347, and authorities cited.

#### Evidence Conflicting, Verdict Stands.

—And where, upon the question of whether or not the destruction was without fault or negligence on the part of the tenant, the evidence is conflicting, a verdict in favor of the landlord on that point could not be disturbed by the court. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

#### ccc. Proof of Diminution of Value for Lessee's Purposes.

In order to maintain the issue on the part of the tenant, it is not only necessary for him to prove that the wharf had been destroyed without fault or negligence on his part, but that the value of the leased premises for

his purposes is thereby diminished. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 473, 49 S. E. 650.

And the amount which a tenant is entitled to have the rent reduced under the statute is the diminished value of the leased premises "to the tenant for his purposes," caused by such destruction. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 471, 49 S. E. 650.

The verdict of a jury, refusing to allow a tenant compensation for the loss of the use of buildings in consequence of the destruction of a wharf on the leased premises, will not be disturbed where it appears that the premises were leased to get rid of a rival in business; that they were not in use at the time of the destruction of the wharf, and had not been in use for a year or two prior to that time, and were not used thereafter because the tenant could make more money by not using them. It was for the jury to say whether "for the tenant's purpose" the leased premises were diminished in value by the destruction of the wharf. *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465, 49 S. E. 650.

**ddd. Special Pleas under Va. Code, § 3299.**

A special plea under § 3299 of the Virginia Code should allege the amount to which the defendant is entitled by way of set-off to the plaintiff's demand. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851; *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42.

Every pleading should answer either the whole of what is adversely alleged, or such part as it is proposed to cover, and a plea which sets up the partial destruction of buildings as a complete defense to an action to recover rent is bad. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

**(b) For Loss of Personalty Rented with Land.**

See ante, "Lease or Surrender," III, A, 8.

"It is a settled principle of the common law, that where a lease is made of lands and chattels, reserving a sum in gross as rent, though the rent is greater by reason of the chattels, it is regarded as issuing out of the land alone." *Scott v. Scott*, 18 Gratt. 150, 161.

So that if the personalty be lost without the fault of the landlord, or from a cause for which he is not responsible, there seems to be no good reason why the tenant should not be bound for the whole rent, even though the loss may have occurred without his fault. *Scott v. Scott*, 18 Gratt. 150, 170.

"The land, of course, would remain subject to the charge for the security of the rent, if any such charge was created thereon. But certainly the slaves were subject to no such charge, unless they happened to be on the land, and therefore liable to be distrained for the rent thereafter in arrear, like any other property of the vendee or lessee or his assigns thereon." *Scott v. Scott*, 18 Gratt. 150, 182; *Newton v. Wilson*, 3 Hen. & M. 470, distinguished because there the loss was due to the landlord's fault.

**(c) For Loss of Land.**

"And so far has this principle been carried, that it has been held, that if the lessee is evicted of the land, the rent is gone, and there can be no apportionment in respect of the goods." *Scott v. Scott*, 18 Gratt. 150, 161.

**c. Death of Lessee—Effect.**

See post, "By Death," VI, B, 4.

Where a tenant dies pending a lease, the lease continues the property of his estate, and the estate of the tenant is liable for the rent contracted to be paid; and, while the landlord may sue out a distress warrant against the under tenant, if any, yet he is not obliged to do so, and his failure will not release the estate of the tenant. *Hutchings v. Bank*, 91 Va. 68, 20 S. E. 950.

**d. Set-Off.**

See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

**Lease from Executor—Debt Due by Testator.**—A tenant having leased land from an executor can not set off debts due to him by the testator against the rent. It might be otherwise, if the executor has acknowledged that he had a sufficiency of assets. *White v. Bannister*, 1 Wash. 166. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483.

**Lease from Testator and Debt Due from Him.**—Upon a contract for the lease of a farm, made by the lessor in his lifetime, for a term of years, the rent accruing from such lease, after the death of the lessor, can not be set off by a debt due to the tenant from the lessor at the time of his death, although the estate of the lessor is insolvent. *Washington v. Castleman*, 31 W. Va. 832, 8 S. E. 603.

While the analogy in respect to the application of the rents of an unexpired term and the payment of debts out of the proceeds of real estate is not entirely complete, it seems that the reason which would in equity deny a creditor the right to set off his debt against the decedent in the one case would equally control in the other. *Washington v. Castleman*, 31 W. Va. 832, 8 S. E. 603.

**Rents Payable Direct to Cestui Que Trust—Drafts of Trustee.**—By order of court the rents of a trust subject are decreed to be paid directly to the cestui que trust by the receiver. The trustee was held to have no powers in the matter, and his drafts against the lessee could not be set off against the rent. *Witt v. Warwick*, 83 Va. 699, 3 S. E. 352.

**Damages for Breach of Covenant to Repair.**—"But there can be no question that the tenant may, in a suit for rent, recoup damages for failure of a lessor's covenant to repair. *Cheuvront v. Bec*, 44 W. Va. 103, 28 S. E. 751." *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

**Deduction from Rent of Taxes Paid by Lessee.**—See the title **TAXATION**.

**Improvements.**—See the title **IMPROVEMENTS**, vol. 7, p. 316.

### c. Interest on Rents.

#### (1) In General.

A court of equity may, in its discretion, allow interest on arrears of rent. *Graham v. Woodson*, 2 Call 249.

"In *Graham v. Woodson*, 2 Call 249, interest was allowed by the high court of chancery on the rents in arrear, and that case was affirmed in this court. But there the court evidently proceeded upon the ground of the unconscientious conduct of the defendant, *Graham*, 'in endeavoring to defeat the rents altogether,' by first purchasing the reversion at an under rate, and then surrendering the lease, and thereby delaying the payment. The plaintiffs were infants; they had no power to distrain, the reversion being granted away to another." *Newton v. Wilson*, 3 Hen. & M. 470, 491.

Interest can not be recovered as of course, in actions for the recovery of rent, but may be given, under circumstances, to be judged of by the jury. *Mickie v. Lawrence*, 5 Rand. 571; *Skipwith v. Clinch*, 2 Call 253, 257; *Newton v. Wilson*, and *Cooke v. Wise*, 3 Hen. & M. 483, (reconsidered) 500; *Dow v. Adams*, 5 Munf. 21; *Graham v. Woodson*, 2 Call 249.

But where a jury state in a special verdict the circumstances under which they allowed interest in an action for the recovery of rent, the court should disallow the interest if, under the circumstances stated, interest ought not to be allowed. *Dow v. Adams*, 5 Munf. 21.

In *Kyle v. Roberts*, 6 Leigh 495, interest was not allowed on balance of rents in arrear.

**Recovery by Way of Damages.**—Interest is not ordinarily recoverable by way of damages in an action for rent in arrear. *Newton v. Wilson*, 3 Hen. & M. 470; *Cooke v. Wise*, 3 Hen. & M. 463. Nor, prior to the statutory enactments, was interest allowed on esti-

mated rents and profits. *Roper v. Wren*, 6 Leigh 38; *Payne v. Graves*, 5 Leigh 561.

Although rent secured by a *nomine pœnæ*, or withheld under vexatious or oppressive circumstances (as by a rescue, or writ of replevin falsely sued out), even by the common law, may be recovered, in an appropriate action, with recompense for the vexation, under the name of damages; but where no such circumstances, peculiar to rents, exist, the jury have no right to give more than the rent-arrear, especially in an action of debt, where the plaintiff is to recover in numero, and where damages are, almost always, if not altogether, nominal only. *Newton v. Wilson*, 3 Hen. & M. 470, 488.

**Not Allowed When Sufficient Property on Premises Liable to Distress.**

—Interest on rents in arrear ought not to be allowed if there were always effects on the premises, liable to distress, sufficient to have satisfied the rents which were not paid, though demanded by the landlord. *Dow v. Adams*, 5 Munf. 21; *Newton v. Wilson*, 3 Hen. & M. 470, 499; *Deans v. Scriba*, 2 Call 416, 419.

Interest on rents will not be allowed where the lessor allows it to accumulate, because he might have distrained for it if it were certain. If it was uncertain, interest was not demandable. *Skipwith v. Clinch*, 2 Call 253.

**Replevy Bond—From Date of Bond.**—See the title FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 444.

**(2) Under the Statutes.**

By statute "in any action for rent, or for such use or occupation, interest shall be allowed as on other contracts." Acts, 1826-27, p. 26, ch. 27, § 3; Va. Code, 1873, ch. 134, § 7; Va. Code, 1887, § 2787. Tenants, therefore, holding property which is the subject of controversy in a pending suit, are bound to pay interest upon the rents, though it is not ascertained who is the party entitled to receive them. *Com. v.*

*Ricks*, 1 Gratt. 416. See *Early v. Friend*, 16 Gratt. 21.

Under the act of March 2d, 1827, the landlord was entitled to interest on rent in arrear, from the time it was due. *Brooks v. Wilcox*, 11 Gratt. 411.

Since 1827 there seems to be no difference between debts due for rent and other debts. And the same provision is in the Code of West Virginia, p. 527, ch. 93, § 7. That the rent is what is called "estimated" can make no reasonable difference. *Vance v. Evans*, 11 W. Va. 342, 381.

It is supposed that the statute allows interest on rent in arrear where the parties are settling the transactions privately between themselves, although there be no action. See 4 Min. Inst. (3d Ed.) pt. 1, p. 127.

**Allowed on Estimated Rents.—**

Where land is occupied by consent of the owner it is proper to charge interest upon estimated rents and profits. *Vance v. Evans*, 11 W. Va. 342.

And when there is a decree for specific performance of a contract for the sale of land, and for an accounting of the rents and profits, although in such case the rents are estimated, it is proper to charge interest on them. *Bolling v. Lersner*, 26 Gratt. 36.

But interest was not allowed on estimated rents and profits in *Roper v. Wren*, 6 Leigh 38, and *Payne v. Graves*, 5 Leigh 561, which arose prior to the statutes.

**Under Award of Arbitrators.—**

Where the leased tenement had been destroyed by fire long before the period fixed for the termination of the lease, and the parties desired to ascertain by arbitration the extent of the lessees' liability for the rent due and to become due, whatever it might be, the defendant agreeing to pay immediately; and the arbitrators accordingly ascertained the present value of the lease, and the amount to be paid the plaintiff in satisfaction of her claim, and the sums thus ascertained bear interest; it



is clearly competent for the arbitrators to award the payment of interest upon the principal adjudged to be due. Even if they had made a mistake, it is not such a mistake on the face of the award as the court can correct. *Forrer v. Coffman*, 23 Gratt. 871, 878. See the title **ARBITRATION AND AWARD**, vol. 1, p. 687.

**Delay in Prosecuting Claim for Ground Rents.**—See the title **GROUND RENTS**, vol. 6, p. 769.

**Between Guardian and Ward.**—See the title **GUARDIAN AND WARD**, vol. 6, p. 830.

## 2. Of Pendente Lite Purchaser.

Where the purchaser of property at a judicial sale had notice of a pending suit, setting up an adverse claim to the property, he is liable to the adverse claimants for rent, they being adjudged entitled to the property, although he immediately delivers possession, and shortly after, title, to another, who is insolvent. *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760.

## 3. Partnership Occupying Premises under Unauthorized Lease.

See ante, "Lease Executed by One Partner for Firm," III, B, 1, d.

## 4. Purchaser under Contract Held Void.

**Chargeable for Time Held.**—Where a purchaser under a contract with a married woman was deprived of his purchase by reason of the fact that the contract was held not to be binding upon her, he was chargeable with the fair rental value of the land while he had it in possession, in the condition in which it was at the time he took possession thereof. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572.

But the tenant was entitled to abatement on the amount of rent, with which he was chargeable, for the value of the improvements, and all taxes upon the land paid by him while in his possession. *Moore v. Ligon*, 30 W. Va. 146, 3 S. E. 572.

**Possession of Wrong Land by Mistake.**—Where the vendor of land delivers to the vendee by mistake other land, which does not belong to him, and the vendee is evicted, he will not be compelled to pay rent for the time he remained in possession, although he holds the full quantity purchased by certain metes and bounds. *Nelson v. Suddarth*, 1 Hen. & M. 350.

**Cotenant Occupying Whole Property.**—See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 8, p. 89.

## 5. When Part Only of Joint Lessees Take Land.

Where two of four joint lessees of land take possession in accordance with the agreement made between the owner and all of the lessees, the occupancy of the two is the occupancy of all, and they are all lessees of the landlord and are responsible to him in an action for use and occupation, regardless of their relations inter se. *Goshorn v. Steward*, 15 W. Va. 657.

## 6. Reception of Rent as Recognition of Tenancy.

See ante, "Tenancy Implied from Holding over," II, B.

## 7. Scaling Acts.

See the title **PAYMENT**.

## E. RIGHT TO RENT AND AP- PORTIONMENT THEREOF.

### 1. In General.

**Follows Ownership of Subject.**—The rents follow the ownership of the principal subject. *Harcum v. Hudnall*, 14 Gratt. 369, 381.

And a devise of the rents and profits is a devise of the land. *Hughes v. Tabb*, 78 Va. 313, 330.

**Tenant Can Not Question His Title.**—See post, "Estoppel of Tenant," VIII.

But if the tenant has enjoyed the land uninterruptedly under the lease, the plaintiff is entitled to recover, whether he had a title to the land or not. *Ross v. Gill*, 1 Wash. 87; *Thompson v. Pendell*, 12 Leigh 591, 601.

## 2. Of Purchasers from Lessor.

Pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the debtor lease the land to a tenant for three years from the first of April, unless there shall in the meantime be a decree of sale, in which case the tenant is to give possession on the first of April after the decree. A rent is reserved of \$300, to be paid at the end of each year of the tenancy, and according to the true construction of the lease, the tenant has a right to the crops growing on the land at the end of every year for which rent is reserved. In June of the third year, the land is sold under a decree in the creditors' suit, and the tenant applies to the purchasers for permission to proceed with the cultivation of the land; but one of the purchasers, in presence of the other (who had been one of the lessors), refuses, declaring that if the tenant sows the land, he, the purchaser, will reap the crop; and in consequence of this refusal the tenant proceeds no farther with his preparations for a full crop, though he remains in possession of the land the third year. A few days before the expiration of that year, the purchasers sue out an attachment against the tenant for \$300 rent to become due the first of April, upon the levy whereof the tenant gives to the sheriff bond and security for the rent. Judgment being obtained on this bond, the same is enjoined as to \$200, upon the bill of the tenant praying an abatement of the rent according to equity. It was held, by two judges, that, under the circumstances, the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of the \$300. *Mason v. Moyers*, 2 Rob. 606. See ante, "By Act or Agency of Lessor," IV, D, 1, b. (2). See the title FRAUD AND DECEIT, vol. 6, p. 448.

That there not having been an actual eviction, there was no remedy at law, and it was competent for the ten-

ant to come into equity upon the ground that he was entitled to an abatement; and the evidence justifying the allowance of \$200 as a fair abatement, the injunction should be perpetuated. *Mason v. Moyers*, 2 Rob. 606, 607. See the title FRAUD AND DECEIT, vol. 6, p. 448.

## 3. Of Purchaser at Judicial Sale.

Land was sold under decree of court after a contract had been made for its rental. The purchaser was complete owner from the day of sale, and was entitled to the rent falling due thereafter. *Taylor v. Cooper*, 10 Leigh 317. See the title JUDICIAL SALES AND RENTINGS, vol. 8, p. 648.

## 4. Under Sale by Lessor, Reserving Rents.

Where a tenement under a five-year lease is sold, by the lessor, during the first year, and the rent reserved on the lease it is agreed shall be received by vendor, to be taken as so much of the purchase money paid, it was held, that it was a sale of the tenement subject to the lease, the vendor reserving the rent; and the vendor did not waive his lien for the purchase money or any part thereof, by the stipulation in regard to the rent. *Kyles v. Tait*, 6 Gratt. 44.

**Liability of the Vendee for the Rent Reserved.**—If, in consequence of the absolute conveyance, lessor's right to enforce the collection of the rents was lost or impaired, the vendee incurred a personal obligation to account for the same to vendor if the rent was collected by him, or otherwise released by him. *Kyles v. Tait*, 6 Gratt. 44.

## 5. Of Guardian.

See the title GUARDIAN AND WARD, vol. 6, pp. 807, 808.

## 6. After Union of Term and Reversion.

See post, "By Merger of Term and Reversion," VI, B, 7.

## F. LIEN FOR RENT AND PRIORITIES.

See post, "Remedies for Breach of Lease and Recovery of Rent," IV, H.

**G. PAYMENT OF RENT.**

**Receipt Prima Facie Evidence.**—A receipt purporting to be in full of rent of real estate to a specified date, or other account, is only prima facie proof of settlement and may be overcome by contradictory evidence, and no rule of universal application as to the nature and sufficiency of such evidence can be formulated. *Anderson v. Davis*, 55 W. Va. 429, 47 S. E. 157.

**Casual Admissions.**—Casual admissions alone, although in writing, are insufficient to show payment of an acknowledged debt for rent, when payment is denied and the debtor, being called upon to prove it, fails to testify or introduce other evidence. *Anderson v. Davis*, 55 W. Va. 429, 47 S. E. 157.

Thus, as the distress warrant could only have covered the rent for one year, the making of the affidavit for it does not necessarily carry upon its face any implication of the payment of the rent for preceding years. *Anderson v. Davis*, 55 W. Va. 429, 434, 47 S. E. 157. See the title **DECLARATIONS AND ADMISSIONS**, vol. 4, p. 325.

**When Entitled to Additional Time.**

—Where the lessee of a mine has made frequent efforts to pay the rent, and the lessor has purposely prevented him, the lessee should be given additional time in which to pay the rent. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

**By Bond or Note.**—"The acceptance of a bond for rent (unless taken as the act directs) does not extinguish the rent; for that is higher than the bond." *Smith v. Ambler*, 1 Munf. 596, 599.

Where the evidence shows that notes were not expressly agreed, when they were received, to be absolute payment or extinguishment of the rent, it is clear beyond controversy that the receipt of these notes by the landlords of the tenant can not possibly be held to be absolute payment or an extinguishment of the rent. *Hornbrooks v.*

*Lucas*, 24 W. Va. 493, 496; *Smith v. Ambler*, 1 Munf. 596, 599, where distress was held legal, though a note had been given for the rent.

But not before default made on note. *Hornbrooks v. Lucas*, 24 W. Va. 493.

**H. REMEDIES FOR BREACH OF LEASE, AND RECOVERY OF RENT.****1. Damages for Breach of Lease.**

A lease for a period of two years, with the option of extending the lease three years longer, the lessor agreeing to build and equip the premises in a certain manner, is an entire contract, and upon breach thereof the lessee was entitled to recover damages, not only for the actual loss sustained down to the trial but the imminent and reasonably certain damages to ensue thereafter from such breach. *Hancock v. Whitehall Tobacco Co.*, 102 Va. 239, 46 S. E. 288.

**Failure to Develop Premises According to Contract.**—The remedy of the lessor of land for oil and gas purposes for the failure on the part of the lessee to develop the leased premises according to the contract, or to protect it from drainage from wells on adjacent property, is ordinarily by an action at law for damages. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

**Measure of Damages.**—Where there has been an entire abandonment by a lessee of his contract of rent, and a refusal on his part to carry it out, the lessor may recover at once, before the expiration of his term, compensation for the injury sustained by breach of the contract, and the measure of his damages is the difference between what he would have received under his violated contract, and what he actually receives from a sale of the lease, either at a private or public sale fairly made. *James v. Kibler*, 94 Va. 165, 26 S. E. 417.

**Purchase of Lease by Lessor No Waiver.**—The fact that the lessor put the lease up at public auction, after due

notice, and became the purchaser thereof, does not affect his right to recover damages for breach of the contract. *James v. Kibler*, 94 Va. 165, 26 S. E. 417.

For if the lessee abandons his contract and refuses to carry it into effect, the lessor may sell the lease and become the purchaser at the sale, and the lessee is bound for the resulting loss, if any. It is the duty of the lessor to relieve the lessee as far as possible from the consequences of his own fault. *James v. Kibler*, 94 Va. 165, 26 S. E. 417.

**Burden of Proof as to Value of Lease.**—If a lease is sold for the refusal of the lessee to carry out his contract of lease, the burden is on the lessee, in an action for damages, to show that the lease did not bring its value. The amount obtained at a public sale fairly made, after due notice to the lessee, is prima facie the true value. *James v. Kibler*, 94 Va. 165, 26 S. E. 417.

**Lease for Rent in Kind.**—Where a salt works was leased for two-thirds of the production, lessees binding themselves to produce at least 60,000 bushels per annum, so that the rent should not be less than 40,000 bushels for each year, and the lease was assigned; for the failure of the first lessees to manufacture 60,000 bushels of salt in one year, the proper action would be for the damages occasioned thereby, and to the extent of such failure, and not for a specific rent of 40,000 bushels of salt. *Prestons v. M'Call*, 7 Gratt. 121.

## 2. Assignment Carries Remedy.

See post, "Assignment and Subletting," VII.

The remedy follows the assignment of the rent; for the statute of the 32 Hen. cap. 34, and our act of assembly, destroyed the distinction of the common law between the grantor's right to distrain, and to re-enter, in the case of fee rents. *Marshall v. Conrad*, 5 Call 364.

For they give the same right of entry to the assignee, that the grantor had; and it makes no difference that the words of both extend to leases for years and estates for life only, as the reason is the same with regard to fee rents, which are within the equity of the laws. *Marshall v. Conrad*, 5 Call 364, 406.

## 3. Lien for Rent, and Priorities.

See the titles MARSHALING ASSETS AND SECURITIES; SUBROGATION.

### a. Relates to Beginning of Continuous Tenancy.

Where a lease was executed to commence on a certain date, for the term of three years, and there never was any surrender of this lease, either by agreement of parties or by operation of law or substitution of a new lease or agreement therefor, all three years constituted the same tenancy, and consequently any lien placed upon property upon the leased premises, and liable for the rent thereof, after the commencement of such tenancy, must be inferior to the lien of the lessor for one year's rent. *Wades v. Figgatt*, 75 Va. 575.

### b. Upon Personalty on Leased Premises.

See post "Amount Distrainable for," IV, H, 4, b.

### (1) In General.

By his contract of rental the landlord becomes the creditor of his tenant and the statute gives him a lien on the personal property of the tenant, placed upon the leased premises. *Huffard v. Akers*, 52 W. Va. 21, 27, 43 S. E. 124. See *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

At common law, all goods found on the leased premises were subject to the landlord's lien for rent, no matter to whom they belonged. *Richmond v. Duesberry*, 27 Gratt. 210, 213. See also, *Mosby v. Leeds*, 3 Call 439, 445, opinion of Lyons, J.

But by our statute the goods of the

lessee, or his assignee, or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days, are liable to distress. *Richmond v. Duesberry*, 27 Gratt. 210, 213.

**Property of Stranger.**—It was held in *Davis v. Payne*, 4 Rand. 332, that the property of a third person never was liable to distress for the rent of the tenant, unless it were found upon the premises; and even where it was found there, the distress was taken away by act, 1818, 1 Rev. Code, ch. 113, § 15.

The mischief or inconvenience of the common law, in relation to the rights of landlords, was, that they were allowed to distrain all goods and chattels found on the demised premises (with some few exceptions) even although the tenants might have no manner of property therein. The object of the legislature was to remedy this inconvenience by providing that goods of a third person on the premises should not be liable to distress. *Harvie v. Wickham*, 6 Leigh 236, 243.

**Material for Use in Building.**—But material placed upon leased property by a contractor, although prepared for use in a structure belonging to another, remains the property of the contractor until put into the structure, and liable to distress for rent of the leased premises, unless the contract otherwise provides. *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

And a provision for estimates, by the engineer, of the work done, which may include acceptable material, and the payment of a percentage of such estimate to the contractor, such material being included in it, will not change this rule. *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

Any lien created by such payment would be subordinate to the rent lien. *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

**Conveyance by Trust Deed of Property on Premises.**—A tenant, having

household furniture on the leased premises, conveyed it by deed of trust to trustees for payment of just debts; but the goods remained in possession of the tenant on the premises, and the lessor distrained them for rent in arrears. These goods were not exempted from distress within the meaning of 1 Rev. Va. Code, ch. 113, § 15. *Harvie v. Wickham*, 6 Leigh 236.

**Goods Already under Lien.**—If such goods, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to distress. *Richmond v. Duesberry*, 27 Gratt. 210, 213.

**Chattels under Unrecorded Conditional Sale.**—Where there is a conditional sale of chattels with title reserved in the vendor, and the chattels are placed upon leased premises by the vendee before the recordation of the contract of conditional sale, they are liable to distress for rent of such premises, for a period which began to run before the time of the sale and the actual recordation. *Huffard v. Akers*, 52 W. Va. 21, 28, 43 S. E. 124.

## (2) Compared to Tax Lien.

**Lien for Taxes Superior.**—The lien for taxes in West Virginia is superior to the landlord's lien for rent. *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762.

**Unaffected by Purchase by Lessee at Sale for Taxes.**—Goods are on leased premises, liable to rent. They are levied upon for taxes against the lessor, and sold therefor on the premises without removal, the lessee becoming the purchaser, and, he not paying the purchase money, two parties assume payment of it; and shortly after, while the property remains on the leased premises, the lessee executes to these two parties a deed of trust conveying such property to indemnify them against loss in case they should pay; the sheriff who sold the property still retaining possession after the execu-

tion of such deed of trust until actual payment to him, which payment is made by the parties who assumed it. After such payment the trustee takes possession of the property, and a distress for rent is made on the property within thirty days after its removal from the premises. It was held, that the distress for rent has preference over the deed of trust. *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762.

It is undeniable that the taxes had preference over the rent, and that had the third parties, or any one other than the lessee, purchased at the tax sale, they would have taken title free of the rent. *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762.

But when the lessee bought the property, at the sale for taxes, as he owed the rent, he simply extinguished the taxes as to the rent, and left the lien for rent no longer subject to them. *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762.

### (3) Goods Carried on and Afterwards Encumbered.

Goods carried on the leased premises and incumbered "after the commencement of the tenancy" are charged with a definite portion of the rent arising under the tenancy during the term, i. e., for one year, and not with the specific rent of any particular year or period of time. *Wades v. Figgatt*, 75 Va. 575; *Richmond v. Duesberry*, 27 Gratt. 210, 213; *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 1000.

"The landlord is protected by the statute against all deeds of trust, mortgages, and other liens, where the lien has been created after the commencement of the tenancy, upon goods on the leased premises which belong to a person liable for rent, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created." *Richmond v. Duesberry*, 27 Gratt. 210, 213; *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762. See *Jones v. Phelan*, 20 Gratt. 229;

*Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 1000; *Wheeling v. Baer*, 36 W. Va. 777, 15 S. E. 979.

Section 12, ch. 93, W. Va. Code, 1891, gives a lien for one year's stipulated rent, whether accrued or not, upon the tenant's goods carried on the premises over liens created after the commencement of the tenant's term by deed of trust, mortgage, or otherwise, though no distress warrant has been issued for such rent. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

"Section 11 gives it to him where it has accrued; § 12 gives it to him whether accrued or not, because accruing under a current tenancy. If the goods should remain on the premises, they would, when the rent should be due, be liable for one year's rent under a distress warrant in such case; and if any one under subsequent lien or legal process take the goods from the premises and frustrate a distress warrant for the rent when due, this section places the landlord where he would be under § 11, giving him right to one year's rent; and that right is manifestly a preference." *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 999.

Judge Christian says, in *City of Richmond v. Duesberry*, 27 Gratt. 210, 213, of the sections in the Virginia Code like those in West Virginia: "From these sections, it is plain that the intention of the legislature was to secure one year's rent to the landlord against all liens created by the tenant after the lease has commenced." *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762, 764.

"One year's rent" and "a year's rent" are used in the statute to denote the amount of rent to be distrained for in the one case and to be paid or secured in the other. And it matters not for what year it accrued, or whether it was before or after the creation of the lien, or whether or not other rents may have accrued after the lien was created

and been paid by the tenants. As long as any rent arising under the tenancy remains unpaid by the persons liable therefor, as soon as it becomes due the person entitled to it may distrain the goods for an amount not exceeding the rent for a year. *Wades v. Figgatt*, 75 Va. 575.

The payment of the rent for the first year, 1876, was no discharge of the prior right of the lessors or their assignee to "one year's rent," within the meaning of the statute, Va. Code, 1873, ch. 134, §§ 11, 12. It covered the rent for 1877. *Wades v. Figgatt*, 75 Va. 575.

**Removal by Lienor on Payment of Rent.**—"If after the commencement of any tenancy a lien be obtained or created by deed of trust, mortgage or otherwise, upon the interest or property in goods on premises leased or rented of any person liable for the rent, the party having such lien may remove said goods from the premises, upon condition that he pay rent that may be in arrear, and securing so much as is to become due, not being more altogether than one year's rent. See Code, 1860, ch. 138, §§ 11, 12." *Richmond v. Duesberry*, 27 Gratt. 210, 213.

"In ascertaining the rent to be 'paid or secured,' the reference is to the time of removal, not to the time the lien was created. It is of no consequence, therefore, what rent may have been paid by the tenant after the lien was created. Such payment does not exonerate the property encumbered from prior liability for what is due at the time of removal or to become due thereafter, not exceeding altogether a year's rent." *Wades v. Figgatt*, 75 Va. 575, 582. See Va. Code, 1904, § 2792.

**Removal of Goods without Paying Rent Due—Measure of Damages.**—See the title EXECUTIONS, vol. 5, p. 416.

Where an officer takes under execution, and removes, goods of a lessee, without paying the rent in arrear due to the landlord, in an action by the landlord against the officer for so do-

ing, not the amount of the rent arrear, but the value of the goods, is the just measure of damages. *Crawford v. Jarrett*, 2 Leigh 630.

Although, at common law, goods of a tenant taken in execution, though remaining on the premises, were not the subject of distraint, because they were in the custody of the law, and by the common law the landlord lost his lien upon the tenant's goods after the sheriff had levied on them; for an execution took precedence of all debts, except specific liens. *Sprinkle v. Rosenheim*, 103 Va. 185, 48 S. E. 883. See post, "After Removal from Premises," IV, H, 3, c.

**Marshaling.**—See the title MARSHALING ASSETS AND SECURITIES.

G. is tenant of a house and lot leased of S., and he gives a deed of trust on a part of the personal property in the house, to secure a debt to P., which is recorded. He afterwards gives another deed of trust on all the property in the house, to secure a debt of J. S. distrains for a year's rent upon the property embraced in the deed to secure P. By consent of all the parties, all the property conveyed in the deeds is sold, and after paying the rent there is a balance left. It was held, that S. is entitled to be paid first his year's rent, out of the proceeds of the whole property, if necessary; but the proceeds of the property not embraced in P.'s deed is to be applied first to pay S. *Jones v. Phelan*, 20 Gratt. 229.

After S. is satisfied, P. is entitled to have the balance of the proceeds of the property, embraced in his deed, applied to pay pro tanto his debt. *Jones v. Phelan*, 20 Gratt. 229.

#### (4) Priority of Trust Deed over Rent for Renewed Term.

A tenant under a lease for a term containing no agreement for renewal, executed a trust deed on personalty on premises. Afterwards landlord and tenant agreed on a renewal different

in terms from original lease. It was held, that the effect of the renewal was a new tenancy commencing after execution and record of trust deed, which had priority over lien for rent. *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. 195; *Wades v. Figgatt*, 75 Va. 575.

In *City of Richmond v. Duesberry*, 27 Gratt. 210, this court decided, reversing the judgment of the circuit court, that the deed of trust creditor was entitled to priority. And the decision was based on the ground that the original lease, which had been assigned, terminated on the first of January, 1872, when, by the holding over of the assignee, a new term commenced, and, therefore, that the lien on the furniture was created before the commencement of the tenancy on account of which the claim for rent was made. *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 323, 2 S. E. 195.

The fact that the holders of the notes secured knew that the instrument in question was being treated as a lease, does not at all change the effect of the instrument, conceding it to be a lease—that is to say, its effect was to create a new tenancy, the commencement of which was after the deed of trust was executed and recorded. *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 325, 2 S. E. 195.

In West Virginia the case of *Richmond v. Duesberry*, 27 Gratt. 210, is cited and quoted from in *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 1000; and also, in *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762. Both turn on the interpretation of the West Virginia statute, which contains the same provisions as the one construed in *Richmond v. Duesberry*.

#### (6) Landlord Has Insurable Interest.

Where a tenant owes rent to his landlord, the latter has an insurable interest in the tenant's furniture, while on the premises, as such furniture is liable by statute for the debt of the

tenant. *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209.

#### c. After Removal from Premises.

Although the landlord's right to distress the goods and chattels of his tenant, continues, in some cases, where the said goods and chattels have been removed from the demised premises, yet the landlord's lien for a year's rent, on the goods and chattels of his tenant, does not extend to protect them from being taken by virtue of any execution, except in cases where the said goods and chattels shall be in or upon the demised premises. *Geiger v. Harman*, 3 Gratt. 130, 131.

If, by the fraud of the tenant, in elotigning from the lands what might be subject to distress for rent, the landlord was in danger of losing his remedy, the common law permitted him to follow the goods, if he had sight of them; and the statute law has enlarged his remedy in certain cases. *Newton v. Wilson*, 3 Hen. & M. 470.

It had been held in *Mosby v. Leeds*, 3 Call 439, that a distress for rent can not be made off the demised premises, and in such case an attachment will be preferred to it. See ante, "Goods Carried on and Afterwards Encumbered," IV, H, 3, b, (3).

**Purchase of Salt—Possession Taken by Lessor—Destruction.**—The owner of a salt factory leased it, reserving rent in salt. In July the lessee sold to a third person all the salt then made, or that should be made before the next January, except what would be due the landlord for rent. The purchaser sent for the salt early in December. A boat of it being loaded, and being on the point of starting, the landlord forbade its being taken away, declaring he would warrant it for the rent. The sheriff then came, saying he had a warrant, and forbade the removal of the salt and the boatman left. The landlord took possession, and sent the boat down the river, where it was sunk. In an action of trover by the purchaser



against the landlord, it was held, that the salt belonged to the purchaser. *Lewis v. Arnold*, 13 Gratt. 454.

#### d. Interpleader.

See the title INTERPLEADER, vol. 7, p. 845.

A proceeding under § 6, ch. 107, W. Va. Code, 1887, to determine conflicting claims as to property distrained for rent, between the landlord distraining and a person claiming the property or its proceeds, is a statutory proceeding, solely to determine such conflicting claims; and there can not be rendered in such proceeding a judgment for money for the value of the property in favor of the landlord against the person making such adverse claim, though he has received the property or its proceeds. *Bartlett v. Loundes*, 34 W. Va. 493, 12 S. E. 762.

#### e. Exemption from Execution.

Section 6 of ch. 193 of the acts of 1872-73 of West Virginia so far as it excepts from the benefit of the exemption from execution debts due for rent, is in violation of § 48, art. 6, of the constitution and is therefore null and void. *Donaldson v. Voltz*, 19 W. Va. 156. This provision is now omitted from the Code. See § 32, ch. 41, W. Va. Code.

#### 4. Distress or Action.

**In General.**—"The remedy by distress for rent is regulated by statute (Va. Code, 1887, ch. 127) from which it appears that rent of every kind may be recovered by distress or action; that it may be recovered by him to whom the rent is due, and from the lessee or other person owing it." *Sprinkle v. Rosenheim*, 103 Va. 185, 187, 48 S. E. 883.

##### a. Right to Distrain.

**Constitutionality.**—In *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, the 14th amendment to the federal constitution was held not to render the state statute allowing distress for rent, unconstitutional and void.

**Necessity for Reversion.**—The rem-

edy for rent, if withheld when it ought to be paid, is by distress; and that of common right, provided the lord or lessor hath in himself the reversion, after the expiration of the lease. *Newton v. Wilson*, 3 Hen. & M. 470, 483.

#### Lease Void as to Part of Premises.

—When the same premises are demised to two different tenants, under separate leases, executed at different dates, if the lessee under the first lease is in possession of part of the premises, so that the lessee under the second lease can not get possession thereof, then the second lease is void as to that part of the premises, and the lessor can not distrain for a proportion of the rent. *Tunis v. Grandy*, 22 Gratt. 109.

**Rent Must Be Due and Unpaid.**—*Wades v. Figgatt*, 75 Va. 575; *Huffard v. Akers*, 52 W. Va. 21, 28, 43 S. E. 124.

But when rent is in arrear, the landlord may issue his distress warrant. *Hancock v. Whitehall Tobacco, etc., Co.*, 100 Va. 443, 447, 41 S. E. 860.

That is, where it is payable quarterly, at the end of each quarter, distress may be made, though the term of the lease may be 99 years. *Redford v. Winston*, 3 Rand. 148, 154.

**Rent Payable in Advance.**—Rent may be payable in advance, by contract, and such rent may be distrained for, if not paid when due. *Williams v. Howard*, 3 Munf. 277.

**Rent Must Be Due by Contract.**—"Certainly, if the rent claimed was not due by contract, there was no right of distress. It was of the essence of the right to distrain, that there should have been a contract. In the absence of a contract, the distress was illegal." *Carter v. Grant*, 32 Gratt. 769, 771.

**Where Note Given for Rent.**—A landlord taking the negotiable note of his tenant for rent, may not distrain or sue for the rent until the maturity and nonpayment of the note. *Hornbrooks v. Lucas*, 3 W. Va. 493. See ante, "Payment of Rent," IV, G.

It can not be inferred that a fraud has been committed by the tenant on his landlords by inducing them to accept for his rent this negotiable note, there being nothing in the case even relied upon to show such fraud except the simple fact, that on the same day, on which he delivered the note for the rent, "he executed a general assignment of effects without giving his landlords notice of his intention to make such assignment." Such an inference of fraud from this simple fact, if it could be fairly drawn, would be, it seems to me, rebutted by the fact that the agreement by the landlords to accept this negotiable note was made two weeks before this general assignment, and there is nothing whatever to show, that, when this agreement was made, the tenant contemplated making any such general assignment, and nothing to show, that he was insolvent, either when he made this agreement, or when he delivered to his landlords this note for his rent. *Hornbrooks v. Lucas*, 24 W. Va. 493, 496.

"This defense could be legitimately made in this case on the oral pleadings and the filing, as a specification of set-off and payments, the two negotiable notes given for the rent, as in this case the law required no regular pleadings to be filed, but it was a summary proceeding upon motion." *Hornbrooks v. Lucas*, 24 W. Va. 493, 504.

**Lease of Land with Slaves.**—It seems, that on a lease of a tract of land, with sundry slaves and other personal property, reserving, by way of rent, a gross sum, payable annually, the remedy by distress might have been resorted to, without any express stipulation. *Williams v. Howard*, 3 Munf. 277.

**Must Be within Five Years.**—Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not. *Sprinkle v. Rosenheim*, 103 Va. 185, 48 S. E. 883; *Redford v. Winston*, 3 Rand. 148, 159.

**Insolvency of Landlord No Ground for Injunction.**—A court of equity in this state will not enjoin an insolvent landlord from issuing a distress warrant for rent merely because the tenant had large set-offs against the landlord's demands. *Hancock v. Whitehall Tobacco, etc., Co.*, 100 Va. 443, 41 S. E. 860.

**Right to Distrain and Priority over Other Liens.**—See ante, "Payment of Rent," IV, G; "Lien for Rent and Priorities," IV, H, 3.

**Presence on Leased Premises—Necessity.**—See ante, "After Removal from Premises," IV, H, 3, c.

#### b. Amount Distrainable for.

**Under Lease Providing for Surrender on Default.**—Where a lease of land provides for the surrender of possession upon any default in the payment of rent, without any further notice, the lessor may include in a distress warrant the rent up to the date on which it is issued and the tenancy terminated, as well as the rent up to the end of the last monthly term, the rent being payable by the month. The whole amount is then due. *Huffard v. Akers*, 52 W. Va. 21, 28, 43 S. E. 124.

**Where There Are Other Liens.**—The distress may not be for an amount exceeding the rent for one year. *Wades v. Figgatt*, 75 Va. 575; *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 999. See ante, "Upon Personality on Leased Premises," IV, H, 3, b.

**Where No Other Lien Created Prior to Levy.**—A distress warrant for rent, duly issued and levied on the goods of a tenant found on the leased premises, has priority over executions subsequently issued and levied on said goods, though the distress be for more than a year's rent, provided the goods are distrained within five years from the time the rent becomes due. *Sprinkle v. Rosenheim*, 103 Va. 185, 48 S. E. 883.

The object of § 2791 of the Virginia Code was to protect the landlord

against the liens created upon the property upon the leased premises and subject to distress, after the tenancy began, by providing that liens so created should be ineffectual to defeat the landlord's right to recover for one year's rent; and it was not intended to affect the right of the landlord to distrain for rent within five years from the time it became due, where no other lien had been created prior to the time the distress warrant was issued and levied. *Sprinkle v. Rosenheim*, 103 Va. 185, 48 S. E. 883.

A distress warrant actually sued out could bind only for one year's rent actually accrued, as against subsequent liens. More rent may have become payable, but as to subsequent liens it could operate only for a year's rent; but its positive effect is to give a levy for one year's rent against subsequent liens, whether the rent accrued before or after the birth of the liens. The section gives no limit as to the tenant. It may, as to him, be levied for rent for a period longer than a year. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 999.

**Distress for Rent in Kind Limited by Actual Production.**—Salt works were leased for a rent of two-thirds of the salt produced, with a covenant to manufacture a certain amount each year at least, and with other conditions as to the delivery of the rent and termination of the lease in case of default; the rent to be distrained for or recovered by the lessors from the lessees in any one year, was to be governed by quantity of salt actually manufactured. The remedy for a failure to make the minimum quantity would be an action for damages, not distress for a proportionate amount. *Prestons v. McCall*, 7 Gratt. 121.

**Proportionate Part of Minimum Rent or Royalty.**—A tract of land is leased for the purpose of mining coal thereon, and is assigned. The lessors reserved as royalty ten cents for every ton pass-

ing over a certain screen, and five cents a ton for every ton passing through the screen. The lease also provides that the minimum rental should be \$3,000 regardless of the amount of coal mined. A distress warrant being sworn out, and a receiver appointed, the works were closed, with five months' rental unpaid, for which the royalty on the coal actually mined amounted to \$500 for the five months, which was decreed to be paid to the lessors. It was held on appeal that the lessors were entitled to five-twelfths of \$3,000, which should have been decreed to them for unpaid royalty. *Coaldale, Min., etc., Co. v. Clark*, 43 W. Va. 84, 27 S. E. 294.

### c. Proceedings to Obtain.

#### (1) In General.

The distress shall be made by a constable, sheriff, or sergeant of the county or corporation wherein the rented premises yielding the rent, or some part thereof, may be, or the goods liable to distress may be found, under warrant from a justice, founded upon an affidavit of the person claiming the rent, or his agent, that the amount of money or other thing to be distrained for (to be specified in the affidavit), as he verily believes, is justly due to the claimant, for rent reserved upon contract, from the person of whom it is claimed. Sections 2787-2790 (Va. Code, 1904) inclusive. *Sprinkle v. Rosenheim*, 103 Va. 185, 48 S. E. 883; *Carter v. Grant*, 32 Gratt. 769, 776.

"The 'amount of money or other thing to be distrained for' should be truly stated, but it is not every variance that would defeat a recovery." *Carter v. Grant*, 32 Gratt. 769, 776.

"At common law the landlord himself, without warrant, seized his tenant's goods, or some one authorized by him by his warrant. *Smith v. Ambler*, 1 Munf. 596." *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 1000.

The remedy by distress was formerly complete, and in the hands of the landlord himself, if there were anything upon the lands which might be distrained. *Newton v. Wilson*, 3 Hen. & M. 470, 484.

By ch. 61, acts, 1834-35, in Virginia, this right of the lessor to make his own distress was abolished and he was required to sue out a warrant from a justice upon affidavit. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998, 1000. See post, "Levy," IV, H, 4, d.

## (2) Warrant and Affidavit.

### Warrant Must Be in Name of State.

—A warrant of distress is a writ, within the meaning of the constitutional provision requiring writs to run in the name of the state. *Beach v. O'Reily*, 14 W. Va. 55.

### Certainty in Describing Premises.—

A distress warrant ought not to be quashed for uncertainty in describing leased premises, where the description was: "A certain messuage and tenement situated in the city of Huntington, in Cabell county, West Virginia, rented by the Central Land Company to F. J. Calhoun"—it not being necessary to describe the premises in such a case as is necessary in case of a conveyance. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

**Affidavit—By Whom Made.**—"Under the statute (§ 10, ch. 93, Code), the affidavit for the distress warrant may be made by the party claiming the rent, or his agent." *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4, 7.

**Authority of Agent.**—And authority from a landlord to an agent to receive tenants for his property, "receive rents and pay for repairs and insurance." does not authorize the agent to sue out a distress warrant for rent in arrear, and levy it on the property of the tenant. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

**Return.**—A distress warrant, not being judicial process, need not be made

returnable before a justice or court. If made returnable to the justice, it is good. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998. See post, "Determination of Value of Rent in Kind," IV, H, 4, f.

## d. Levy.

### Officer May Make Second Levy.—A

writ of fieri facias, after being levied on property insufficient, in the opinion of the officer making the levy to satisfy the writ, may be levied on other property at any time on or before the return day of the writ. The same principle applies to a distress warrant, except that it has no return day, and may be levied at any time; at least, if it be a reasonable time after it is placed in the officer's hands. *Brooks v. Wilcox*, 11 Gratt. 411, 416.

**By Private Person.**—At common law, a distress might be levied by the landlord or by any private person authorized by the landlord for that purpose. *Ferguson v. Moore*, 2 Wash. 54, 57; *Smith v. Ambler*, 1 Munf. 596.

## e. Sale.

**By Proper Officer.**—Property distrained for rent can be sold only by an officer duly qualified as such, as by a sheriff or constable. *Ferguson v. Moore*, 2 Wash. 54.

### Landlord Can Not Sell—Property a Pledge.—

Although a landlord may levy a distress warrant personally or by means of an agent, he can not sell the distrained effects, which in such case are only to be held as a pledge to compel the tenant to pay the rent. *Smith v. Ambler*, 1 Munf. 596.

**Surplus Belongs to Tenant.**—In a proceeding by distress for recovery of rent, under ch. 113, 1 Rev. Va. Code, 1819, where the value of rent in arrear has been found by the jury, and the court orders an officer to sell the property distrained, the proceeds of the sale after the deduction of the rent, interest and costs, should be turned over to the tenant. *Brooks v. Wilcox*, 11 Gratt. 411.

#### f. Determination of Value of Rent in Kind.

**Where Application Made.**—The statute providing for the ascertainment of the value of rent distrained for, where reserved in things other than money, gave the landlord a right to make the application to the circuit or county court at his election. Where he made it to the circuit court, but withdrew it by the leave of that court before it was finally acted on, he had a right to make it to the county court. There was no necessity for a new affidavit and warrant to authorize the proceedings in the county court. *Brooks v. Wilcox*, 11 Gratt. 411, 415. The statute now says (Va. Code, 1901, § 2795) the court of the county or corporation in which the distress was made.

**Proof of Distress for Rent So Reserved—Object of Jury.**—The only object of the proceeding before a jury in the case of a distress for rent, is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a distress warrant has been levied for rent in something other than money, and that it is due and in arrear. *Brooks v. Wilcox*, 11 Gratt. 411.

"Of course the court would not entertain an application for an inquiry as to the value of the rent, without being satisfied that rent reserved on something other than money had been distrained for. The warrant and return would be sufficient evidence of that fact. If the notice stated the fact with sufficient certainty, and the tenant did not controvert it, the court, without requiring further evidence, might properly proceed to ascertain the value of the rent, either by their own judgment, or if required by either party, by the verdict of a jury." *Brooks v. Wilcox*, 11 Gratt. 411, 418.

**Oath of Jury.**—The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascer-

tain the rent "said to be due." *Brooks v. Wilcox*, 11 Gratt. 411.

**Value of Rent Ascertained—Order of Court.**—The jury having ascertained the value of the rent in arrear, the court makes an order directing the officer to sell the property distrained as is directed by law, and after satisfying the rent due, with interest and costs, to pay over the balance to the tenant. This is substantially in accordance with the statute. *Brooks v. Wilcox*, 11 Gratt. 411.

"No judgment is rendered against the tenant. The only object of the proceeding is to ascertain the value in money of the rent in arrear. When the value in money of the rent in arrear is ascertained, the landlord is placed in the same situation in which he would have stood if the rent had been reserved in money. The officer proceeds in the same way to complete the execution of his duty under the warrant; and the remedies of the tenant for a wrongful distress are the same in the one case as the other." *Brooks v. Wilcox*, 11 Gratt. 411, 417.

#### g. Wrongful Distress.

##### (1) Remedies by Action.

See generally, the title TRESPASS.

"There are various actions that may be maintained by tenants against their landlords; as, 1st, trespass or case under the statute, 1 Rev. Code, ch. 113, § 5, for a distress made when no rent is in arrear and due, a remedy given in England, by the statute of 2 W. & M. Stat. 1, ch. 5, § 5. 2d, An action for excessive distress, given by our statute, *Ibid.* § 31, which is similar to the English statute of Marl. 52, II. 3, ch. 3. A simple action of trespass did not lie at common law in such case; for at common law, the landlord might distrain for more than the rent in arrear, so as to make it the interest of the party to redeem the goods by paying the rent; *Lynne v. Moody*, 2 Stra. 851. 3d, A special action on the

case lies for distraining for more rent than is due, whereby the tenant has been obliged to pay a larger sum than was justly due, besides costs, etc. And 4th, in England, an action lies under the statute of 51 H. 3, for distraining beasts of the plough and sheep, there being other sufficient distress on the premises." *Jones v. Murdaugh*, 2 Leigh 447, 449.

"And all of them go upon the relation of tenant and landlord, admitted and stated in the declaration." *Jones v. Murdaugh*, 2 Leigh 447, 450.

**Goods Not Sold—Trespass and Case May Both Be Brought.**—Where a distress is made for rent pretended to be due, when there is none due, and the goods distrained are not sold, the remedy is by action at common law, and trespass may be maintained. But the party suing is not obliged to bring trespass, as he may waive the trespass and bring case. *Olinger v. McChesney*, 7 Leigh 660. See the title TRESPASS.

**Replevin Sued Out and Not Prosecuted Will Not Prevent Action on the Case.**—Where there is a wrongful distress, the fact that the party distrained upon sued out a writ of replevin which was never prosecuted, will not prevent him from maintaining case for the wrongful distress. Case will lie for suing out an attachment for rent maliciously and without probable cause. *Olinger v. McChesney*, 7 Leigh 660.

**Declaration—Allegations.**—In an action under 1 Rev. Va. Code, ch. 113, § 5, for wrongful distress for rent when no rent is in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and the defendant, otherwise it is bad on general demurrer. *Jones v. Murdaugh*, 2 Leigh 447. See Va. Code (1904), § 2898.

"According to approved authorities, it is sufficient, in an action for a wrongful distress, for the plaintiff to charge that the defendant unlawfully and with

force and arms took and seized his goods in the name of a distress for rent, upon a demise of the land (averring that no rent was due) without specifying the particulars of the demise itself." *Olinger v. McChesney*, 7 Leigh 660, 667.

**Variance.**—In an action on the case for wrongful distress, the plaintiff alleged that he held under a lease for five months for twenty dollars payable in repairs and labor. It appeared at the trial that the lease was for twelve months and for money rent of sixty-five dollars. The variance was fatal. *Olinger v. McChesney*, 7 Leigh 630.

**Measure of Damages.**—In an action, under § 2898 of the Virginia Code (1887), to recover damages for distraining property for rent not due, in the absence of any charge of fraud, malice, oppression, or other special gravation, the measure of the plaintiff's damages is compensation for the injury suffered—such damages as are the natural and proximate result of the injury complained of. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

Thus, in an action under § 2898, Va. Code, 1887, for damages on account of illegal distress for rent, the declaration alleged that the defendant levied on \$975 of goods to satisfy a claim for rent amounting to \$400, and that in fact there was no rent due, and that the plaintiff thereby incurred expenses and losses by reason of being deprived of gains in his business. There being no allegation showing circumstances of aggravation, only compensatory damages could be recovered. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

**Loss of Unlawful Detainer Suit as Evidence.**—Where rent is payable by the month, and a distress warrant is sued out for rent in arrear, and three months before and two months after suing out such warrant, actions of unlawful detainer are sued out by the landlord against the tenant to recover

possession of the leased premises, and there was judgment in both in favor of the defendant, these judgments although between the same parties, are not evidence that no rent was due at the time the distress warrant was sued out. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354.

## **(2) Unlawful Distress by Agent—Landlord's Liability.**

See the title AGENCY, vol. 1, p. 274.

## **h. Tenant's Right to Defend.**

Equity will not enjoin a tenant from disputing his liability for the rent, or the fulfillment by the landlord of his part of the contract, in a case not involving a rescission of the contract of lease. In each case the party has an adequate remedy at law. *Hancock v. Whitehall Tobacco, etc., Co.*, 100 Va. 443, 41 S. E. 860.

"If a tenant wishes to make defense he gives a forthcoming bond, which, when forfeited, the officer returns to the county court. See Code, §§ 2787, 3004, and 900. When motion is made for judgment upon this bond, the tenant may make any defense which shows that the rent is not due (§ 3621, Va. Code), and it was expressly decided in *Allen v. Hart*, 18 Gratt. 737, that set-off is an admissible defense upon a motion in a forthcoming bond taken under a warrant of distress." *Hancock v. Whitehall Tobacco, etc., Co.*, 100 Va. 443, 447, 41 S. E. 860. See the title FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 411.

## **i. Equitable Relief from Excessive Distress for Rent.**

A tenant complaining of distress made for more rent than was in arrear and due, not having restored to an action of replevin for redress, nor showing any reason for failing to resort to his remedy at law, is not entitled to relief in equity. *Mayo v. Winfree*, 2 Leigh 370.

Even if the landlord should distress property as being fraudulently removed

from the premises, and should not show that it was so fraudulently removed, nor that the distress was levied within the time allowed by law, nor that the property ever was on the demised premises, the tenant ought not to seek his redress in a court of equity, but by damages at law. *Davis v. Payne*, 4 Rand. 332.

## **j. Forthcoming and Replevy Bonds for Distraigned Property.**

See the titles DETINUE AND REPLEVIN, vol. 4, p. 634; FORTHCOMING AND DELIVERY BONDS, vol. 6, pp. 415, 416, 421, 422, 436, 438, 445.

## **5. Motion on Bond for Distraigned Property.**

A landlord is not entitled to the summary remedy by motion on a three months replevin bond, unless it appears that such bond was taken by the sheriff or other officer legally authorized to make distress and sell the distraigned effects. *Smith v. Ambler*, 1 Munf. 596; *Ferguson v. Moore*, 2 Wash. 54, 57. See the titles DETINUE AND REPLEVIN, vol. 4, p. 634; FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 411.

## **6. Specific Performance.**

See the title SPECIFIC PERFORMANCE.

**Right in General.**—An executory lease that is unfair, unjust or unreasonable will not be enforced in equity. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

And where an agreement to make a lease is entered into upon certain terms, the party to whom the lease is to be made can not enforce a specific performance, unless he performs his part of the agreement, or offers to perform, and shows that he is willing and able to do so. *Harvie v. Banks*, 1 Rand. 408.

**Purchaser of Agreement for Lease—Forfeiture.**—The purchaser of an agreement for a lease and those under whom he claims, having committed such acts as would have amounted to

a forfeiture, had a lease been actually executed with such covenants as were usually inserted in leases to other tenants of the same estate, shall not have the aid of a court of equity, to enforce a specific performance, against a judgment at law recovered by a purchaser of the fee simple estate. *Jones v. Roberts*, 3 Hen. & M. 436. See *Jones v. Roberts*, 6 Call 187.

**7. Suit in Equity.**

A mere pecuniary demand for rent or royalties proceeding out of land, can not be recovered by suit in equity, without other grounds of equitable jurisdiction. *Zinn v. Zinn*, 54 W. Va. 483, 46 S. E. 202.

**8. Attachment for Rent.**

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 83.

**9. Covenant, Action of.**

See the title COVENANT, ACTION OF, vol. 3, p. 731.

**10. Debt, Action of.**

To the other remedies for the recovery of rent the action of debt was superadded in certain cases, by the common law; and that remedy has been still further extended by statutory provisions. *Newton v. Wilson*, 3 Hen. & M. 470, 484; *Cooke v. Wise*, 3 Hen. & M. 463. See ante, "Interest on Rents," IV, D, 1, e. See Va. Code (1904), § 2787.

**11. Recovery for Use and Occupation.**

See the title ASSUMPSIT, vol. 2, p. 1.

**V. Rights, Duties and Liabilities as to Possession and Use of Premises.**

**A. AS BETWEEN LANDLORD AND TENANT.**

**1. As to Possession.**

**a. In General.**

**Landlord's Right Gone.**—A landlord, by leasing premises and placing a tenant in possession, transfers both the possession and the right to the possession to the tenant during the term

of the lease, and during the term he can have no more right to enter than a stranger. All his rights, so far as the possession was concerned, were absolutely vested in his tenant. *Chan- cey v. Smith*, 25 W. Va. 404, 407; *Storrs v. Feick*, 24 W. Va. 606; *Duff v. Good*, 24 W. Va. 682.

**Illegal Search of Premises by Land- lord—Effect.**—The landlord of a tenant at will may peaceably enter the premi- ses, but an illegal search for stolen goods makes him trespasser ab initio. *Faulkner v. Alderson*, Gilmer 221.

The right of the landlord to enter to determine the lease, in case of an estate at will, if this was such, can not justify such a trespass as is here complained of. *Faulkner v. Alderson*, Gilmer 221, 226.

**Tenant's Possession That of Land- lord.**—See post, "Estoppel of Tenant," VIII.

Where a tenant is put in possession by a party having title to land and in fact the rightful owner of it, and remains on it, setting up no title in himself, his possession is, in law, that of the party so putting him on the land. *Genin v. Ingersoll*, 2 W. Va. 558; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757; *Virginia Mining, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. 689; *Emerick v. Tavener*, 9 Gratt. 220; *Allen v. Paul*, 24 Gratt. 332.

**Scope of Principle.**—The tenant's possession is that of the landlord. And so it is the possession of any one claiming title to the same property under the landlord's title, where such title is recognized by the tenant by pay- ing rent or otherwise. *Virginia Min- ing, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. 689.

**Possession of Tenant as Notice.**— "Possession by a tenant is notice, not only of his right, but also of his land- lord's." *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183, 193.

"When a purchaser has been put



upon inquiry by the possession of a tenant, and upon making such inquiry receives information as to the tenant's claim, he may rely on such information, in the absence of anything to give notice of its falsity." *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183, 185.

**b. Duty to Put Lessee in Possession.**

See ante, "Covenant for Quiet Enjoyment," III, D, 4, c; post, "Mere Failure to Deliver Possession," VI, B, 10, a, (4).

**Tenant's Remedies.**—Where a tenant was enjoined by landlord from enjoying the rented premises and the injunction was dissolved, in addition to his remedy on the injunction bond, tenant may recover damages by action on the case for the injury done him by being improperly enjoined. *Hubble v. Cole*, 88 Va. 236, 13 S. E. 441. See the title INJUNCTIONS, vol. 7, p. 512.

And the fact that the lessee has a right of action on the injunction bond will not bar his action of covenant. *Hubble v. Cole*, 88 Va. 236, 13 S. E. 441, 29 Am. St. Rep. 716, 13 L. R. A. 311.

**Failure to Deliver Possession—Measure of Damages.**—In an action for damages for failure of the landlord to give possession of property which had been leased, or from which he has ejected the tenant, where the gist of the action is the deprivation of the benefit of the lease, whether the action is covenant or tort, the general rule is that the plaintiff is entitled, as the measure of the damages, to the difference between the rent reserved and the value of the premises for the term. He may also recover such special damages as have directly and necessarily been occasioned by defendant's wrongful act or default, but can not recover what he might have made on the premises during his lease, nor for loss sustained by selling his stock, implements, etc., for less than their value. *Robrecht v. Marling*, 29 W.

Va. 763, 2 S. E. 827; *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 13; *Newbrough v. Walker*, 8 Gratt. 16.

In an action of covenant for the failure to deliver to the plaintiff possession of a mill which he had rented of the defendant, the plaintiff not having sustained any special damage, he is entitled to recover only the difference between the rent contracted to be paid, and a fair rent for the property at the time when it should have been delivered. A conjectural estimate of the profits which might have been made, is no legitimate basis upon which to fix the damages. *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127.

**c. After Forfeiture or Abandonment.**

If the tenant forfeits his lease, or entirely abandons the premises, then the right to the possession reverts to the landlord and he may lawfully enter. *Chancey v. Smith*, 25 W. Va. 404, 407; *Mitchell v. Carder*, 31 W. Va. 277.

But the fact that the lessee moved off the premises without abandoning them, or an intention to do so, did not amount to a vacation of the possession or a forfeiture of his lease, entitling the landlord to enter and put another tenant in possession. *Chancey v. Smith*, 25 W. Va. 404, 407.

**2. Relation Not Confidential.**

There is nothing confidential in the relation of landlord and tenant to make communications between them privileged under the law of slander and libel. *Dillard v. Collins*, 25 Gratt. 343. See the title LIBEL AND SLANDER.

**3. Tenant's Interest in Leased Premises.**

**Right to Appropriate Things Not Property.**—A lessee having the legal right to enter upon and occupy any portion of the premises, he could, without becoming a trespasser or incurring any liability to the lessors, use and appropriate anything he might find thereon, which is not the property of another, such as animals *feræ naturæ*, or waters percolating through

the land, even though such use and appropriation may deprive another, having an equal right, of the power to do so. These are not the subjects of absolute property and being therefore, *jure naturæ*, capable of a qualified ownership only, they belong to him who first appropriates them. *Wood County Petroleum Co. v. Transportation Co.*, 28 W. Va. 210, 215.

**Oil Severed from Freehold.**—The word "lease" has a definite legal significance; and a contract in writing selling a "lease" does not carry with it oil, that had theretofore been pumped from an oil well on the leasehold so sold. *McGuire v. Wright*, 18 W. Va. 507; *Dresser v. Transportation Co.*, 8 W. Va. 553. See the title MINES AND MINERALS.

#### 4. Restrictions as to Use.

**In General.**—When a lessee is, by the terms of his lease, restricted to a particular use of the demised premises, equity will, generally, restrain him from any other use of them, even though no irreparable injury be shown to result from such use. *Frank v. Brunnemann*, 8 W. Va. 462. See the title INJUNCTIONS, vol. 7, p. 530.

**Covenant to Farm without Unnecessary Injury to Land.**—Where it appears by the terms of a lease that all of the land was rented without restrictions as to its cultivation, except that the land should be farmed in a way to prevent injury, in so far as injury could reasonably be prevented; and it appears by the evidence that a certain bottom set in blue grass had been in corn twelve or fifteen times in the past thirty years; that it was the best husbandry to plow this, as it never washed, as did other portions of the farm, but was the best for corn, and the most easily reset in grass, it was held, that an injunction restraining lessee from cultivating it in corn should be dissolved. *Hubble v. Cole*, 85 Va. 87, 7 S. E. 242.

The covenant is, to farm without

unnecessary injury to the land; that is, to farm it in a husbandlike manner. Whether it is an act of good husbandry to plow up the land which is the subject of this dispute or not, can not be determined by an inspection of the contract, and resort must be had to the custom among farmers in the neighborhood, and the character of the land itself, the subject of the contract. *Hubble v. Cole*, 85 Va. 87, 92, 7 S. E. 242.

**Erection of Building without Permission.**—See the title INJUNCTIONS, vol. 7, p. 530.

#### 5. In Laying Out Reserved Right of Way.

A lessor reserving a right of way, must use his own judgment fairly in laying out the way, and, if he does this, may do so unrestrictedly, unless restricted by the terms of the lease. He can not exercise it arbitrarily, to the unnecessary damage of the lessee. *McKell v. Collins Colliery Co.*, 46 W. Va. 625, 33 S. E. 765.

#### 6. As to Repairs.

##### a. Lessor's Duty to Repair or Rebuild. (1) In Absence of Express Covenant.

**Not Bound to Repair.**—Unless a lease provide for repairs by a landlord, he is not bound to either repair or rebuild in case of accidental destruction. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149; *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751; *Hoyleman v. Kana-wha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

"The law does not require a lessor to rebuild a house destroyed by fire without a covenant to do so in terms or a general covenant to repair. 18 Am. & Eng. Ency. Law 226 (2d Ed.); *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776." *Arbenz v. Exley*, 52 W. Va. 476, 483, 44 S. E. 149.

**Mere Parol Promise Insufficient.**—Nor would the lessor be bound by a parol promise to make repairs, if such

promise is founded only upon the relation of landlord and tenant. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

The lessee will be confined to the terms of the written contract declared upon, and can not recover upon a verbal contract or understanding made or had contemporaneously with said written lease. *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11.

**When Not Implied.**—When a written lease of property provides that the lessee shall keep the same in repair, except as to unavoidable accident and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents. *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 52 Am. St. Rep. 872, 33 L. R. A. 449; *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11.

**Lessee Can Not Repair and Hold Him Liable.**—"Washburn on Real Property (vol. 1, p. 537, § 7) states the law as follows: 'Without an express covenant on the part of the lessor, he can not be held liable for repairs made by the tenant upon demised premises. Nor would he be bound by a parol promise to make repairs if such promise is founded only upon the relation of landlord and tenant.'" *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

A tenant can not make permanent improvements, and charge the landlord therefor, without the latter's consent. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776; *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858.

## (2) Under Covenant to Repair.

**Independent of Covenant to Pay Rent.**—The landlord's covenant to repair and the tenant's to pay rent are independent covenants, and at common law a breach of the former is no defense to an action on the latter. And this still remains the law, both in England and the United States. *Arbenz*

*v. Exley*, 52 W. Va. 476, 484, 44 S. E. 149.

He is bound only so far as his covenant goes. His covenant to repair is independent and does not release from rent, and is to be enforced by recouping damages in an action for rent (*Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751), or by a separate action for damages. *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

**Under Covenant to Keep Roof in Order.**—Where a lease contained no general covenant to repair or rebuild, but only the limited one to keep the roof in order, as neither the written lease nor the law required the lessor to rebuild, of course this clause as to repair of the roof had no application after a fire destroyed the house. *Arbenz v. Exley*, 52 W. Va. 476, 483, 44 S. E. 149.

**Tenant's Remedies.**—"In 12 Am. & Eng. Ency. Law 748, the law as to landlord is stated as follows: 'Where the landlord has agreed to repair, and does not do so, it is no defense in an action to recover the rent. The tenant's remedy in such case is an action on the landlord's covenant to repair, or he may set off or counterclaim his damages or he may make the repairs himself, on failure of the landlord after notice, and deduct the costs from the rent, or he may abandon the premises if the repairs are not made at the time agreed upon, provided he does so at once after default of the landlord.'" *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751.

**Tenant May Repair and Recoup Cost.**—If a landlord covenants to make repairs to premises, the tenant may notify him to do so; and, if he fails or refuses to comply with such covenant in a reasonable time, the tenant may make the repairs, and, in an action instituted by the landlord, may recoup the same as offsets or payment against the rent demanded. *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751; *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

But where a written lease provides for a tenant being "credited on the rents with all improvements and repairs," but does not specify what improvements and repairs would be allowed, it should be construed to refer to permanent improvements and repairs, not those which the tenant would be bound by law to do. The language is not definite enough to change what would otherwise be a legal rule. *Winston v. Stewart*, 48 W. Va. 488, 37 S. E. 603.

**Damages from Failure to Make Repairs as Set-Off to Rent.**—A lessor covenants to put certain repairs upon the demised premises, which he fails to do. In an action of replevin upon a distress for the rent, the tenant may set off the damages accrued by the failure of the lessor to make the repairs, under the 62d section of the act, Sup. Rev. Code, p. 157. *Caldwell v. Pennington*, 3 Gratt. 91. See *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

**Failure to Repair as Ground for Abandonment.**—Failure to repair does not warrant abandonment, unless the property is therefrom untenable, and remaining in possession after breach is a waiver of right to abandon. *Arbenz v. Exley*, 52 W. Va. 476, 483, 44 S. E. 149.

**Time Allowed for Making Repairs.**—"The landlord is not bound to make repairs unless he covenant in the lease to make them. But when he does covenant to make repairs, and no time is specified in which to make them, he must make them within a reasonable time, so that the lessee may have the benefit of them." *Cheuvront v. Bee*, 44 W. Va. 103, 28 S. E. 751.

#### b. Lessee's Duty to Repair or Rebuild.

##### (1) Under Covenant to Keep Premises in Repair.

**Common-Law Rule.**—It is well settled, at common law, that where the lessee of premises covenants to keep them in repair he is bound to keep

them in repair, unless otherwise stipulated in the lease, even though the premises are destroyed by unexpected and unprecedented means and without default on his part. The reason of this rule in its origin is, that a covenant to pay rent, generally, is intended to bind the covenantor to pay the whole rent, notwithstanding the demised subject, or part of it, may be destroyed by fire or otherwise during the term; and that if the parties intend to make any exception to this implied liability they should expressly do so in the lease. *Ross v. Overton*, 3 Call 309; *Thompson v. Pendell*, 13 Leigh 591; *Scott v. Scott*, 18 Gratt. 150; *White v. Stewart*, 76 Va. 546; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

"The operation and effect of the covenant to repair (at common law) are well understood. It extends not only to ordinary and gradual decay of the premises, but also accidental injuries by fire and tempest. So that under this covenant the lessee is bound to repair even when the damage to the inheritance is produced by causes over which he has no control." *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 104.

Thus, where the lessee of a mill promised to leave the premises in proper tenantable repair, and during his lease the mill was carried off by a sudden and unexpected movement of ice in the river, it was held, under the common-law rule, that the lessee was bound to pay the rent and perform the covenants. *Ross v. Overton*, 3 Call 309.

In *Maggort v. Hansbarger*, 8 Leigh 532, 537, the court said: "And even where there were such express covenants to repair, it has seemed to some a strained and doubtful construction to extend them to the case of rebuilding. *Ross v. Overton* (3 Call 309), was considered at the time a doubtful case, although *Ross* had expressly cov-

enanted to deliver the mill and other improvements at the expiration of the said term of seven years, in proper tenantable repair."

**Covenant to Return with All Appurtenances.**—The rule had no application where there was no covenant to repair, or to deliver the premises in good order, or in the same order as that existing at the time of the lease. Thus in a case in which the lessee of a mill covenanted to pay the rent and return the property, at the end of his term "with all of its appurtenances," the court, applying this rule, held that the contract, according to its fair meaning, could not be considered as binding the tenant to rebuild the mill, which was destroyed by fire during the tenant's term without any negligence on his part. *Maggort v. Hansbarger*, 8 Leigh 532, distinguishing *Ross v. Overton*, 3 Call 309; *Morris v. Ross*, 2 Hen. & M. 408, and saying: "There are strong considerations that would render me averse to extending the doctrine of the tenant's liability in any degree beyond the decided cases. Such risk is scarcely ever contemplated by either party, and the tenant receives no premium for the insurance."

**Statutory Modifications.**—The rigorous construction put on covenants to repair at common law has been modified by statute in Virginia and West Virginia. Va. Code, 1887, § 2455; W. Va. Code, ch. 72, § 22, p. 690. See 2 Min. Inst. (4th Ed.) p. 723.

The West Virginia statute is as follows: "No covenant or promise by a lessee that he will leave the premises in good repair shall have the effect, if the buildings are destroyed by fire or otherwise, without fault or negligence on his part, of binding him to erect such buildings again, or to pay for the same or any part thereof, unless there be other words showing it to be the intent of the parties that he should be so bound." W. Va. Code, ch. 72, § 22. It does not go as far as the Virginia statute.

### **Present Statutory Rule in Virginia.**

—The common-law rule, however, is no longer in force in Virginia, as it is now provided by statute, that "no covenant or promise by a lessee to pay the rent, or that he will leave the premises in good repair, shall have the effect, if the buildings thereon be destroyed by fire or otherwise, without fault or negligence on his part, or if he be deprived of the premises by the public enemy, of binding him to make such payment or erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be bound," etc. Section 2455, Va. Code; *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851; *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 100.

### **General Covenant Qualified by Specifying Certain Repairs.**

—In a recent case upon this subject, the court did not deem it necessary to decide whether the lease in question was within the terms of the statute above quoted, but held that a covenant in a lease to keep the building in repair, followed by a clause, separated from it only by a semicolon, that the tenant should replace all glass broken, and repair damages from bursting pipes, applies only to the repairs enumerated, and not to a destruction of the property. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851. See article in 7 Va. Law Reg. 159.

"To give the words 'to keep in repair' the comprehensive meaning contended for, would be to treat the language immediately following as surplusage and exclude it from all consideration in determining the intention of the parties." *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

**Effect of Covenant "to Keep in Repair."**—*Quære*, whether, inasmuch as the statute does not mention the covenant to "keep in repair" among those it releases from the ancient rule, therefore the covenant in question "to keep

the plant and buildings in repair during the term of this lease," remain as at common law, and the defendant is bound to rebuild. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 37 S. E. 851.

"It is clear from the report of the revisors (1849), volume 1, page 610, that the intention was to abolish the common-law rule with respect to this entire subject of rents. Whether or not the revisors have failed to accomplish their manifest purpose, and have left the common-law rule in force where there is a covenant 'to keep in repair during the term,' need not be decided in this case." *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 244, 37 S. E. 851.

**Agreement to Make Necessary Repairs Construed.**—And under a lease expressly stating that the lessee is to make all necessary repairs and put a mill in condition to start up, and to keep it in repair during the lease, the lessee can not claim reimbursement for repairs put upon the property during the time it was in his hands as lessee. *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

#### **Time Allowed Lessee.**

**Agreement to Make Repairs—No Time Specified.**—Where the premises are out of repair at the time of the lease, and the tenant agrees to make certain repairs, without specifying when they are to be made, the tenant has until the end of the lease to make them, unless there is something in the nature of the repairs requiring them to be made sooner. *Calhoun v. Wilson*, 27 Gratt. 639.

And, though the time is fixed by law and not in terms, a verbal agreement to make them at an earlier period is inconsistent with his written contract, and therefore does not come within the exception to the general rule, viz: That parol evidence may be introduced when it establishes an agreement additional to but consistent with the writ-

ten agreement. *Calhoun v. Wilson*, 27 Gratt. 639, 640.

And this applies to such evidence intended as a foundation for proof of the parol contract. *Calhoun v. Wilson*, 27 Gratt. 639.

#### **(2) In Absence of Express Covenant.**

**In General.**—The rule requiring the tenant to repair or rebuild, had no application where there was no covenant to repair, or to deliver the premises in good order, or in the same order as that existing at the time of the lease. *Maggott v. Hansbarger*, 8 Leigh 532.

But a tenant for years or from year to year must keep the premises wind and water tight, and is bound to make fair and tenantable repairs, such as the keeping of fences in order, or replacing doors and windows that are broken during his occupation. But he is not bound to rebuild premises which have accidentally becomes ruinous during his occupation, unless he is under a covenant to rebuild. Nor is he liable for the ordinary wear and tear of the premises, nor answerable if they are burned down, nor bound to rebuild a fallen chimney, or replace doors and sashes worn out by time, to put a new roof on the building, or to make similar substantial and lasting repairs, such as are usually called "general repairs." The natural wear and tear of buildings is paid for in the rent. *Bodkin v. Arnold*, 48 W. Va. 108, 112, 35 S. E. 980.

**Ordinary Repairs and Removal of Filth.**—A tenant must make ordinary repairs to buildings, repair and keep up fences, remove and keep down filth growing on farming and grazing lands, at his own expense, unless otherwise provided in the lease. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776. See *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980.

"The law requires a tenant for years to make repairs and keep land in tillable or pasturable condition, by removing what is commonly called filth, such

as elders, briers, and like growth, unless otherwise stipulated in the lease. He must repair existing fences. He must fence with new fences, so far as may be necessary to his use of the land. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816; 2 *Minor's Inst.* 682, 686." *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776, 778.

This is in the absence of any special covenant requiring the landlord to maintain the fences on leased land. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816.

## **7. Lessee's Liability for Negligence or Misfeasance.**

### **a. In General.**

If by lessee's negligence, or misfeasance, the property leased has been materially injured, he ought at once to make good the loss by repairing it, or by indemnifying the landlord for the expense he has necessarily incurred in making such repairs. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 102. See the titles TRESPASS; WASTE.

### **Effect of Covenant Avoiding Lease When Premises Become Untenantable.**

—A covenant in a lease that the same should be void if the premises should be so damaged by fire or other cause as to render them untenable, will not affect the right of the lessor to recover damages from the lessee for injury to the premises due to lessee's neglect or misfeasance. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95.

### **b. Landlord's Remedies.**

**Case or Covenant for Permanent Injury.**—Wherever the injury to leased premises, by the tenant's negligence or misfeasance, is permanent, the lessor or reversioner may have an action on the case; and it is not for the tenant to say that an action of covenant may be maintained against him for the same cause; for the lessor may have at his option either remedy. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95.

"There seems to be no doubt," says

Mr. Minor, 'that in case of agreement not to do waste, the landlord had his election, where waste is committed, to bring either case for the waste, or the appropriate action for the breach of the agreement. If by the special agreement the landlord acquires a new remedy, he does not therefore lose that which he had before.' 2 *Minor's Inst.*, 1st Ed., p. 633. In this he is supported by numerous authorities." *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 99.

At common law the tenant was liable for waste from accidental causes, but only where there was an agreement to repair. In all such cases the only remedy was by suit on the covenant. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 101.

**Unaffected by Entry to Make Repairs.**—In case of such injury, as claimed by lessor, he may enter and make the necessary repairs, with the consent of the lessee, without affecting his right to recover for such injury. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95.

### **Action Brought Pending Lease.**—

The action on the case may be brought pending the lease; and the action will not be prevented by the covenant of the lessee to leave the premises in good repair. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95.

Where the tenant is guilty of voluntary waste, where by his act injury is done to the reversioner, then the lessor may bring his action during the lease, even though the tenant may have it in his power to restore the premises to their original state before its expiration. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 101. See ante, "Under Covenant to Keep Premises in Repair." V, A, 6, b, (1).

**Negligence or Misfeasance Question for Jury.**—"Whether the injury to the building was caused by the negligence or misconduct of the defendants, as charged in the declaration, or was ow-

ing to a defect in the construction, as claimed by the defendants, was a matter exclusively for the jury under the supervision of the court." *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95, 103.

**Measure of Damages.**—In an action on the case by a landlord against his tenant for damages to a building, which the latter had covenanted to keep in repair, on refusal of the latter to repair, and the building having been repaired by the landlord with the tenant's consent, the measure of damages is what was necessarily expended in placing the property in its former condition. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95.

The measure of the lessee's liability is not what the lessor may think proper to expend, but what is necessarily expended in restoring the property to its former condition, or such sum as will be sufficient to compensate the lessor for the damage and loss sustained by the injury to the property. *Moses v. Old Dom. Iron, etc., Co.*, 75 Va. 95.

### 8. Right of Action Touching Leased Premises.

#### Against Third Person.

**Trespass—Tenant Proper Plaintiff.**—An action of trespass against a stranger should be brought by the tenant, and not by the landlord. *Kretzer v. Wysong*, 5 Gratt. 9. See *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744.

Even though the landlord has recovered a judgment in unlawful detainer, without the actual possession. *Kretzer v. Wysong*, 5 Gratt. 9.

And when there has been a sublease, but an ouster of or surrender by the sublessee, in favor of the original tenant, upon the trespass, the right of action enures, not to the lessor, but to the tenant. *Kretzer v. Wysong*, 5 Gratt. 9.

But the owner of land, who has leased it to a tenant for a share of the crop, may sue for a tort of a wrong-

doer damaging the growing crop. *Neal v. Ohio River R. Co.*, 47 W. Va. 316, 34 S. E. 914.

**Quære**, as to effect of covenant to repair and pay rent in any event. *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744. See the title TRESPASS.

**Account of Profits.**—See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 95, et seq.

**Temporary and Permanent Injuries Compared.**—"The possession of the tenant is the possession of the landlord. The tenant may have his action for a temporary disturbance of his enjoyment of the premises, but for permanent injury to the reversion, inheritance, or freehold the right of action is in him who is seized and possessed of the same, whether his possession be actual, by his own occupation, or constructive, by the occupation of his agents, servants, or tenants." *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757, 759.

"For any particular act of carelessness whereby the possession of the tenant was disturbed—not by such proper and lawful use, but by the reverse—he might perhaps bring his action for the disturbance of his possession and temporary enjoyment of the premises." *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757, 760.

When we come to consider the cases of *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406, and *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 451, "all difficulty as to the rights and remedies of the mere tenant or owner of a term upon the one hand, and the owner of the fee or inheritance on the other, disappears. In those cases, both in the syllabus and opinion, it is made perfectly clear that, for permanent injuries to the value of the property, entire damages can be recovered in one suit, and no second suit can be brought for the same cause of action. It is also manifest from the study of those cases that the owner recovers damages



which necessarily result from the building and proper use by the railroad company of its track in the adjoining street which it has taken and occupied." *Fox v. Baltimore, etc., R. Co.*, 34 W. Va. 466, 12 S. E. 757.

**Injunction to Waste.**—See the title **INJUNCTIONS**, vol. 7, pp. 529, 531.

**Breach of Contract between Landlord and Railroad.**—Where a landowner makes a contract with a railroad company to fence its right of way through his lands, and subsequently the landowner leases for a year to a tenant, and at date of lease the fence was in bad condition, and down in several places, the tenant can not maintain an action for damages on the contract. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816.

The lessees could assert no claim for damages against their landlord, in the absence of a special covenant, on account of the condition of said fence, or any loss sustained by them by reason thereof. Much less could they maintain such an action against an entire stranger to their contract. *Hoyleman v. Kanawha, etc., R. Co.*, 33 W. Va. 489, 10 S. E. 816.

**Life Tenant's Right of Action.**—See the title **ESTATES**, vol. 5, pp. 185, 186.

**9. Liability of Lessor for Injuries to Tenant.**

**Failure to Repair Accidental Damages—Necessity for Express Covenant.**—"In the case of *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11, this court held, that 'a lessee of a store room can not recover in an action of assumpsit against his lessor for damages sustained by reason of the failure of said lessor to repair damages to such building caused by unavoidable accident, where there is a written lease between said contracting parties, in the absence of an express covenant that said lessor should make such repairs.'" *Clifton v. Montague*, 40 W. Va. 207, 21 S. E. 858, 861. See ante, "In Absence of Express Covenant," V, A, 6, a, (1).

**10. Liability for Taxes and Assessments.**

See the titles **SPECIAL ASSESSMENTS; TAXATION**.

**B. LESSOR'S LIABILITY TO THIRD PARTIES.\***

**For Defective Condition of Premises.**

—"It is moreover settled, that where injuries are caused by the defective and insecure condition of property, such as is complained of in the present case, the liability of the owner is not affected by the mere fact that the property is occupied by a tenant, if the wrong causing the damage arises from the nonfeasance or misfeasance of the former." *Belvin v. French*, 84 Va. 81, 86, 3 S. E. 891.

**Injury to Water Power by Erection of Boom.**—A lessor who erects a boom in such close proximity to a milldam as to injure the water power of such dam, and thereby creates a nuisance against the same, is equally liable with his lessee with notice for the continuance of such nuisance. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400. See the title **NUISANCES**.

**Landlord as Defendant in Ejectment, and Liability for Costs.**—See the titles **COSTS**, vol. 3, p. 613; **EJECTMENT**, vol. 4, p. 871.

**C. LIABILITY FOR NUISANCE.**

See the title **NUISANCES**.

**D. REMEDIES FOR RECOVERY OF POSSESSION.**

See the titles **EJECTMENT**, vol. 4, p. 871; **FORCIBLE ENTRY AND DETAINER**, vol. 6, pp. 156, 167, 188.

**Alienation by Tenant.**—Tenant alienating part or all of premises remains liable to his lessor in an action to recover possession of the whole premises, if possession be withheld after termination of the tenancy, whether such alienation be by sublease or by conveyance in fee with warranty, and whether the action be ejectment or unlawful detainer. *Emerick v. Tavener*, 9 Gratt. 220.

## VI. Duration and Termination of Tenancy.

### A. DURATION.

#### 1. In General.

**Necessity for Definite Term.**—"A letting for a term must fix the term to be a lease for a specific term. *Tayl., Landl. & Ten., § 75.*" *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 277.

**Perpetuation of Lease.**—A lease of land for oil and gas purposes contains the following provision: "Term of lease two years, and as much longer as oil or gas is found in paying quantities. If gas only is found, second party agrees to pay \$250 each year, quarterly in advance, for the product of each well while the same is being used off the premises." This was construed to mean that the production in paying quantities of either oil or gas, and the payment of the rent or royalty as agreed upon, would perpetuate the lease during the time of such production. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

#### 2. Renewal in General.

**By Holding over.**—Where a tenant in possession under a lease continues in possession after the expiration of the term, the law implies a renewal of the lease on the same terms. *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392. See ante, "Tenancy Implied from Holding over," II, B.

**Covenant Therefor Satisfied by One Renewal.**—It is well settled that a general covenant for renewal does not imply a perpetual renewal. The most a lessor is bound to give on such a covenant is a renewal for one term only. A different construction would virtually lead to a grant in perpetuity. *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392; *King v. Wilson*, 98 Va. 259, 260, 35 S. E. 727.

**Privilege of Refusal Distinguished.**—"A covenant of renewal supposes the

expiration of a lease for a definite period, and provides for a new one of the like kind; and in the nature of things can not occasion a tenancy from year to year, determinable by a notice to quit." And it is not conceivable that a "preference" reserved to lessee in a lease for one year, giving him the refusal of the premises so long as the lessor desires to rent them, can be regarded as a covenant for renewal, from year to year, absolutely and indefinitely. *Crawford v. Morris*, 5 Gratt. 89, 108. See ante, "Tenancy from Year to Year, etc.," I, A.

**Enurement to Colessees.**—See ante, "Joint and Several Lease," III, A, 2.

If one of several joint owners of a lease, to cure a defect therein, takes an additional lease in his own name, he will be presumed to be acting for the common benefit of all the owners, and that such additional lease is a confirmation of the original lease. *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. 600.

To oust his co-owners of such benefit, the second lessor must show that, after they had notice by his acts or words that he intended to hold his lease adversely to them, they delayed for an unreasonable time in accepting the terms thereof. *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. 600.

**Dealings Must Be Fair.**—If he, for eleven months, by his actions leads the rest of the lessees to believe that he has no intention of asserting the second lease in avoidance of the first, but during this time the property is developed in common and mutually enjoyed, he can not suddenly and without reasonable notice to them, claim exclusive ownership under the second lease. The dealings between them must be fair and open, and free from all deception. *Weaver v. Akin*, 48 W. Va. 456, 37 S. E. 600.

**Concurrence of All Lessees Necessary.**—Where six parties become the joint lessees of real estate for the term

of five years with the privilege of continuing the lease for five more years upon giving sixty days' notice prior to the end of the term, one of said lessees has no power to extend such lease by giving the required notice without the concurrence of the other lessees. *Howell v. Behler*, 41 W. Va. 610, 24 S. E. 647.

And where only one of said lessees takes possession of and occupies the property, and dies before the expiration of five years from the date of the lease, a purchaser of said lease at the sale of the estate of such deceased lessee can not, by giving sixty days' notice, extend the term of said lease for an additional five years, and a bill in equity, filed by such purchaser, to enforce specific performance of the agreement as to such extension of the term of the lease, will be dismissed. *Howell v. Behler*, 41 W. Va. 610, 24 S. E. 647.

**Presumptive Exercise of Option to Continue.**—The president and general manager of a company, having leased its property for one year, with the privilege of continuing the lease four years longer, and having taken possession of the property under the contract and remained in undisputed control thereof until the institution of this suit, which was more than two years after the date of the lease, without any meeting of the stockholders or directors in the meantime, and without giving notice of any kind to the lessor of an intention to surrender the lease, was properly held to have exercised his privilege in favor of continuing the lease after the expiration of the first year. *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

And the fact of the lease and its extension may be shown by the complaining stockholders, before the commissioner, in a suit to wind up the corporation, although the bill charges that the company's property was being operated by the company, and was not demurred to. This does not commit

them so as to prevent them from showing such lease to meet a claim unexpectedly set up by such lessee, denying such renewal. *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

**Notice of Increased Rent "If Tenant Remains" Not a Renewal.**—The following language, to wit: "Should you remain in said rooms over five days from date of this notice, you will be required to pay rents at the rate of twenty dollars (\$20) per month, also pay all water rents," is not a renewal of the lease, but the language is only a warning that if tenant remains over five days, and lessor is compelled to put him out, lessor will require him to pay \$20 per month so long as he unlawfully withholds the property. *Drinkard v. Heptinstall*, 55 W. Va. 320, 324, 47 S. E. 72.

**By Paying Rent beyond Date of Surrender.**—The mere inclusion in the settlement upon the surrender of a lease, of rent to a date later than that of the surrender, would not operate as a renewal of such lease. It would not nullify the effect of the surrender in terminating the lease, and here, in fact, the inclusion of this rent was not under the tenancy, but as part of the expenses under a trust created at the same time to pay such rent. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378.

**Waiver of Strict Compliance with Terms of Renewal.**—A lease of land is made for ninety-nine years, renewable forever. It provides that the rent shall be paid annually on the first day of June in every year, and if the annual rent remains unpaid for six months after it becomes due, then the lessor shall re-enter and hold as formerly until all arrears of rent are paid. It is further provided that at the expiration of the term the lessor, in case the conditions are complied with, so as to entitle a lessee to a renewal, shall execute a new lease for the same term and on the same conditions as the first, except that one year's rent extraordinary, and the charges of making and record-

ing the conveyance, shall be paid by the lessee at the time of the renewal, and that the lease may be continued forever at the expiration of each term by making new leases, subject to the above conditions. The right to renew is not lost where all the rents were paid without demand, although not upon the exact date when due, and notwithstanding that for several years after the termination of the first lease, the rent was paid and accepted as formerly, without any offer or demand for renewal; the lessee having immediately, on notice to quit from the lessor, made a tender of everything required. *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

**Privilege of Renewal as Present Lease.**—See ante, "Lease or Contract for Lease," III, A, 3.

**Renewal as New Tenancy.**—See ante, "Lien for Rent and Priorities," IV, H, 3.

### 3. Breach of Covenant for Renewal.

**Allegations.**—Where an action of assumpsit is brought for damages for the violation of a covenant in a lease which provided for its renewal and which was conditioned on the performance of the terms of the lease, the lessee must allege a performance of such conditions, or a valid excuse for nonperformance. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

**Parol Evidence to Modify Lease—Rebuttal by Later Lease.**—In an action of assumpsit for damages for failure to renew a lease, where the plaintiff had introduced evidence that a certain lease had been modified by a parol agreement, and it was denied by the defendant, it was error to refuse to admit a later lease between the parties, which provided that it should not conflict or interfere with the lease sued on, to rebut such evidence. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

**Speculative Profits as Element of Damages.**—In an action for the breach of a covenant to renew a lease, evidence

of the future profits to be made from the property, if a certain price can be obtained for the product thereof, is inadmissible on the question of damages. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

## B. TERMINATION OF TENANCIES IN GENERAL.

### 1. By Abandonment or Surrender by Lessee.

#### a. Presumed from Nonuser.

Where a lease is executed to a party, of all coal, timber, and mineral privileges on a certain tract of land, for the term of 99 years thence ensuing, at a certain price for coal mined and shipped therefrom, and for all such timber as said lessee may think merchantable, which may be cut, shipped, sawed, or moved from said leased premises, no time being fixed for the commencement of operations, the lessor has a right to presume that said operations will be commenced in a reasonable time, and if nothing has been done under said contract for the period of seventeen years from the date of the contract, the lessor has a right to presume the contract has been abandoned, and said lessee or his assigns can not, after having been guilty of such laches, restrain said lessor from cutting and using the timber on said land by enjoining him from cutting and removing the same. *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493. See *Shenandoah, etc., Co. v. Hise*, 92 Va. 238, 23 S. E. 303, where it was held, that operations must be begun in a reasonable time, or the lease will be forfeited.

"No lease of land for a rent for a return to the landlord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for the purposes of speculation, without doing and performing in connection therewith what the lease contemplated." *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Rorer Iron Co. v. Trout*, 83

Va. 397, 409, 2 S. E. 713. See *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220, 223; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 592, 42 S. E. 655.

**Work Abandoned for Seven Years.**

—Where a lease is made for the purpose of drilling and operating for oil and gas for a term of years, or as long as oil or gas is found in paying quantities, with a provision that the work should be commenced by a certain date, and nothing is done under the lease for seven years after said date, the lessee is presumed to have abandoned the lease, and it is proper for equity to cancel the lease and quiet the title to the land. *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220.

**b. Failure to Pay Rent an "Abandonment"—Option of Lessor.**

The provision in a lease that the failure to pay the rental within a certain time shall be considered as an "abandonment," makes the lease void at the option of the lessor on such failure, only when the covenant was intended for his benefit, and he avails himself of the privilege. *Bowyer v. Seymour*, 13 W. Va. 12.

**c. Mere Removal Insufficient.**

But merely moving off the premises, without abandoning or intending to abandon them, is not a vacation of possession or a forfeiture of the lease. *Chancey v. Smith*, 25 W. Va. 404, 407.

**d. New Lease as Surrender of Old.**

**Amounts to Surrender.**—If a lessee for life or years take a new lease of the reversioner, for a longer or shorter term than before, it is a surrender of the first lease. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. 487. See post, "Assignment and Subletting," VII.

**Tenancy from Year to Year Extinguished by New Contract.**—A tenant from year to year, who has been paying an annual ground rent of six dollars, which was worth much more, and

who had built a meat shop on the land, under an agreement that he might remove all buildings erected by himself, executed the following instrument: "On or before the first day of January 1889, I promise to pay to" the lessor "the sum of twenty-five dollars, for rent of beef shop on Main street from Jan. 1, 1888, to Jan. 1, 1889. Given under my hand this 17th day of May, 1888." This instrument established such a new contract as would extinguish the tenancy from year to year. *Edwards v. Hale*, 37 W. Va. 193, 16 S. E. 487.

**Lease during Option to Purchase.**—

A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

"The former gave the lessee the right to mine for oil for ten years, paying rent; the latter gave the separate distinct right to purchase outright, at a fixed price, within five years." *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

**Relation Back as to Term.**—A takes a lease of B in May, 1777, for twenty-one years. In August, 1778, a similar lease of the same estate is executed. The rents are to be settled by the scale of May, 1777. *Skipwith v. Clinch*, 2 Call 253.

**e. Jury Weighs the Evidence.**

Where there is evidence tending fairly to show a surrender, and the jury so finds, that is enough to settle the question. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378.

**f. Failure to Repair as Ground for Abandonment.**

See post, "Under Covenant to Repair," V. A, 6, a, (2).

**g. Surrender by Sublessee.**

See post, "Assignment and Subletting," VII.

**h. Effects of Abandonment or Surrender.**

See post, "Consequences of Termination," VI, C.

**Usually Terminates Rent.**—"When the surrender was made, that ended the tenancy and all claim to further rent." *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378.

A tenant from year to year can only end the tenancy by notice to quit, must pay rent as such, and not discharge himself from rent by abandoning the premises. *Abenz v. Exley*, 52 W. Va. 476, 44 S. E. 149.

**Surrender after Union of Term and Fee Simple Held Not to Cut Off Rent.**—See post, "By Merger of Term and Reversion," VI, B, 7.

A. leases to B. for twenty years, with liberty to B. of surrendering the lease at any time before on payment of five shillings. A. devises the rents during the lease to his five daughters and the fee simple afterwards to his son, P., who sells to B., who surrenders the lease; this surrender shall not disappoint the daughters' legacies; but B. will be decreed to pay the rents. *Graham v. Woodson*, 2 Call 249.

**Effect on Right of Possession.**—See ante, "After Forfeiture or Abandonment," V, A, 1, c.

**i. Recovery of Damages.**

See ante, "Damages for Breach of Lease," IV, H, 1.

**2. By Agreement of Parties.**

**Renders Notice Unnecessary.**

Where a lease provides that for non-payment of rent it shall be forfeited and surrendered on ten days' notice, and the lessor demands rent in arrear, and the lessee does not demand notice and pay, but agrees to tend the term and surrender his lease, though he has no other notice, the tenancy is thereby ended, and the lessor becomes entitled to possession. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378. See post, "By Notice to Quit," VI, B, 9.

**Agreement to Surrender Possession on Sale—Assignment.**

—Land was leased for a term of ten years for the annual rental of \$150, with the proviso that if the lessor should sell during the lease the lessee should give possession at the end of the current year. The lessee assigned the lease with the same provision, and the assignee also reassigned, but reserving an annual rent of \$200, with the understanding that if the original lessor should sell during the lease, then the latter contract should expire.

It was held that, in accordance with the original covenant between the lessor and lessee, the sale of the premises alone would not determine the lease without surrender by the lessee, which was accepted by the lessor, or at least, without demand of surrender, as the lessor or his vendee might waive the surrender. *Dudley v. Estill*, 6 Leigh 562.

By the covenant between the assignee, D., and his assignees, C. & L., they were bound to pay the rents reserved as long as the lease continued, and the lease might continue, notwithstanding the lessor's sale of the premises, if the surrender thereof was not made, or was not demanded, much more if it was expressly waived, by the lessor or his vendee, the sale not being per se an eviction of the term. *Dudley v. Estill*, 6 Leigh 562.

It seems, that in case of a sale made by lessor, not upon the precise terms mentioned in the covenant between him and lessee, upon which the latter was to give the possession, but upon terms equally or more advantageous to him, the lessee, or his assignees would be bound to surrender the premises, if demanded by lessor or his vendee. *Dudley v. Estill*, 6 Leigh 562.

A mining lease for a period of ten years, terminable at the will of either party during that term, which provides that the lessee shall remove not less than an average of 12,000 tons of ore

per year, does not bind the lessee to remove that quantity each year, but only an average of that quantity during the ten years; and if the lease is terminated by the lessor, without fault of the lessee, at an early period of the lease, the lessee is only bound to pay the price agreed for the ore actually mined, and, if he has made advances to the lessor on account of royalties contemplated under the lease, he is entitled to recover of the lessor the amount so advanced less the royalties due by him for ore actually mined. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. 439.

**Estates at Will.**—See ante, "Tenancy at Will or by Sufferance," I, C.

In a suit to rescind a mining lease where the bill charges, and the answer admits, that the lease was terminable at the will and pleasure of either party, it will be so treated, and the lease held to have been terminated by the institution of the suit. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. 439.

### 3. By Cancellation.

**Option to Cancel.**—The lessors of a lease were held entitled to cancel it, when its condition, that it should be void at their option, if certain condemnation proceedings by a railroad were not commenced by a certain day, was not complied with. *Laurel Creek, etc., Co. v. Browning*, 99 Va. 528, 39 S. E. 156.

**For Failure of Purpose.**—Where a lease has failed of its purpose by the default of one of the parties, occasioned by either his inability or unwillingness to comply with its provisions, a court of equity, having acquired jurisdiction of the parties and the subject matter, will not hesitate, at the instance and for the relief of a party not in default, to cancel the lease, if it stands as a barrier in the way of doing complete justice in the cause. *Laurel Creek, etc., Co. v. Browning*, 99 Va. 528, 39 S. E. 156.

**Fraudulent Procurement.**—Where a

lease was procured by means of fraudulent representations of material facts, which were peculiarly within the knowledge of the lessees, with the result that undue advantage was taken of the owners, this constitutes sufficient grounds for cancelling the lease. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285. See *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220, 223.

False promises by lessees by means of which they were enabled to secure the lease, are not sufficient grounds for setting aside the lease for fraud, as in order to rescind a contract such representation must be made in regard to existing facts. *Love v. Teter*, 24 W. Va. 741. See the title FRAUD AND DECEIT, vol. 6; p. 516.

### Subsequent Lease Subject to First—

**Cancellation by Mistake.**—Where the lessor of property makes a subsequent lease of the same property with the indorsement that the second lease is taken subject to the first lease, the latter by mistake having been handed back to the lessor to be cancelled, such indorsement saves to the first lessee his right, if any, to have the mistake corrected. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501.

### 4. By Death.

#### a. Death of Lessor in Executory Lease at Will.

An executory oil and gas lease, which is not binding upon the lessees to carry out its covenants, but is optional with either party to defeat the same at any time and relieve themselves from the payment of any consideration, is terminated by the death of the lessor. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

This is qualified in a later case as follows: "The point is made that *Trees v. Oil Co.*, 47 W. Va. 107, 34 S. E. 933, holds that an executory oil lease is terminated by the death of the lessor. Surely this court did not mean to hold, and did not hold, that broad

proposition. Under the peculiar feature of the lease in that case, as put in the first point of the syllabus—not binding the lessee to carry out its covenants, but giving him right to defeat the same at any time without payment of anything, that lease was held to be a lease, or option for a lease, at will, determinable by either party any time, as it created no vested estate. The lessee did nothing and said nothing." *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 902.

**b. Death of Lessor a Life Tenant.**

**In General—Common Law and Statute.**—All unexpired leases made by a life tenant terminate at his death, except as otherwise provided by statute. But the West Virginia Code, ch. 94, § 1, provides that, "If there be tenant for life or other uncertain interest in land which is let to another, the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor; the rent, if it be reserved in money, shall be apportioned between the tenant for life or other uncertain interest, or his personal representative, and those who succeed to the land," etc. *Shufflin v. House*, 45 W. Va. 731, 31 S. E. 974; *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975; *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86. See Va. Code (1904), § 2809.

Then the tenancy would be at an end, unless new arrangements were entered into between the tenant and the owner of the property. *Holden v. Boring*, 52 W. Va. 37, 39, 43 S. E. 86.

And where it is revived by the attornment of the tenant and the affirmation of the owner who succeeds to the remainder in receiving the yearly rental or otherwise. *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86.

The statute merely preserves the tenancy until the end of the current year, and does not change the date of its beginning or termination, but only avoids the hardships of the unexpected death of the life tenant. *Holden v. Boring*, 52 W. Va. 37, 43 S. E. 86.

**Recognition of Tenancy or Mere Sufferance.**—See ante, "Implied Tenancies," II.

If the remainderman only permitted the tenant to remain after the end of the current year without in some way receiving her as her tenant, she became a mere tenant at sufferance. If, however, she then recognized her as her tenant and received the annual rental from her, she thereby continued her as her yearly tenant according to her original tenancy, with the right to three months' notice. *Holden v. Boring*, 52 W. Va. 37, 40, 43 S. E. 86.

**Statute Inapplicable to Leases of Building Lots.**—All unexpired leases given by a life tenant on town lots used for building purposes alone terminate with the death of such life tenant, and do not continue in force until the end of the current year. *Shufflin v. House*, 45 W. Va. 731, 31 S. E. 974; *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

The word "land" in § 1, ch. 94, W. Va. Code, is used in a restricted sense to denote agricultural or farming land, and not town lots used for building purposes alone. *Shufflin v. House*, 45 W. Va. 731, 31 S. E. 974; *Jones v. Shufflin*, 45 W. Va. 729, 31 S. E. 975.

**c. Death of Lessee.**

See ante, "Death of Lessee—Effect," IV, D, 1, c.

The lessee's death, pending the lease, does not terminate it. *Hutchings v. Bank*, 91 Va. 68, 20 S. E. 950.

**5. By Forfeiture.**

**a. In General.**

See ante, "By Cancellation," VI, B, 3.

**Incorporation of Forfeiture Clause by Indorsement.**—A mere indorsement on a lease that it is taken subject to another lease does not incorporate in the former lease a forfeiture provision contained in the latter lease. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501.

**Forfeiture Not Prevented by Infancy.**—Infancy alone will not prevent a forfeiture of the estate. And if in



such case the landlord re-enter and reoccupy the premises, or obtain possession under ejectment, all his proceedings being regular, that possession will avail him as effectually as though an adult were the claimant. *Leonard v. Henderson*, 23 Gratt. 331, 339.

**Not Usually Enforcible in Equity.—**

While the court, as a court of equity, will not in general enforce the penalties or forfeitures which may be provided in the lease, by decreeing that lessee deliver possession of the property to the plaintiff, still the court may grant plaintiffs other relief prayed for in the bill which is proper for the exercise of its jurisdiction, and to restrain wrong and injury in proper cases even between landlords and tenants. *Frank v. Brunnemann*, 8 W. Va. 462, 472.

**Performance of Condition before Petition for Lapsed Patent.**—If land was forfeited for nonpayment of quit rents or want of cultivation, still if the condition was performed before the land was petitioned for, the title was saved. *Wilcox v. Calloway*, 1 Wash. 38.

**Of Estate for Life.**—See the title ESTATES, vol. 5, p. 186.

**b. For Breach of Covenant or Conditions Generally.**

See post, "Remedy for Breach of Covenant," III, D, 6; "Damages for Breach of Lease," IV, H, 1.

**Must Be Express, Not Merely Implied.**—To work a forfeiture of an (oil and gas) lease there must be a breach of a condition or covenant expressed in the lease; ordinarily a breach of an implied covenant will not work a forfeiture of the lease. *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128.

Where, in such lease, causes of forfeiture are specified, it is not to be inferred that there are other causes of forfeiture not declared in the lease to be such. *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128.

Under such a lease, the remedy for a breach of an implied covenant is ordinarily not by way of forfeiture of the lease in whole or in part, but by an action for damages caused by such breach. *Core v. New York Pet. Co.*, 52 W. Va. 276, 43 S. E. 128; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004; *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

**Forfeiture for Nondevelopment or Delay.**—See ante, "Presumed from Nonuser," VI, B, 1, a.

"Forfeiture for nondevelopment or delay is essential to private and public interest in relation to the use and alienation of property. In general, equity abhors a forfeiture, but not where it works equity and protects a landowner from the laches of a lessee, whose lease is of no value till developed." *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 592, 42 S. E. 655. See *Shenandoah, etc., Co. v. Hise*, 92 Va. 238, 23 S. E. 303; *Crawford v. Ritchey*, 43 W. Va. 232, 27 S. E. 220.

**Condition against Subletting.**—The breach of a condition against subletting will be ground of forfeiture. *McKiddle v. Darracott*, 13 Gratt. 278.

**Lessor's Option.**—See post, "Enforcement and Waiver of Forfeiture," VI, B, 5, e.

**c. For Nonpayment of Rent.**

**(1) Mere Refusal to Pay Rent.**

A lease for a certain number of years in land, created by deed, will not be forfeited by a simple refusal to pay rent, or any mere words, where there is no open act of unmistakable hostility to the landlord's title, with full notice from the tenant of his adverse title, or assertion of adverse title, and of his holding possession of the premises adversely to the landlord, when no condition or covenant of forfeiture is contained in the deed, especially when the term exceeds five years. *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200.

And a failure or refusal of a tenant to pay rent to his landlord will not work a forfeiture of the unexpired term by the common law. *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 211.

A party claiming the benefit of a forfeiture of an unexpired term, especially by mere words, and a refusal to pay rent, should be held to clear and satisfactory proof. The words proven or relied on should be clear and distinct in their meaning, and not leave reasonable doubt as to the true meaning of the party using them. *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 211.

**(2) Must Be for Lessor's Benefit and Be Availed of by Him.**

And the effect of the covenant or condition declaring that "a failure to make such payment, within sixty days after such payment is due, shall be considered an abandonment of this lease," is to make the lease void at the option of the lessor only in cases where the covenant or condition is intended for his benefit, and he actually avails himself of his privilege. *Bowyer v. Seymour*, 13 W. Va. 12; *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754; *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944.

**(3) Lessor's Option.**

See post, "Lessor's Option," VI, B, 5, e, (1).

**(4) "Shall Be Considered an Abandonment" Construed.**

Where the provision in the lease, in respect to rent is: "A failure to make such payment, in sixty days after such payment is due, shall be considered an abandonment of this lease," etc., the words, "shall be considered an abandonment," etc., as employed in the lease, must be considered in a legal aspect, when applied to this lease, as amounting to no more than, and in fact as being equivalent to, the words "shall be considered forfeited," or the words "shall be considered void." *Bowyer v. Seymour*, 13 W. Va. 12, 20.

**(5) Waiver of Due Notice.**

Where a lease provides that, for non-

payment of rent, the lease shall be forfeited and surrendered on ten days' notice, and the lessor demands rent in arrear, and the lessee does not demand notice and pay, but agrees to end the term and surrender his lease, though there was no other notice, the tenancy is thereby ended, and the lessor becomes entitled to possession. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378.

**(6) Enforcement and Waiver of Forfeiture.**

See post, "Enforcement and Waiver of Forfeiture," VI, B, 5, (6).

**Necessity for Demand and Re-Entry.**—See post, "Necessity, Propriety and Effect of Re-Entry and Demand of Rent," VI, B, 5, e, (2).

**d. For Disclaiming to Hold of Lessor.**

By the common law a tenant for life may forfeit his estate by disclaiming to hold of his lord or by affirming or impliedly admitting the reversion to be in a stranger. This doctrine is founded in a rule of the feudal law, that if the vassal denied the tenure he forfeited his feud. Now this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger; for in all these cases he denies that he holds the feud from the lord. But as by the feudal law the vassal was to be convicted of this denial, so in the English law, those acts which plainly amount to a denial must be done in a court of record, to make them a forfeiture. *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 212. See post, "To Deny Landlord's Title," VIII, A.

**e. Enforcement and Waiver of Forfeiture.**

**(1) Lessor's Option.**

A clause of forfeiture contained in a lease on account of a failure to perform its conditions, is for the lessor's benefit, not the lessee, and the lessor may avail himself thereof to declare a forfeiture or not, as he chooses. *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95; *Guffey v. Hukill*, 34 W. Va.

49, 11 S. E. 754; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *McKildoe v. Darracott*, 13 Gratt. 278, 284.

And where the tenant fails to comply with said covenant or condition in said lease, and the landlord demands payment at the time, place, and in the manner prescribed by the common law, and payment of the rent is not made in proper time, it is at his option to enter upon the leased premises, or such part thereof as can be entered upon by him. *Bowyer v. Seymour*, 13 W. Va. 12.

Before the lease can be regarded as at an end, the lessor must, by word or deed, in some unequivocal way, manifest a purpose to treat the lease as forfeited. Otherwise the lessee would have it in his power to make default for his own benefit, and thus escape the performance of one duty by willfully failing to perform another. *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

In 2 Min. Inst. (4th Ed.) p. 773, the author says: "A condition avoiding a lease upon a contingency (e. g., the lessee's nonpayment of rent), according to the modern authorities, does not render the lease absolutely void, ipso facto, though it be expressly so declared; for that would enable the lessee, by his own misconduct, to determine the lease at his pleasure; but it leaves the lessor the option of entering for the breach of condition, or not, at his will; and the lease is thus voidable only, and not void. Citing *Dudley v. Estill*, 6 Leigh 562, quoted in *Deaton v. Taylor*, 90 Va. 219, 225, 17 S. E. 944. See *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754; *Bowyer v. Seymour*, 13 W. Va. 12.

**Knowledge and Time for Election.**—"Nothing done by the lessor before he has knowledge of the forfeiture can have the effect of waiving it. After he is informed of the forfeiture he must make his election, in view of all the circumstances, whether he will waive

or enforce it. He is not bound to elect immediately; but may take his own time to do so. Until he makes up his mind, however, he must take care to do no act which may have the effect of affirming or recognizing the continuance of the tenancy. He can not first waive, and then enforce the forfeiture. The lessee can not be a tenant and a trespasser at the same time. He continues to be a tenant, if the forfeiture be waived, just as if it had never occurred. He becomes a trespasser, if it be enforced." *McKildoe v. Darracott*, 13 Gratt. 278, 284.

**Former Distinction between Leases Void and Voidable.**—There was, however, a distinction formerly drawn between leases, that were declared to be void upon a breach of condition, and such as were to be voidable only. In the case of a lease for lives, if the lessee was guilty of any breach of the condition, the lease was only voidable, although, by its express terms, it was to become thereby absolutely void; and the landlord might waive his right to re-enter, by the acceptance of rent, or by some other act, which amounted to a dispensation of the forfeiture. But upon the breach of such a condition in a lease for years, the lease became ipso facto void, and no subsequent recognition could set it up again. *Bowyer v. Seymour*, 13 W. Va. 12, 20; *Deaton v. Taylor*, 90 Va. 219, 224, 17 S. E. 944.

Yet if the condition in such case was merely, that the lessor might re-enter, the lease was voidable only, and might be affirmed by an acceptance of rent, if the lessor had notice of the breach at the time. But the force of this distinction has been almost, if not quite, abated by the modern decisions, which establish, that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his

privilege. *Bowyer v. Seymour*, 13 W. Va. 12, 20; *Deaton v. Taylor*, 90 Va. 219, 224, 17 S. E. 944.

**(2) Necessity, Propriety and Effect of Re-Entry and Demand of Rent.**

**(a) At Common Law.**

**In General.**—At common law, when there was a condition of re-entry reserved for rent in arrear, the lessor, upon breach of the condition, might re-enter and reoccupy the demised premises. Such re-entry, however, was always attended with great particularity and many inconveniences. A formal demand of the exact rent due must have been made—made at a convenient time before sunset on the day, and at the place stipulated by the parties; and, if no place was appointed, at the most notorious place on the premises. (*Bowyer v. Seymour*, 13 W. Va. 12, 24). And this demand must have been actually made, though the possession was vacant, and no one was present to make the payment. These requisites being complied with, if the tenant failed to pay the rent in arrear, the forfeiture was complete; the lessor might re-enter at once, and bring his ejectment to obtain the actual possession. *Leonard v. Henderson*, 23 Gratt. 331, 334; *Johnson v. Hargrove*, 81 Va. 118; *Newton v. Wilson*, 3 Chen. & M. 470, 486. See *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

But the lessee might seek the lessor at any time during the natural day, that is, before twelve at night, on which the rent becomes due, and make a personal tender of the rent, in order to save the forfeiture, etc. *Taylor's Landlord and Tenant*, § 493; *Adams on Ejectment*, with notes, 161 top page and 160 side page. *Bowyer v. Seymour*, 13 W. Va. 12, 24.

**Rule Inapplicable to Action by Landlord.**—This rule, as to re-entry by the landlord before action brought by him to recover the premises by reason of a forfeiture of the lease, was not enforced, and was held not to apply at

common law in cases of ejectment brought by the landlord against the tenant, because it was considered, that the confession of lease, entry and ouster was sufficient without proof of re-entry. *Bowyer v. Seymour*, 13 W. Va. 12, 26.

**Necessity for Notice of Re-Entry.**—

If a grant be made, reserving a yearly rent, with a condition for re-entry if the rent be not paid, after demand made upon the premises, if no property is found on the land, whereof distress can be made, the grantor, upon demand made, and failure to pay, no property to distrain being found on the land, may re-enter, and grant over to another. *Wartenby v. Moran*, 3 Call 491.

"There is no ground for the objection, that notice ought to have been given that a re-entry would be made; because, the law requires no such notice to be given; for, upon the demand of the rent, and no property found to distrain, the right of re-entry attached." *Wartenby v. Moran*, 3 Call 491, 494.

**Re-Entry by Heir or Executor.**—Not only may the lessor re-enter for a forfeiture; but his heir or executor may also re-enter, when entitled to the reversion. *Bowyer v. Seymour*, 13 W. Va. 12, 20.

**Distress or No Distress.**—At common law, when a forfeiture was sought to be enforced for the nonpayment of rent, there was no distinction made between cases, where there was a sufficient distress upon the premises, and where there was not. In general, before a landlord could enter for the nonpayment of rent, he must have made a formal demand of the precise sum due for the last current quarter; and if the demand included any portion of the rent of a previous quarter, it would have been bad. *Bowyer v. Seymour*, 13 W. Va. 12, 24. But see *Wartenby v. Moran*, 3 Call 491.

**Rule Same Whether Lease Perpetual or for Life.**—But whether the lease

under consideration be a perpetual lease, or a lease for life, was wholly immaterial; for at common law in either case the landlord can only terminate the lease by re-entry, if the estate leased be in whole or part susceptible of an entry. *Bowyer v. Seymour*, 13 W. Va. 12, 23.

**(b) By Statute.**

But to avoid some of the foregoing inconveniences and niceties of the common law, the statute of George II, ch. 23, was enacted. For this purpose the legislature of West Virginia enacted §§ 6, 16, 17, ch. 93, of the Code of 1868, which are substantially the same as in the Virginia Code of 1860. *Bowyer v. Seymour*, 13 W. Va. 12, 24. See Va. Code, 1887, §§ 2786, 2796, 2797. See *Johnston v. Hargrove*, 81 Va. 118, 123.

These sections made a material change of the common-law rules, and the practice of the courts. They substitute the service of a declaration in ejectment on the tenant in possession, for a formal demand of the rent and a re-entry; and thus relieve the landlord of many embarrassments attending the exercise of that right. They deprive the tenant of all claim to relief in courts of law or equity, unless his application is made within twelve months after execution executed. They are applicable, not only to rents arising upon leases for life or years, but to conveyances in fee, with clauses of distress and re-entry. *Leonard v. Henderson*, 23 Gratt. 331, 336.

If, on a tenant's failure to fulfill the covenant of payment, or to comply with the landlord's demand therefor, made as prescribed by the common law, the landlord does not re-enter in fact, he may bring ejectment, under Code, ch. 93, § 16, and recover, subject to the provisions of § 17, as to the tenant's being completely barred of all rights, etc., in 12 months. *Bowyer v. Seymour*, 13 W. Va. 12.

**Insufficiency of Distress.**—As this statute in effect dispenses with a de-

mand for rent in those cases, only, where there is no sufficient distress upon the premises, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed upon a claim of re-entry for the nonpayment of rent, if a sufficient distress can be found. And presumably the same rule applies where the lease on its face is declared to be absolutely void in case of its nonpayment. *Bowyer v. Seymour*, 13 W. Va. 12, 25. See *Johnston v. Hargrove*, 81 Va. 118; *Marshall v. Conrad*, 5 Call 364.

**Statutory Remedy Cumulative.**—"The contention that ch. 93, W. Va. Code, 1887, provides the only means of enforcing a forfeiture for nonpayment of rent or breach of condition, is not tenable in my opinion. I think the action of ejectment therein provided for is remedial, and a cumulative remedy to dispense with demand and re-entry, and that it does not destroy the common-law mode of demand and re-entry. But, however that may be, it applies only where there is necessity to make demand and re-entry." *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754. See *Bowyer v. Seymour*, 13 W. Va. 12.

**Applies Only to Ejectment against Tenant.**—The common-law formalities of a demand are dispensed with in Virginia, by providing for an action as a substitute for such demand when there is insufficient distress found. It applies, however, only to the service of a declaration in an action of ejectment, which it provides "shall be in lieu of a demand and re-entry," and then further provides that "upon proof to the court, by affidavit in case of judgment by default, or upon proof on the trial that the rent claimed was due, and no sufficient distress was upon the premises, \* \* \* and that the plaintiff had power thereupon to re-enter, he shall recover judgment," etc., Code, ch. 134, § 16. *Johnston v. Hargrove*, 81 Va. 118, 123. This is now § 2796 of the Virginia Code, 1887, and the same,

substantially, as W. Va. Code, ch. 93, § 16, which is similarly construed in *Bowyer v. Seymour*, 13 W. Va. 12.

For by an ancient rule of the common law, before lessor can exercise a stipulated right of re-entry for breach of covenant to pay rent, he must make an actual demand upon the tenant for the payment thereof, unless by special agreement the requirement of demand has been dispensed with. The rule as respects the necessity for demand remains unaltered in general by statute. Code, 1873, ch. 113, § 21. *Johnston v. Hargrove*, 81 Va. 118; *Newton v. Wilson*, 3 Hen. & M. 470, 486. See now Va. Code, § 2457. Ch. 72, § 21, W. Va. Code, 1891, is practically the same. And see *Bowyer v. Seymour*, 13 W. Va. 12.

This statute makes a stipulation in a deed of lease for re-entry for default in the payment of rent for a given period, equivalent to an agreement that upon the happening of such event, the lessor may re-enter "upon the demised premises, or any part thereof, in the name of the whole, \* \* \* and the same may again have, repossess and enjoy as of his former estate." *Johnston v. Hargrove*, 81 Va. 118, 120.

"This statute was not designed to alter the rules of the common law in respect to the forfeiture of estates for nonpayment of rent, but to authorize a concise and abbreviated form of leases and other conveyances." *Johnston v. Hargrove*, 81 Va. 118, 120.

Thus, H., tenant of J., for five years, rent payable first day of each month, under a lease for five years with clause of re-entry for ten days' default in paying any installment of rent, was in default for rent for proceeding month, and J. notified H. that unless he quit the premises in five days he would proceed against him for the unlawful detainer thereof. Next day H. tendered the rent to G., who had been acting as J.'s agent in the matter, but G. refused to receive it. Seven days after

the notice, J. brought unlawful detainer for the premises. It was held, that as J. had made no demand for the rent in arrear, his action was not maintainable, either at common law or under the Code, 1873, ch. 130, § 4, which requires a notice to give possession or pay the rent. See now Va. Code, 1887, § 2719. *Johnston v. Hargrove*, 81 Va. 118. See *Bowyer v. Seymour*, 13 W. Va. 12.

"Construed in the light of the statute under which it was given, and the previous course of dealing between the parties, the notice was the same, in effect, as if the plaintiff had said to the defendant 'unless within five days you pay to myself or agent the rent now due, your possession will be deemed unlawful.' And consequently the tender to the son, who has regularly heretofore acted as the plaintiff's agent in collecting the rent, was a valid tender, as the defendant insists. For it is not contended that the son's agency has ever been formally revoked, or otherwise than constructively by the notice to quit." *Johnston v. Hargrove*, 81 Va. 118, 124.

Service of notice on H. to quit did not revoke G.'s agency, and the tender of the rent in arrear within the statutory period of five days, would, even had there been a demand for the rent, have defeated the action under the statute. *Johnston v. Hargrove*, 81 Va. 118.

**Formalities Still Required.**—"And how, when and where demand must be made is well settled by the authorities. Thus, it must be for the precise sum due for the last current quarter or installment, on the day it is due, at some convenient hour before sunset on that day, on the premises, at the most notorious place thereon, and if there be a dwelling house, at the front door thereof." *Johnston v. Hargrove*, 81 Va. 118, 121; *Bowyer v. Seymour*, 13 W. Va. 12, 24.

"And where the right of re-entry is

made to depend upon the fact that the rent shall be behind and unpaid for a specified period after the same becomes due, the demand must be made on the last day of the extended time; otherwise the lessor is not entitled to re-enter; for every required formality must be strictly observed." *Johnston v. Hargrove*, 81 Va. 118, 121.

"In the case of the tenant, until demand made, no forfeiture or penalty (although secured by a *nomine pœnæ*) could be incurred; for the presumption of the common law is, that the tenant is always upon the lands, ready to pay his money, and the contrary must be alleged and shown or no penalty is incurred." *Newton v. Wilson*, 3 Hen. & M. 470, 486. See *Johnston v. Hargrove*, 81 Va. 118, 123.

**Right of Re-Entry Expressly Reserved.**—"Where there is not only a declaration that a certain act or omission shall work a forfeiture, but also that for it the landlord may re-enter, it may plausibly be said that the landlord may or may not choose to enforce the forfeiture by re-entry, and if he elects to so enforce it he must make such re-entry, as that is the act pointed out by the express terms of the lease as the mode of enforcement of the forfeiture; whereas, when there is no provision for re-entry, it is not required." *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

**Where No Clause of Re-Entry.**—But where a lease for years contains a clause of forfeiture for breach of its covenant to pay rent or other covenant, but no clause of re-entry for such forfeiture, demand and re-entry is not the only mode by which the landlord may enforce the forfeiture. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

Demand is only necessary as a prerequisite to re-entry where there must be re-entry. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

In the case of *Bowyer v. Seymour*, 13 W. Va. 12, the lease "was made for

coal mining, and provided that a failure to pay money which it stipulated was to be paid for coal should be considered an abandonment of the lease, and it was held, that notwithstanding nonpayment of such money, the lessor must make a demand for the rent and a re-entry to make the forfeiture complete. But there is a marked line of distinction between that case and this in the fact that, as Judge Haymond says, that was a lease in fee, or at least for life, and under the original common-law rule above given a freehold estate could not be forfeited for breach of a condition without demand and re-entry; whereas the lease in this case is a lease for years, which, under said rule, does not require re-entry. Anything said in that case as to a lease for years would be obiter." *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 756.

#### (c) Refutation of Forfeiture by Absence of Re-Entry.

Where a deed of lease expressly reserves a right of re-entry for nonpayment of rent, and yet no such re-entry ever has been made or attempted to be made, the presumption is irresistible that there was no such forfeiture. At all events there was no re-entry or statutory proceeding equivalent thereto, without which a forfeiture can not be enforced. *Mayo v. Carrington*, 19 Gratt. 74, 89.

#### (d) Re-Entry to Secure Rent Does Not Always Terminate Lease.

In a proceeding to recover rent due upon a perpetual lease granted out of land, with right of distress and entry if the rent was not paid, a special verdict finds the entry of the grantee of the rent upon the land, and the holding by him and those claiming under him for forty-three years; but does not find that the original entry was under the right of entry given by the deed, or that the parties held adversely, nor any facts from which such an entry or such a possession results as a conclusion of law. The court, there-

fore, can not infer either fact. *Turner v. Smith*, 18 Gratt. 830.

**(e) Action for Damages Unaffected.**

The right of re-entry was a cumulative remedy, to which lessor might resort or not, at his election; and whether he resorted to it or not he might still resort to his remedy by action for the breach of the covenant not to underlet; in which action he would be entitled to recover such damages as he could show that he had sustained. *McKildoe v. Darracott*, 13 Gratt. 278, 287.

**(f) Execution of Subsequent Lease as Avoidance of Former.**

A lease for years for drilling for petroleum oil and gas contains provision: "The parties of the second part covenant to commence operations for said purposes within nine months from and after the execution of this lease, or to thereafter pay to the party of the first part \$1.33 1-3 per month until work is commenced, the money to be deposited in the hands of John Kennedy for each and every month. And a failure on the part of said second parties to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease," and there is no covenant for re-entry, and there is failure to commence operations and to pay money in lieu thereof, and the lessor leases to another person. Held, that the first lease is thus avoided, and the second lease is good against it, as the execution of the second lease is a sufficient declaration of forfeiture, without demand and re-entry. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754. See *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544.

And the second lessee may maintain unlawful detainer against the first lessee in possession. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

But "the execution of the second lease can not be taken as conclusive evidence of a purpose to declare the first one forfeited when by its own

terms it shows such not to be the purpose (*Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501). But if silent on the subject, as this one is, can it not be shown that the lessor executed and delivered the new lease to the lessee himself, on condition that it was to be given back if the first lessee objected? This court, in the case of *Stuart v. Livesay*, 4 W. Va. 45, and in *Newlin v. Beard*, 6 W. Va. 110, following the case of *Ward v. Churn*, 18 Gratt. 801, 812, would seem to hold such conditions valid when made known to the obligee." *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522, 526.

Saying: "I do not understand *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754, to lay down a different doctrine, and, being read by the light of its own facts, it does not profess to treat of leases generally or to say that even in these cases the lessee in a proper case would be deprived of his remedy for relief from the forfeiture in a court of equity, by the lessor executing a new lease to some third party." *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522, 526.

And where the lessor of land gives a subsequent lease of the same property to another person, on which was endorsed before execution that it was taken subject to the prior lease, it was held that the second lease was not an unequivocal declaration of forfeiture of the first. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501.

The first lease having, by mistake, been surrendered to be cancelled, this endorsement saves the lessee's right, if any, to have such mistake corrected. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501.

**(3) Waiver of Forfeiture.**

**(a) In General.**

The cause of forfeiture only renders the lease void as to the lessee, and it may be affirmed by the lessor, and the rights and obligations of both parties will continue in that cause. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754;



*Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *McKildoe v. Darracott*, 13 Gratt. 278. See ante, "Lessor's Option," VI, B, 5, c, (1).

**(b) Knowledge of Forfeiture Essential.**

Nothing done by the lessor before he has knowledge of the forfeiture can have the effect of waiving it. *McKildoe v. Darracott*, 13 Gratt. 278, 284. See ante, "Lessor's Option," VI, B, 5, c, (1).

**(c) Acts Amounting to Waiver.**

**aa. In General.**

If, the lessor, with knowledge of the forfeiture, do any act affirming the tenancy or recognizing its continuance, he thereby waives the forfeiture. Whether the act, in a given case, will have that effect, is sometimes a question of difficulty, but any act unequivocally waiving the forfeiture will be sufficient. *McKildoe v. Darracott*, 13 Gratt. 278, 282; *Deaton v. Taylor*, 90 Va. 219, 225, 17 S. E. 944; *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

"And in *Tyler on Ejectment*, page 312, it is said: 'It may be affirmed as a general proposition that whatever acts of the landlord will be a waiver of a forfeiture for nonpayment of rent, will be a waiver for any other cause.' 1 *Pomeroy Eq.*, § 541, and note." *Deaton v. Taylor*, 90 Va. 219, 225, 17 S. E. 944.

**Mere Inaction Said Not to Be Waiver.**—"Generally, the lessor, by merely being passive, will not waive the forfeiture. It is not enough that he knows of the breach without availing himself of his right of re-entry. The act by which the forfeiture is waived must, as we have seen, amount to an affirmation of the tenancy or a recognition of its continuance." *McKildoe v. Darracott*, 13 Gratt. 278, 282.

Though if, by his acquiescence, he induce the tenant to incur expense in making improvements or otherwise, that is a circumstance from which, it seems, a jury might infer a waiver.

*McKildoe v. Darracott*, 13 Gratt. 278, 282.

**(bb) Acceptance of Rent.**

Acceptance by the landlord of rent accruing after breach of a condition contained in the lease, with full knowledge of the breach and all of the circumstances, is a waiver of the right to declare a forfeiture and re-enter upon the premises. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Allen v. Bartlett*, 20 W. Va. 46; *McKildoe v. Darracott*, 13 Gratt. 278; *Deaton v. Taylor*, 90 Va. 219, 225, 17 S. E. 944.

"Whether the act, in a given case, will have that effect, is sometimes a question of difficulty. The acceptance of rent, *eo nomine*, generally, if not always, has that effect; because it can rarely, if ever, occur without the relation of landlord and tenant, and is an admission that the tenancy is then subsisting." *McKildoe v. Darracott*, 13 Gratt. 278, 282.

It was said in *Jones v. Roberts*, 3 Hen. & M. 436, that the acceptance of rent after a forfeiture of a lease will be regarded as a waiver of the forfeiture or not, according to the *quo animo* with which it is received. See *Jones v. Roberts*, 6 Call 187.

But see *McKildoe v. Darracott*, 13 Gratt. 278, 284, where it was said: "The case of *Jones v. Roberts*, 3 Hen. & M. 436, in which it was contended by the counsel for the plaintiff in error, that this court had approved the case of *Doe v. Batten* (which declared such acceptance of rent to be merely evidence of waiver to be considered by a jury), was a suit for specific performance of an agreement for a lease and there were many reasons for refusing to enforce the agreement, without relying on the doctrine of that case, which is incidentally referred to with seeming approbation by two of the judges. The question did not properly arise, and could not have been considered in the case."

The alleged doctrine of *Doe v. Bat-*

ten, that mere acceptance of rent is not, in itself, a waiver, but matter of evidence only, is discredited by later English cases, and that Lord Mansfield did not intend to state any such doctrine, is clearly shown by his opinion in *Goodright v. Davids*, Cowp. R. 803, only three years later. *McKildoe v. Darracott*, 13 Gratt. 278, 283.

**Forfeiture for Subletting.**—A lease being forfeited by the act of the lessee in subletting the premises, the forfeiture will be waived if the lessor, with knowledge of the forfeiture, accepts rent, or sues out a distress for rent, accruing after the forfeiture. *McKildoe v. Darracott*, 13 Gratt. 278; *Allen v. Bartlett*, 20 W. Va. 46, 54; *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151.

**Periodical Payments of Commutation Money.**—Periodical payments made by a lessee as compensation for his failure to perform the conditions of his lease, can not be held to be rent. Hence, their payment and acceptance by the lessor, after his right to forfeiture has accrued, can not create a new tenancy, other than one by mere sufferance. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271.

**Acceptance of Rent after Forfeiture Confers No Lien for Reimbursement.**

—Where two leases were executed upon the same property, the second after the first had been avoided and the rights of the lessee therein terminated, neither the payment by the first lessee of the rental for the first year, made after its expiration, before his enjoyment under the lease was interfered with nor his payment of the rental for another year after he was aware of the second lease, and after his possession and enjoyment had been interrupted, will give such lessee any right to a lien upon the rental from the second lease in the hands of the lessor. This was an oil lease. *Eclipse Oil Co. v. Garner*, 53 W. Va. 151, 44 S. E. 131.

**(cc) Distress or Demand of Rent.**

The same may be said of a distress

for rent, and also of an absolute and unqualified demand of rent, whatever may be the secret motive of the lessor in demanding it. *McKildoe v. Darracott*, 13 Gratt. 278, 282. See *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Allen v. Bartlett*, 20 W. Va. 46, 54.

**(dd) Previous Indulgence of Tenant.**

"Where the landlord, by his acquiescence in tenant's dilatoriness in the payment of rent, has induced the tenant to believe that strict observance of his covenant to pay the rent at the time specified in the lease will not be required of him, equity will not permit the landlord to enforce a forfeiture, where, under the circumstances, it would be inequitable, and full compensation can be made to the landlord for the tenant's default." *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151.

**(ee) Recognizing Lessee's Right to Assign.**

The right to insist upon the forfeiture of a lease for breach of condition subsequent, was held to be waived by the lessor recognizing lessee's right to assign the lease. *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944.

**(d) New or Continuing Forfeiture Not Waived.**

"The waiver of one forfeiture is of course not a waiver of a subsequent forfeiture. And if the act of forfeiture be continuing, a waiver of a right of re-entry for one breach will not preclude a re-entry for a new or continuing breach." *McKildoe v. Darracott*, 13 Gratt. 278, 285.

But a subletting is not a continuing act of forfeiture, and if the forfeiture is once waived it can not afterwards be retracted. *McKildoe v. Darracott*, 13 Gratt. 278.

However, a lessor does not, by waiving his entry on one underletting, waive his right to re-enter on a subsequent underletting. *McKildoe v. Darracott*, 13 Gratt. 278, 286.

**(e) No Waiver after Subsequent Lease.**

Waiver of forfeiture of a lease for

nonpayment of rent can not be made by the lessor after he has granted a lease of the same premise to another lessee. *Guffey v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

**(f) No Revival after Waiver.**

A forfeiture, if not by a continuing act, such as a neglect to repair, once waived, can not be revived. *McKildoe v. Darracott*, 13 Gratt. 782.

**(4) Suit to Enforce—Necessary Parties.**

The lessor or landlord is a necessary party to a bill in chancery filed by subsequent lessees to enforce the forfeiture of, set aside and annul a prior lease covering the same subject matter. *Pyle v. Henderson*, 55 W. Va. 122, 46 S. E. 791.

**Cotenants.**—In a controversy between two sets of lessees under two several leases, cotenants interested under either one or both such leases should be made parties to a bill in equity filed to settle such controversy. *Pyle v. Henderson*, 55 W. Va. 122, 46 S. E. 791.

**(5) Effect on Right of Possession.**

See ante, "After Forfeiture or Abandonment," V, A, 1, c.

**f. Relief against Forfeiture.**

**(1) In Courts of Equity.**

Courts of equity, acting upon the idea that the clause of re-entry was inserted mainly for the landlord's security, and that it was against conscience to allow him to pervert it to a different purpose, have usually granted the tenant the necessary relief, upon his satisfying the rent and paying all the costs incurred. This relief of the tenant was without limitation. It continued as long as he was in a condition to offer the landlord satisfactory indemnity. *Leonard v. Henderson*, 23 Gratt. 331, 335.

"Where covenants are broken and there is no fraud, and the party is capable of giving complete compensation, it is the province of a court of equity to interfere to give the relief

against forfeiture for breach of other covenants, as well as that for payment of rent." *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 37 S. E. 596.

"It is the strict rule of the common law, creating the harsh result of forfeiture, which calls into play the interposition of a court of equity in granting relief against it in certain cases. The bill in equity for relief against it presupposes a forfeiture at law." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544.

**Re-Entry Clause Mere Security for Rent.**—It seems that a clause of re-entry for nonpayment of rent is in general considered as a mere security for the rent, and that a forfeiture will not be enforced, although the demand for the rent be made; provided, the tenant satisfies the rent due, and compensates the landlord for any damages he may have sustained in consequence of the former's default. See also, Code, 1873, ch. 134, § 20. *Johnston v. Hargrove*, 81 Va. 118, 122. See now Va. Code, 1887, §§ 2800, 2804; W. Va. Code, ch. 93, §§ 20, 24.

**All Stipulations to Be Fully Performed.**—Where an agreement for a lease can properly be considered as executed and as passing a legal title to lessee, and that title is forfeited at law for failure to perform its stipulations a court of equity ought not to relieve against such forfeiture, upon the mere payment of the arrears of rent, but only on the condition that lessee should perform all the stipulations in the said contract on his part to be performed. *Harvie v. Banks*, 1 Rand. 408, 411.

**Inequitable Forfeiture for Unintentional Breach.**—"A court of equity will often relieve a tenant from an attempted inequitable forfeiture unless the tenant's breach was willful, and particularly when the breach or default was a result of accident or mistake." *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 37 S. E. 596. See *Pyle v.*

Henderson, 55 W. Va. 122, 125, 46 S. E. 791.

**Full Compensation or Special Grounds of Relief.**—"Before a court of conscience will relieve against a forfeiture of such a lease there must be a fair and reasonable commutation as alternative for the main thing to be done, or the damages from failure to do such main thing must be measurable in money with some reasonable degree of certainty, or there must be some special circumstances calling for relief from the forfeiture caused by the party's failure to perform the specific act which he covenanted to perform." *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544.

**Where Compensation Fully Made for Negligent Default.**—The forfeiture clause in a gas and oil lease, under which a valuable estate, vested in the lessee in so far as the rentals are concerned, made payable in gas, oil, and money, is in the nature of a penalty to secure such rentals, against which a court of equity will grant relief when compensation for such rentals can be fully made, and great loss wholly disproportionate to the injury occasioned by the breach of the contract would otherwise result to the lessee, negligently, but not fraudulently, in default. *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 37 S. E. 596. See *Pyle v. Henderson*, 55 W. Va. 122, 125, 46 S. E. 791.

Otherwise, the relief from such forfeiture is denied. (English, J., dissenting.) *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544. See the title MINES AND MINERALS.

**Forfeiture Due to Neglect of Landlord.**—"And it will also relieve from forfeiture when caused by the neglect of the landlord. 18 Am. & Eng. Ency. Law (2d Ed.) 389." *Pyle v. Henderson*, 55 W. Va. 122, 125, 46 S. E. 791.

**Strict Performance of Covenants Prevented by "Act of God."**—A lease for oil and gas purposes contained a

covenant that the lessee should commence operations for a test well within one year from the date thereof, at same point in the district in which the leased premises were located, and complete such well in eighteen months after its commencement. Before the expiration of a year from the date of such lease the test well was located by surveying and leveling; the timbers afterwards used in constructing the derrick were cut down and hewn; a contract was made with a party for drilling the well; and the machinery was ordered to be hauled to the location, but neither the timber nor machinery was hauled to the location within the year, by reason of the impassable condition of the roads. The well was, however, completed in less than eighteen months after the date of the lease. Held, that the lease was not forfeited on the ground that operations were not commenced within a year from the date thereof. *Fleming Oil, etc., Co. v. South Penn Oil Co.*, 37 W. Va. 645, 17 S. E. 203.

**Relief against Forfeiture and Specific Performance.**—The purchaser of an agreement for a lease and those under whom he claims, having committed such acts as would have amounted to a forfeiture had a lease been actually executed with such covenants as were usually inserted in leases to other tenants of the same estate, shall not have the aid of a court of equity to enforce specific performance against a judgment at law recovered by a purchaser of the fee-simple estate. *Jones v. Roberts*, 3 Hen. & M. 436.

## (2) On Ground of Estoppel.

**In General.**—The refusal of one of several joint lessors to sell to the lessee a right of way for a railway over other lands not leased, does not estop such lessor from taking advantage of a provision in the lease rendering it void if a right of way for a railway to the leased premises is not obtained by condemnation or otherwise

in a given time. The mere existence of a lease does not impose an obligation to grant the right of way, nor estop the lessor from a bona fide effort to protect his property from serious injury. *Laurel Creek, etc., Co. v. Browning*, 99 Va. 528, 39 S. E. 156.

There are no such relations, contractual or other, existing between them, as to impose upon the lessors any legal obligation to allow appellants a right of way over their lands. *Laurel Creek, etc., Co. v. Browning*, 99 Va. 528, 533, 39 S. E. 156.

**By Indulgence to Lessee.**—If, in case of a lease with forfeiture clause for nonpayment of rent, the lessor by his conduct clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and because of this he does not make payments when due, the landlord can not, without demand or notice, declare a forfeiture, and there is no forfeiture which equity would recognize, and if there is in such case technically a forfeiture at law, equity would relieve against it. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151.

### (3) In Courts of Common Law.

"The courts of common law, however, often stayed the proceedings in the action of ejectment, and relieved the tenant from the forfeiture, upon his bringing into court, before the lessor obtained possession, the rent in arrear, and making compensation to the latter for all the damage he had sustained." *Leonard v. Henderson*, 23 Gratt. 331, 335.

### 6. By Execution of New Lease.

See post, "Second Lease and Possession Taken Thereunder," VI, B, 10, a, (5).

It is not competent for the lessors in a valid and binding lease to terminate the lease by the execution of another lease during any quarter within which the rental was paid as provided in the lease proposed to be

terminated. *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

But the execution of a new lease to other lessees, and possession thereunder, render a prior executory lease at will invalid. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

### 7. By Merger of Term and Reversion.

See ante, "Effects of Abandonment or Surrender," VI, B, 1, h.

**Purchase of Term by Remainderman.**—"A sale by a particular tenant to the remainderman amounts to a surrender, and operates a merger of the term, unless there be some good cause for the continued separation of the term and the remainder." *Scott v. Scott*, 18 Gratt. 150, 164. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

**Purchase of Reversion.**—A purchase of the reversion in fee by a tenant for years ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

### Devise of Rents and Reversion—Purchase of Reversion by Lessee.

The owner of land leased it for a term of twenty years, with the privilege to the lessee to end the term at any time on paying five shillings. The lessor then devised the annual rental to his daughter, and the reversion to his son, who sold to the lessee, and the latter immediately terminated his lease. It was held that the lessee could not dis-appoint the legatees, and he was decreed to pay them the rent. *Graham v. Woodson*, 2 Call 249.

**Purchase under Option.**—Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

**Option and Lease Not Inconsistent.**

—But a lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

**8. By Limitation, Collateral or Conditional.**

See the titles **CONDITIONS**, vol. 3, p. 50; **COVENANTS**, vol. 3, p. 741; **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS**.

**In General.**—"A clause in a lease designed to abridge the right of the tenant during the period limited for the duration of his estate, may operate in several ways. It may operate as a collateral limitation, sometimes, but as I think, improperly called a conditional limitation, of the tenant's estate, and a limitation marks the bounds or limits of an estate, beyond which it can not continue. A collateral limitation marks an event which may happen within the time described in the direct limitation, and in the happening of that event puts an end to the estate." *Millan v. Kephart*, 18 Gratt. 1, 7.

Under a lease for a term of years, stipulating that if the lessor sold the property before the time ran out, the lessee should deliver possession upon a proper notice of such sale, where the lease had been destroyed, it was for the jury to ascertain from the parol evidence adduced what were the terms of the contract, and, under instructions from the court, their legal effect, in the event of a sale of the property and notice to the lessee to surrender. *Millan v. Kephart*, 18 Gratt. 1.

**Condition and Limitation Compared.**

—"It may operate as a condition. While a limitation marks the bounds or compass of an estate, and the utmost time of its continuance, the effect of a condition is to defeat the estate before it reaches the boundary,

or has completed the full space of time described by the limitation." *Millan v. Kephart*, 18 Gratt. 1, 7.

**Necessity of Right of Entry to Condition.**—A reservation of a right of entry is generally necessary to raise a condition, where words which of themselves import a condition are not employed. *Millan v. Kephart*, 18 Gratt. 1, 8.

"The effect of a condition, however, is only to make the lease void at the option of the lessor; and the modern authorities seem to establish that this is so, even where it is provided that the lease shall become void on breach of the condition." *Millan v. Kephart*, 18 Gratt. 1, 8.

"An entry, therefore, would be necessary to put an end to the estate of the tenant. Without such entry the right of the tenant would not expire, and the remedy adopted in this case would not lie." *Millan v. Kephart*, 18 Gratt. 1, 8.

**Collateral Limitation or Covenant.**

—If the stipulation was a collateral limitation, K. was entitled to recover the premises; if it was a covenant, he was not entitled to recover. *Millan v. Kephart*, 18 Gratt. 1.

"It may operate as a covenant only, having no effect upon the estate either to limit or to defeat it, but giving to the landlord a remedy by an action for damages, or by a suit in equity for a specific execution." *Millan v. Kephart*, 18 Gratt. 1, 8.

The jury was to ascertain the true intention of the parties as embraced in the contract. For that purpose they were to consider the whole contract; not any one provision only, but all its provisions; not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties; and thus to determine whether the stipulation for the surrender of the property upon a sale and notice, was

a collateral limitation, or a covenant. *Millan v. Kephart*, 18 Gratt. 1.

**No Particular Notice Necessary.**—The notice was not required to be for three months, or for any particular period. Any notice which would distinctly inform, the tenant that a sale had been made, would be "proper" notice. *Millan v. Kephart*, 18 Gratt. 1.

### 9. By Notice to Quit.

#### a. Must Be Explicit and Positive.

A notice to terminate a tenancy must be explicit and positive. A conditional notice is not sufficient. A notice to tenant that unless certain repairs are made and assurances given, the landlord will not renew a lease, is conditional, and not sufficient to terminate a lease. *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

#### b. Estoppel to Deny Sufficiency of Notice.

A tenant may be estopped by his acts from denying the sufficiency of an otherwise insufficient notice, but in such case the estoppel can only arise where the conduct of the tenant has been such as to mislead the landlord to his prejudice. *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

#### c. Notice Provided for in Lease.

The notice to be given may be provided for by the terms of the lease. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378.

**"Proper Notice" Construed.**—Where a lease contained a stipulation that if the lessor should sell the demised premises during the term, upon proper notice the lessee should surrender possession, it was held that any notice that distinctly informed the tenant that a sale had been made would be a "proper notice." Neither the law nor the contract required any particular form or length of notice. *Millan v. Kephart*, 18 Gratt. 1.

#### d. Necessity for Notice to Quit.

##### (1) Where Limit of Term Fixed.

"If the length of the term be fixed

by the contract, as where the lease is for a year, or a certain number of years, no notice to quit is necessary to dissolve the relation of landlord and tenant." *Crawford v. Morris*, 5 Gratt. 89, 107.

So, where a lease provides that the same shall terminate and cease whenever the lessee, from any cause, ceases to work for the lessor, and it appears that the lessee had ceased to work for the lessor before the action was commenced, said lessee is not entitled to notice to quit. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299.

##### (2) To Tenant from Year to Year.

Where a tenancy from year to year has been created, notice to quit must be given by the party wishing to terminate the lease. The period of such notice depends on statutory provisions. *Allen v. Bartlett*, 20 W. Va. 46; *Arbenz v. Exley*, 52 W. Va. 476, 44 S. E. 149; *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771; *King v. Wilson*, 98 Va. 259, 35 S. E. 727.

To terminate a tenancy from year to year requires a notice in writing from the party wishing to terminate it to the other party for three months prior to the end of any year. *West Virginia Code*, ch. 93, § 5. *Allen v. Bartlett*, 20 W. Va. 46, 54; *Crawford v. Morris*, 5 Gratt. 89, 107.

In Virginia, if the premises are within a city or town, three months' notice are required, and if without, six months. See *Va. Code*, 1887, § 2785. *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. 771.

And where the evidence shows an occupation as tenant with payment of annual rent, in order to maintain an action of ejectment against such tenant, the landlord must prove a notice to quit. *Smoot v. Marshall*, 2 Leigh 134. See the title *EJECTMENT*, vol. 4, p. 884.

**Under Stipulation to Give Tenant Preference Each Year.**—The agreement for the renewal of a lease pro-

vides that the tenant is to get the house, at the price stated therein, for one year, after his present year expires, and is to have the preference each succeeding year thereafter. It was held, that this did not create a tenancy from year to year so as to entitle the tenant to the legal notice to quit. *Crawford v. Morris*, 5 Gratt. 89; *Drinka d v. Heptinstall*, 55 W. Va. 320, 47 S. E. 72. See ante, "Tenancy from Year to Year, etc.," I, A.

**(3) To Tenant at Will or by Sufferance.**

A tenant at will or at sufferance is not entitled to six months' notice to quit. *Harrison v. Middleton*, 11 Gratt. 527; *McClung v. Echols*, 5 W. Va. 204; *Williamson v. Paxton*, 18 Gratt. 475; *Emerick v. Tavenner*, 9 Gratt. 220.

"Where there is no possession, and no injury can result to the lessee, such as the loss of crops, a re-leasing of the same premises is a sufficient notice to terminate an estate at will. Re-entry is always sufficient notice, but there can be no re-entry where the lessee has never been in possession." *Echpse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, 928.

And the institution of suit by lessor will determine a tenancy at will. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. 439.

**Possession under Contract of Purchase.**—One who has taken possession of land under a parol contract of purchase from the owner, can not be ejected at the suit of a grantee of the owner, where there has been no previous demand for possession, since he is tenant at will of the owner. *Jones v. Temple*, 87 Va. 210, 12 S. E. 404, 24 Am. St. Rep. 649.

**(4) To Tenant Holding Adversely.**

If a tenant claims to hold adversely to his landlord, he is not entitled to notice to quit. *Harrison v. Middleton*, 11 Gratt. 527; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Allen v. Paul*, 24 Gratt. 332; *Emerick v. Tavenner*, 9 Gratt. 220, 232.

"The most that he can require is reasonable notice, and he is entitled to no notice if he claims to hold adversely, or attorns to some other person, or does some other act disclaiming to hold as tenant." *Harrison v. Middleton*, 11 Gratt. 527, 548.

And if there was evidence from which a jury might infer that the tenant had disclaimed to hold under the landlord, it might be submitted to the jury, and if the evidence proved this fact to the jury's satisfaction, no notice to quit was necessary. *Smoot v. Marshall*, 2 Leigh 134.

**Unnecessary Where Formal Disclaimer Made.**—Notice to quit is unnecessary where formal disclaimer has been made by a tenant holding over, before bringing an action against him for unlawful detainer. *Emerick v. Tavenner*, 9 Gratt. 220.

**To Purchaser from Tenant Who Had Notice or Made Disclaimer.**—Purchaser in fee under tenant is not entitled to notice to quit before the lessor can maintain an action for unlawful detainer against him and the tenant jointly, where the tenant has received notice to quit or has made a formal disclaimer. *Emerick v. Tavenner*, 9 Gratt. 220.

**To Sublessee of Same.**—And if he held expressly as under tenant of E., he would not be entitled to the notice. When T. had determined the tenancy of E. by six months' notice to quit, or E. had disclaimed to hold as tenant, and thereby deprived himself of the right to notice, it was competent for T. to proceed at once to oust both E. and A. *Emerick v. Tavenner*, 9 Gratt. 220.

**(5) Waiver of Notice.**

The necessary notice may be waived by consent of the lessee and surrender of premises by him. *Clator v. Otto*, 38 W. Va. 89, 18 S. E. 378.

**(6) For Maintenance of Forcible Entry and Detainer.**

See the title FORCIBLE ENTRY AND DETAINER, vol. 6, p. 171, 172.



### c. Waiver by Reception of Rent.

The acceptance of rent by a lessor, *eo nomine*, which has accrued after the expiration of a notice to quit, is a waiver of it. Dictum in *McKildoe v. Darracott*, 13 Gratt. 278, 283.

But the after reception of rent by the lessor could not operate as a waiver of notice in favor of the lessee as against the subsequent lessees. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

### 10. By Eviction of Tenant by Landlord.

#### a. What Constitutes Eviction.

##### (1) Definition of Eviction.

The term eviction may be defined as not a mere trespass, but something of a grave and permanent character done by the landlord, with the intention of depriving the tenant of the enjoyment of the demised premises. *Tunis v. Grandy*, 22 Gratt. 109.

"In order to constitute a breach of warranty in the case of landlord and tenant, there must be an actual eviction from the premises. 1 Tayl. Landl. & Ten., §§ 377, 378, 381. 'An actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises—a physical ouster or dispossession from the very thing granted, or some substantial part thereof.' 11 Am. & Eng. Ency. Law (2d Ed.) p. 459; 2 Minor, Inst., 757; *Briggs v. Hall*, 4 Leigh 484." *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 901.

"The word eviction—from *evincere*, to evict, to dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent; because it is now well settled, that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended." *Tunis v. Grandy*, 22 Gratt. 109, 130.

And the wrongful entry of the landlord into a meadow, and his forcible cutting and carrying away of the hay, might well authorize a jury to find an eviction as to the meadow land, and a court on demurrer must do the same. *Briggs v. Hall*, 4 Leigh 484, 485.

##### (2) Actual Disturbance of Possession Necessary.

Where a lessor in a lease for a term of years merely warns his lessee, during the last year of the term, not to sow any fall crops upon the land, the gathering of which would necessarily be beyond the term, and under the terms of the lease the lessee's right so to sow was clear, this, unaccompanied by any act disturbing the tenant during his term, would furnish no ground of complaint, much less a foundation on which to found a claim for damages for the loss following obedience to such instruction not to sow. *Mason v. Moyers*, 2 Rob. 606, 616. See ante, "Of Purchasers from Lessor," IV, E, 2. See the title CROPS, vol. 4, p. 97.

##### (3) Tortious Entry or Actual Expulsion Unnecessary.

In later times, a tortious entry, or actual expulsion, has not been considered necessary to constitute an eviction, as formerly it was. *Tunis v. Grandy*, 22 Gratt. 109, 130.

##### (4) Mere Failure to Deliver Possession.

While, under some circumstances, the failure of the owner to deliver possession to a lessee might be the basis of an action if he refused on request, it is not eviction. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 901. See ante, "As to Possession," V, A, 1; "Covenant for Quiet Enjoyment," III, D, 4, c.

##### (5) Second Lease and Possession Taken Thereunder.

A tenant is evicted where, before the expiration of his lease, the landlord rents the demised premises to another person, who takes possession of them without the tenant's consent. But it

requires, in addition, the taking of possession of the premises by the second lessee, which is necessarily an exclusion of the first lessee. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899, 901. See ante, "By Execution of New Lease," VI, B, 6.

**(6) Breach of Covenant as to Use of Part of Premises.**

See ante, "Lease or Covenant," III, A, 9.

If a lessor intended to make a covenant with lessee in regard to the extent to which an adjacent wharf might be used by another, then a breach of that covenant, supposing it to have been broken, would not amount to an eviction. *Tunis v. Grandy*, 22 Gratt. 109, 110.

Even if lessees had a right, at their election, to make the alleged interference with their rights by such other party a cause for withdrawing from the use of that part of the wharf, and thus to produce a constructive eviction of it, surely they ought to have given very distinct notice of their intention to do so to the lessor, and released to her their interest in that part of the wharf, in order that she might indemnify herself by restricting him to his rights, and by making the best use she could of the wharf, subject to those rights. *Tunis v. Grandy*, 22 Gratt. 109, 134.

**(7) Mere Trespass No Eviction.**

"It is well settled that a mere trespass, however aggravated, does not amount to an eviction. As where a part of the demised premises is recovered by a person claiming under a prior lease from the landlord, it seems that the eviction in such case is by title paramount, so as to be ground for an apportionment of the rent, and not for its entire forfeiture." *Tunis v. Grandy*, 22 Gratt. 109, 131.

**(8) RENTAL BY LESSOR WITH SUBLESSEE'S CONSENT.**

On October 3d, 1792, land was leased for a term of five years. On November 9th, 1795, the lessee demised

the remainder of his term to M., who agreed with the landlord in May, 1797, that he might rent the remainder of his year to whomsoever he wished. Accordingly the landlord rented to G. for two years. In an action by the original lessee against G. it was held, the lease to G. was not an eviction of the plaintiff, and did not prevent the landlord's recovering a balance due for rent on the original contract. *Cooke v. Wise*, 3 Hen. & M. 463.

And although the lessor did demise the premises to another for a longer period than he was entitled to under the sublease and surrender to him, yet as his lessee had not reserved any part of the term to himself, lessor might without injury to him include the whole period unexpired, in his new lease; for having under such surrender of the possession, a lawful right to enter and hold until the full and complete end of lessee's term, and the immediate reversion being in himself, he might lawfully redemise the premises, provided, in so doing, he evinced no intention to injure lessee or put an end to his interest in the lease. Therefore, the conduct of lessor in taking from the sublessee the possession of the premises, and redemising them, even for a longer period, if coupled with circumstances which repel the conclusion that he accepted the possession as a surrender of the lease, and with a view to avoid the remainder of lessee's term, is not (of itself) sufficient to discharge lessee from his liability to pay the rent for the residue of the term contained in his lease. *Cooke v. Wise*, 3 Hen. & M. 463.

**(9) Surrender No Eviction.**

In a suit against the lessor of premises, to which the tenant was not a party, a decree directing the sheriff to lease the demised premises, which was done, the tenant giving possession, his surrender was held not to amount to an eviction. *Murray v. Pennington*, 3 Gratt. 91.

**b. Liability Therefor.**

**Liability of Lessee to Assignee.**—A person assigning a lease, for value received, but without any special agreement to be responsible for the title, is not bound to restore the purchase money, upon the eviction of the assignee, in consequence of a defect in the lessor's title; especially where the lessor has not been previously resorted to, or shown to be insolvent, and where the possibility of the eviction was in contemplation of both the parties at the time of the assignment. *M'Clenahan v. Gwynn*, 3 Munf. 556.

**Liability of Landlord to Assignee.**—If the landlord is liable in case of eviction under paramount title to the original lessee, he is equally liable in damages to the assignee. *McClenahan v. Gwynn*, 3 Munf. 556.

**Remedy of Lessee.**—"The remedy upon the warranty is a remedy given against the lessor, when the lessee is evicted by better title and by right. It does not exist where the eviction is by wrong and without title. It can not, then, be appropriate to the eviction by the lessor himself, which is by wrong and without title." *Black v. Gilmore*, 9 Leigh 446, 450.

"His remedy for an eviction by his landlord is trespass or ejectment." *Black v. Gilmore*, 9 Leigh 446, 450.

**c. Effect on Liability for Rent.**

See ante, "Apportionment and Abatement," IV, D, 1, b.

**C. CONSEQUENCES OF TERMINATION.****1. Right to Crops.**

See the title CROPS, vol. 4, p. 97.

At common law where land is leased for a certain number of years, and consequently the period of the term is fixed and certain, and the lease is silent as to who shall be entitled to the growing crop on the land at the end of the term, the off going tenant is not entitled to such way going crop (*Mason v. Moyers*, 2 Rob. 606; *Harris v. Carson*, 7 Leigh 632, 30 Am. Dec.

510); but where the lease recognizes the right to sow in the last year of the term, as was the case in *Mason v. Moyers*, 2 Rob. 606, and the tenant is restricted to the cultivation of a certain portion of the land and pays an equal annual rental for its use, he has a right to reap the way going crop, where the lease is silent as to who is entitled thereto. *Kelley v. Todd*, 1 W. Va. 197; *Mason v. Moyers*, 2 Rob. 606.

**Parol Evidence of Usage to Vary Rule.**—See ante, "Parol Evidence to Explain Lease," III, E, 3.

**2. Removal of Buildings and Payment Therefor.**

Where the terms of a lease require the lessee to erect buildings upon the leased premises, and there is no agreement for their removal by the lessee, he has no right to remove them. *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392. And the general rule is that buildings form a part of the freehold, and can not be removed by the tenant at the end of his lease. *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697; *Effinger v. Hall*, 81 Va. 94. See the title FIXTURES, vol. 6, p. 145.

**Surrender Provided for by Lease.**—And where the lease in terms provides that the lessee shall surrender the buildings upon the premises at the termination of the lease, in the absence of ambiguity and allegation of fraud or mistake, this must govern. *Tait v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. 697.

**Under Ten Year Lease Renewable for Like Term at Lessor's Option.**

—Upon a lease for ten years at an agreed rent, renewable for a like period upon the same terms, at the option of the lessor, upon giving six months' notice, where the contract stipulates that the lessee shall erect buildings at once, and, if lessor elects to terminate the lease at the expiration of the first term, he shall pay for the buildings, at a valuation made by arbitrators, and, if he fails to pay for the buildings the lessee

shall hold as tenant from year to year at the same rent, subject to the ordinary notice to terminate the tenancy at the end of any year, at which time the lessor is to pay as aforesaid for the buildings, if no notice to terminate is given by the lessor, and the lessee holds for more than a full second term of ten years, the lessor may, upon notice, terminate the tenancy and recover the leased premises, including the buildings, without paying for the latter. *Powell v. Pierce*, 103 Va. 526, 48 S. E. 666.

It may be said here, as was remarked in *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392, under substantially the same state of facts: "As the lease was continued for twenty years, the full period which the lessee was entitled to, the lessor had, at the expiration of that time, the right to the possession of the leased premises, including the storehouse;" or at the end of any one year thereafter, where tenant held over. *Powell v. Pierce*, 103 Va. 526, 531, 48 S. E. 666.

The fact that in *Peirce v. Grice*, 92 Va. 763, 24 S. E. 392, it was merely left optional with the lessor to continue the lease, while in this case the lessor was required to give six months' notice, previous to the termination of the first term, of his election to continue the lease; and the fact that here, upon a failure to give the required notice and pay for the buildings, the lessee was to become a tenant from year to year, subject to the ordinary notice to terminate the tenancy at the end of any year, at which time the lessor was to pay for the buildings, is not perceived to materially affect the question at issue. *Powell v. Pierce*, 103 Va. 526, 530, 48 S. E. 666.

The failure of lessor to give the six months' notice of his intention to renew the lease, entitled the lessee, at the expiration of the first term, to decline to accept the second, and to demand pay for his buildings, but having failed to do this, and having enjoyed the leased premises for a longer period

than the second term, he is deemed to have waived the notice required of the lessor, and can not now claim that he was tenant from year to year for all these years and claim compensation for the buildings. *Powell v. Pierce*, 103 Va. 526, 48 S. E. 666.

**"Renewable or Pay for Improvements."**—Where the language of the lease is, "renewable or pay for the improvements," it is clear that, at the end of the first term of ten years, the lessor was under obligation either to renew the lease for another term of ten years, or to pay for the improvements. He could not be required to do both. Had there been no renewal, the lessee would have been entitled to the value of the improvements, but when the lease was renewed for the second term, the contract to pay for the improvements was thereby satisfied. *King v. Wilson*, 98 Va. 259, 261, 35 S. E. 727.

**General Covenant for Renewal.**—A general covenant for renewal binds lessor to renew for one term only, and, at the expiration of the second term, the lessor is entitled to recover the premises and the improvements. *King v. Wilson*, 98 Va. 259, 35 S. E. 727. And see ante, "Renewal in General," VI, A, 2.

## VII. Assignment and Subletting.

### A. ASSIGNMENT AND SUBLEASE DISTINGUISHED.

See post, "Liability of Original Lessee," VII, C.

If a lessee grant to another his whole term, it seems to have been decided that it is an assignment, although a greater rent be reserved and payable to the original lessee. But if the lessee reserve any part of the term (even a single day), it seems to be considered as an under lease only, and not as an assignment. *Cooke v. Wise*, 3 Hen. & M. 463 (note containing opinion of trial judge).

But, in order to constitute an assign-

ment of a lease or covenant, it seems to be necessary that the assignment even of the whole term should be made by deed, or at least by an instrument in writing, and not by parol only. For it seems to be agreed, that wherever there is an assignment, the original lessor or lessee, or their assigns, may sue or be sued by the assignee of either, upon any of the covenants contained in the original lease. *Cooke v. Wise*, 3 Hen. & M. 463.

#### **B. PAROL GIFT OF LEASEHOLD.**

A testator having put his daughter's husband into possession of a leasehold tract of land, and delivered him the lease, permanent improvements, also, being made by the son-in-law, with the assistance of the family, and parol declarations, by the testator, that he had given him the land, in consideration of his having married his daughter, and to prevent his moving to Kentucky, being proved; it was decided that the son-in-law had an equitable title to the land, for the time the lease had to run, and to a release of the legal title, from the heirs or executors, according as the interest conveyed by the lease might be greater, or less. *Shobe v. Carr*, 3 Munf. 10.

#### **C. LIABILITY OF ORIGINAL LESSEE.**

**In General.**—The lessee certainly, and his estate, are bound, that his assigns shall do what is provided; for he is bound for the performance of all his express covenants, during the continuance of the whole lease, notwithstanding the assignments; and this, although the lessor accepted the assignee as tenant. *Farmers' Bank v. Mutual Ass'n Society*, 4 Leigh 60, 84; *Cooke v. Wise*, 3 Hen. & M. 463.

An assignee of the lease can not be considered as the tenant in possession, the assignment having been made to him without the privity or assent of the lessor. The lessor is not bound thereby, but may still consider the original lessee as his tenant. *Ferguson v.*

*Moore*, 2 Wash. 54, 57; *Emerick v. Tavenor*, 9 Gratt. 220.

#### **After Surrender to Original Lessor.**

—Where a lease is assigned by the tenant, as to his whole interest, an agreement between his assignee and the lessor that the latter might rent the premises for the balance of his year, to any person and for any term he might choose, and a lease executed accordingly by such lessor to a third party, to extend beyond the original term, would operate as a surrender of the premises to the original lessor and consequently discharge the original lessee from any liability to him. *Cooke v. Wise*, 3 Hen. & M. 463.

But if such transfer of interest by the original lessee was an under lease only, the act of the new tenant could not, of itself, affect the contract between the original lessor and lessee. *Cooke v. Wise*, 3 Hen. & M. 463.

A sublessee, unrestrained from demising the premises to any other person, may lawfully demise or assign his interest to anyone, without avoiding the original lease. *Cooke v. Wise*, 3 Hen. & M. 463. See ante, "Rental by Lessor with Sublessee's Consent," VI, B, 10, a, (8).

#### **New Lease Extinguishing Old.**

Where the original lessees, with the assent of the lessors, assigned the lease before the expiration of the first year thereof, assignees assuming all their contracts and liabilities relating to the business, and on the very next day taking another lease of the same property from the original lessors upon a rent reserved in money, the taking of the new lease operated as a surrender of the first, and extinguished the liabilities of such lessees as assignees of the first prospectively; and as assignees they were not liable for prior breaches of contract by assignors. *Prestons v. McCall*, 7 Gratt. 121.

**On Implied Covenants.**—But after assignment and acceptance, he is not liable on covenants merely implied by

law. *Farmers' Bank v. Mutual Ass'n Society*, 4 Leigh 69, 84.

**For Breach of Covenant against Underletting.**—See ante, "Action for Damages Unaffected," VI, B, 5, c, (2), (c).

**D. LIABILITY OF ASSIGNEE OR SUBLESSEE.**

**In General.**—"The principle is elementary, and has received the repeated approval of this court, that when the relation of landlord and tenant has been once established, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or mediately; and the succeeding tenant is as much bound by the acts and admissions of his predecessor as if they were his own. *Emerick v. Tavener*, 9 Gratt. 220, 224." *Neff v. Ryman*, 100 Va. 521, 524, 42 S. E. 314. See *Allen v. Bartlett*, 20 W. Va. 46.

**Assignee.**—An assignee of a lease is fixed with notice of its covenants and takes the estate of his assignor cum onere, and each successive assignee of a lease, because of privity of estate, is liable upon covenants maturing and broken while the title is held by him. *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696.

**Sublessee.**—If the lease contain a clause of forfeiture, and re-entry by the lessor, in case some of the covenants in the lease be not duly performed, the lessor can enter upon the under tenant for the forfeiture as well as if he were an assignee of the whole term, for the possession of the under tenant is by virtue of the license from the lessee, and is construed as his possession merely. Note to *Cooke v. Wise*, 3 Hen. & M. 463, containing opinion of trial judge.

**For Breaches Occurring before Assignment.**—In general, the assignee of a term of years is not liable for breaches of the covenants in the lease before the assignment, but, if the assignee by express covenant with his assignor, bind himself to pay the rents,

and perform all the covenants in the lease contained, and required to be done and performed on the part of the lessee, such a covenant not only binds the assignee to fulfill the covenants during his own time, but makes him liable for breaches before his time. *Farmers' Bank v. Mutual Assur. Society*, 4 Leigh 69.

**Lease of Factory—Assignee Assumes Liabilities—Rights of Lessor.**—A salt factory was leased for the annual rental of two-thirds of its product, with the stipulation that a certain quantity should be produced each year, the lessee agreeing to sell the lessor's share. It was further agreed that the lease should not be sublet or assigned without the written permission of the lessor, who had the privilege of terminating it on two months' notice. Within a year the lease was assigned, and the lessor entered into a new agreement with the sublessee, the latter assuming all of the lessee's liabilities. The sublessee paid off the debts of the lessee. For the failure of the lessee to manufacture the required amount the lessor was entitled to damages, but as the new lease was made within a year, the lessee's covenant was not broken, and therefore the sublessee was only required to account to the lessor for two-thirds of the stock left by the lessee, after deducting all expenses attending the sale of what was sold. *Prestons v. McCall*, 7 Gratt. 121.

There could be no breach of the covenant to manufacture the amount required per annum, until the end of the year; and as the surrender of that lease and the taking of the new one was within the year, the breach of that covenant became impossible; and therefore the assignees were not bound by their contract to comply with that covenant. *Prestons v. McCall*, 7 Gratt. 121.

Where the lessors and the first lessees had contracted that the latter

should market all the salt produced and account to lessors for two-thirds of its value, the lessors are not liable to the assignees for debts paid by them to other creditors of their assignors, for horses or anything else, contracted to be paid for in salt, the contract for the sale of the salt not constituting a partnership. *Prestons v. M'Call*, 7 Gratt. 121.

The contract of assignment was not for an indemnity to assignors against the debts and contracts contemplated, but for their complete exoneration by the engagement of assignees to relieve them therefrom, and to become debtors and paymasters in their stead. *Prestons v. M'Call*, 7 Gratt. 121.

But the contract between the old and new lessees embraced the arrears of salt rent then on hand, and the proceeds of such as had been sold and was unaccounted for by the old lessees for which the new ones were bound to account to the lessors. *Prestons v. M'Call*, 7 Gratt. 121.

**Enforcement by Lessor.**—Though the lessors were not parties to the contract of assignment, yet where it was made in part for their benefit, and a consideration therefor moved from them, and the whole change of tenancy was an arrangement in which they participated, and which could not be made without their consent, they have a right, so far as they are concerned, to enforce the undertaking of assignee to pay the debts and liabilities of the assignors. *Prestons v. M'Call*, 7 Gratt. 121.

**Assignees Holding over—How Amount of Rent Determined.**—See ante, "From Year to Year," II, B, 1.

## **E. LIABILITY OF MORTGAGEE OF TERM.**

A mortgagee of a term of years, though he never enters into possession, is bound to perform the covenants of the lease from the date of the mortgage, like any other purchaser. *Farmers' Bank v. Mutual Assur. Society*, 4 Leigh 69. See the title MORTGAGES AND DEEDS OF TRUST.

## **F. LIABILITY OF LANDLORD TO ASSIGNEE OR SUBLESSEE.**

The landlord is liable to the assignee of a lease for damages whenever he would have been similarly liable to the lessee. *McClenahan v. Gwynn*, 3 Muni. 556.

But under tenant acquires no rights under original lease, except the mere right of possession so long as lessee's covenants remain unbroken. Note to *Cooke v. Wise*, 3 Hen. & M. 463.

**Liability for Eviction after Assignment.**—See ante, "Liability Therefor," VI, B, 10, b.

## **G. CONCEALMENT OF COVENANT AS FRAUD.**

See the title FRAUD AND DECEIT, vol. 6, p. 448.

# **VIII. Estoppel of Tenant.**

## **A. TO DENY LANDLORD'S TITLE.**

### **1. Principles Stated.**

#### **a. General Rule.**

The general rule is firmly established that the possession of the tenant is the possession of the landlord, and is not adverse to him, and the tenant will not be allowed to deny his landlord's title. *Reusens v. Lawson*, 91 Va. 226, 258, 21 S. E. 347; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154; *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866; *Hodgkin v. McVeigh*, 86 Va. 751, 10 S. E. 1065; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802; *Locke v. Frasher*, 79 Va. 409; *Suttle v. Richmond, etc., R. Co.*, 76 Va. 284, 289; *Creekmur v. Creekmur*, 75 Va. 430; *Rakes v. Rustin Land, etc., Co.*, 2 Va. Dec. 156; *Turpin v. Saunders*, 32 Gratt. 27, 32; *Bartley v. McKinney*, 28 Gratt. 750; *Allen v. Paul*, 24 Gratt. 332; *Dobson v. Culpepper*, 23 Gratt. 352; *Alderson v. Miller*, 15 Gratt. 279; *Miller v. Williams*, 15 Gratt. 213, 218; *Wild v. Serpell*, 10 Gratt. 405, 415; *Emerick v. Tavener*, 9 Gratt. 220; *Lutheran Church v. Arkle*, 49 W. Va. 92, 94, 38 S. E. 486; *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S.

E. 169; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; *Marmett Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Bushong v. Rector*, 32 W. Va. 311, 317, 9 S. E. 225, 227; *McFarland v. Douglass*, 11 W. Va. 637, 652; *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 210; *Genin v. Ingersoll*, 2 W. Va. 558; *McClung v. Echols*, 2 W. Va. 204, 215; *Campbell v. Fetterman*, 20 W. Va. 398, 412; *Jones v. Fox*, 20 W. Va. 370, 380. See *Kelly v. Patchell*, 5 W. Va. 585.

Nor can he be permitted to deny that the possession so received was the possession of his landlord. *Turpin v. Saunders*, 32 Gratt. 27, 32; *Emerick v. Tavener*, 9 Gratt. 220, 223; *Locke v. Frasher*, 79 Va. 409, 413.

"The tenant enters under his landlord, and acquires possession by admitting his title. It would be a breach of good faith to attempt to hold a possession so obtained, by impeaching the landlord's title." *Alderson v. Miller*, 15 Gratt. 279, 283. See *Mitchell v. Baratta*, 17 Gratt. 445, 449, and the same rule applies to a lessee from the state. *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802.

"This doctrine was unknown to the common law, and is an estoppel in pais. The only tenant's estoppel known when Lord Coke wrote was that strictly by indenture; but the tenant's estoppel is now no longer thus restricted, as it is founded on the possession, and not the instrument of demise, and is as operative after the conclusion of the lease as before, and until that possession is ended. It is only where there is fraud or mistake, in consequence of which one takes a lease of land, that he will not be estopped by the lease." *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

**b. Rule Not Affected by Possession at Time of Lease.**

The operation of the general rule

that the tenant can not deny his landlord's title is not affected by the fact that tenant is in actual possession at the time he accepts the lease; as by such acceptance he as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself. *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866; *Locke v. Frasher*, 79 Va. 409; *Emerick v. Tavener*, 9 Gratt. 220; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *S. C.*, 38 W. Va. 607, 18 S. E. 762.

In *Turpin v. Saunders*, 32 Gratt. 27, 32, doubt is cast upon the question as to whether the estoppel exists where the tenant is already in possession when the lease is made, citing *Miller v. Williams*, 15 Gratt. 213, 218. But in *Locke v. Frasher*, 79 Va. 409, 413, citing and following *Emerick v. Tavener*, 9 Gratt. 220, the doubt is resolved.

**c. Tenant Estopped in All Actions.**

In an action by the landlord against his tenant, whether the action be debt, assumpsit, covenant, unlawful detainer, or ejectment, where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord; for in such case the tenant is estopped from denying the title of his landlord. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *S. C.*, 38 W. Va. 607, 18 S. E. 762. See *Suttle v. Richmond, etc., R. Co.*, 76 Va. 284, 289; *Bartley v. McKinney*, 28 Gratt. 750.

**In Direct or Collateral.**—Tenant is estopped to impugn landlord's title during the tenancy, or until he has restored possession, or done something equivalent thereto, either by proof of title in himself or another, whether the question arises in a direct action to recover possession or in a collateral action. *Emerick v. Tavener*, 9 Gratt. 220.

**d. Surrender of Possession.**

See post, "After Disclaimer and No-



tice to Landlord—Surrender Unnecessary," A, 3, e.

**c. May Not Controvert Boundaries in Lease.**

The lease being for a certain quantity of land, situate as therein described, and lessee having executed it under his hand and seal, and thereby recognized the description and boundaries therein specified, and that he then held the same in possession; and the warrant being for the precise tenement described in the lease, neither lessee nor one claiming under him, can be entertained to deny that the tenement had its boundaries, or that they were within them. *Emerick v. Tavener*, 9 Gratt. 220.

Neither will be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others; nor will they be permitted to introduce these title papers for the purpose of showing that they had not possession of the land claimed by lessor. *Emerick v. Tavener*, 9 Gratt. 220.

**f. Secret Attornment to Another.**

A tenant can not destroy the possession of his landlord by a secret attornment to another, and such an attornment as against the landlord is of no effect. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

If a tenant takes a secret lease or conveyance for the land from a third party, claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

**g. Inconsistent Claims Waived.**

**In General.**—One who enters into a lease, thereby waives all claims inconsistent with the title and possession so acquired. As where the real owner takes a lease from another, or an adverse claimant gets into possession by tampering with the tenant. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

**Right to Conveyance as Real Purchaser.**—A lot is bought and a house is built thereon for one party, with money furnished by another, who takes the deed in his own name as security. Default being made in the monthly payment of money, which was agreed to be done until the debt was extinguished, by mutual verbal consent the property was placed with a real estate agent who rented it to the purchaser. It was held, that by the agreement under which the plaintiff became defendant's tenant, the former waived all rights under the deed, and was estopped to deny the defendant's title. *Jordan v. Katz*, 89 Va. 628, 16 S. E. 866.

One in possession under agreement to purchase can not be ousted before his lawful possession is determined by demand or otherwise. (*Williamson v. Paxton*, 18 Gratt. 475.) Yet such possession may be determined by the acceptance of a lease. *Locke v. Frasher*, 79 Va. 409.

**Purchaser from Tenant.**—And it has been held, that though a party purchase from the tenant and enter upon the premises under an absolute conveyance, he still, in judgment of law, is deemed to have entered as the tenant of the landlord, and to hold the possession subject to all the duties and responsibilities appertaining to that character. *Emerick v. Tavener*, 9 Gratt. 220, 224; *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 210.

**h. Lease from Third Person Void.**

As a tenant is not permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during the tenancy, if he takes a lease from a third person, it is void, and can not work an adverse possession against his landlord. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

**i. Agreement for Lease Should Adverse Title Be Established.**

To agree with an adverse claimant of the leased property to take a lease from him, should he establish his

title, is not an act of bad faith on the part of the lessee towards his lessor, or a denial of his landlord's title. *Carrington v. Otis*, 4 Gratt. 235, 252.

**No Legal Title Passing.**—Thus, M., being in possession of a lot of ground under an agreement for a perpetual lease from C., makes an agreement with A., who sets up a title to the lot, that upon A.'s establishing a title to the lot against C., A. shall grant M., and M. will take from A., a perpetual lease of the lot, on the same terms on which M. holds from C. Held, that A. may maintain a writ of right for the lot against C., he not having passed his legal title to M. *Carrington v. Otis*, 4 Gratt. 235.

And M. being in possession under C., A. may maintain ejectment for the lot against M.; and the agreement between them will be no impediment in the way of his recovery. *Carrington v. Otis*, 4 Gratt. 235.

**Ejectment against Lessee No Bar to Specific Execution of Contract.**—The action being brought by A. against M. to establish his title, and thus be enabled to execute his agreement with M., A.'s recovery in the action of ejectment will be no bar to a specific execution of the contract at his instance against M. *Carrington v. Otis*, 4 Gratt. 235.

But a court of equity will not sustain a bill by A. against M., for a specific execution of the agreement, until A. has established his title against C. at law. And though A. make C. a party to the bill, for the purpose of settling the title, the court will not decide upon it. *Carrington v. Otis*, 4 Gratt. 235.

**j. Rule Same Where Title Forfeited for Taxes.**

The fact that during the tenancy the title of the landlord has been forfeited for the nonpayment of taxes on the land in controversy, constitutes no valid defense to an action of unlawful detainer, brought to dispossess the ten-

ant, as the plaintiff is entitled to be placed in statu quo, unless, perhaps, the tenant has made a distinct disclaimer, and has been holding adversely for more than three years, or can sustain some other valid defense. *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

**k. Controversy Not between Landlord and Tenant.**

The rule that a tenant can not deny the title of his landlord applies only in actions against the tenant for rent or possession, but does not render the tenant incompetent to deny such title in a controversy between other parties and the landlord, in which such tenant has no interest. *Bartley v. McKinney*, 28 Gratt. 750.

**l. Title Must Be Adversary.**

The principle that a tenant can not set up against his landlord in ejectment an adversary title in a stranger, will not prevent him from setting up title under a lease for lives, duly recorded, from the person under whom his lessor claims to one under whom the tenant claims, the validity of which the person, under whom the lessor claimed, had admitted by the regular annual receipt of the rents stipulated by the lease, from the defendant, and those under whom he claimed, down to a period of two months before the institution of the suit. *Smoot v. Marshall*, 2 Leigh 134.

"If the evidence was rejected, because the assignment of the lease under which the defendant claimed, not being by deed, did not pass the legal title to the freehold estate created by the lease, and so the defendant was setting up against his landlord a title in the lessee for lives, or his representatives, the answer is, that if the defendant had not the legal title, yet the lessee was a stranger neither to the lessor of the plaintiff, nor the defendant. The latter being in possession with his assent, had the legal title under the lease, as his tenant at

will or at sufferance, and so claimed under him, and that with the assent of the landlord, which was necessary according to the terms of the lease; and such a possession he had a right to maintain against the landlord, without violating any rule of law, as long as the lease continued." *Smoot v. Marshall*, 2 Leigh 134, 139.

#### **m. Double Tenancy and Estoppel.**

And one may be tenant to two landlords, holding conflicting title to the same property, by taking leases from both. All the consequences of the relation attach and he can dispute the title or possession of neither. Either could dispossess him as if he were the only landlord. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402, 403.

### **2. Application of Rule.**

#### **a. In General.**

"It is a general rule that the tenant shall never be permitted to controvert his landlord's title, or set up against him a title, acquired by him during his tenancy, which is hostile in its character to that which he acknowledged in accepting the demise. And this rule extends to a tenant holding over, as well as to an under tenant, assignee, or other person claiming under the lease, and is applicable to every species of tenancy, whether for years, or from year to year, at will or by sufferance." *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

#### **b. Under Covenant to Surrender Possession.**

It was held, in *Stuart v. Andrews*, 1 Va. Dec. 449, which was an action of unlawful detainer to recover the possession of land which had been leased, that where the defendant had acknowledged the right of the plaintiff "by a solemn contract under his hand and seal, under which contract he came into the possession and enjoyment thereof, and obligated himself to return the same to the plaintiff at the expiration of the lease, by the law as established for ages, he is estopped to

deny his title, and is bound by his solemn covenant to surrender to him the possession."

#### **c. Under Special Verdict in Ejectment.**

Where a special verdict finds that both the tenant of land, and one claiming possession of it, claim an estate in fee simple under the same person, the former under a title bond executed after a general warranty deed under which the claimant claimed, it is a finding of the seizin of the claimant, and the tenant is estopped to deny it. *Creigh v. Henson*, 10 Gratt. 231.

#### **d. Under Lease from Church.**

"It can not be that any man can accept a lease from a church of its property, take possession, and when sued for the rent or possession, plead a want of authority either in the church to hold the property, not just then wanted for religious purposes, or to lease it." *Lutheran Church v. Arkle*, 49 W. Va. 92, 94, 38 S. E. 486.

#### **e. To Occupant Helping to Pay Rent.**

And a party residing with the tenant and helping to pay the rent, thereby admits landlord's title, and can acquire no right to the premises by adverse possession against the landlord. *Hodgkin v. McVeigh*, 86 Va. 751, 10 S. E. 1065.

#### **f. To Owner Taking Lease of Another.**

Even when one who is the real owner enters into a lease, leasing his own land from another, this rule prevents him from setting up title in himself. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169.

#### **g. To Adverse Claimant under Tenant.**

So, an adverse claimant, who gets into possession of land by tampering with the tenant, can not resist the landlord's claim when the tenant himself could not. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

#### **h. To Successors in Title.**

Where the tenants, or their predecessors, have been put into possession of the premises by the plaintiffs, or

their predecessors, and have acknowledged the title of the latter, the possession of the former is the possession of the latter, until the former, as such tenants, by some act disclaim to hold of the latter as their landlords. *Allen v. Paul*, 24 Gratt. 332; *Emerick v. Tavener*, 9 Gratt. 220, 224.

**Estoppel Attaches to All Successors under Tenant.**—Tenant's estoppel to deny lessor's title attaches to all successors who acquire possession through or under such tenant, either immediately or remotely. *Emerick v. Tavener*, 9 Gratt. 220; *Creigh v. Henson*, 10 Gratt. 231.

Possession of land obtained from the tenant of another is merely the substitution of one tenant for another, and such substituted tenant can not be heard to set up title or possession in himself adverse to that under which he entered. *Genin v. Ingersoll*, 2 W. Va. 558.

If he would set up adverse possession he must restore that acquired through the tenant of another, and assert his adverse claim, or he must bring home to the landlord or cotenant with him notice of his adverse claim and holding under it, or he must actually oust the tenant. *Genin v. Ingersoll*, 2 W. Va. 558.

#### i. To Tenant Holding over.

One in as tenant after the term has expired, continues to hold as such as long as he remains in possession, unless he disclaims to hold as such, and asserts a right adverse to lessor and such disclaimer and assertion of adverse right are brought home to the knowledge of lessor by a full notice of the disclaimer and assertion of title. *Emerick v. Tavener*, 9 Gratt. 220; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154, 159.

#### j. To Tenant Acquiring Possession by Wrong.

And the rule is extended to the case of a tenant acquiring the possession by

wrong against the owner; e. g., a grantee in fee of a tenant for years. *Emerick v. Tavener*, 9 Gratt. 220, 223.

### 3. Exceptions to Rule.

#### a. Termination of Lessor's Title Since Demise.

"But the rule that the tenant is precluded from denying the title of his landlord is not to be extended so as to estop him from denying the validity of rights which had no existence when he took possession. For example, the tenant may show that, although the landlord had an interest in the premises at the time of the making of the lease, his interest terminated before the alleged cause of action arose. The tenant will be estopped from denying only what he has once admitted." *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

There is this modification which is well established, that he may always show that his landlord's title has expired or been extinguished since the lease, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of law. *Miller v. Williams*, 15 Gratt. 213, 219.

Thus, in a suit to sell land it was sold, but no conveyance made, to the plaintiff, who conveyed it, and the grantees put a tenant in possession. Upon appeal a reconveyance to the original owner was ordered, the first sale being set aside, and the deed was executed. Thereupon the tenant attorned and afterwards gave possession to the original owner, to whom the reconveyance had been made. In ejectment by the former purchasers against the original owner, it was held, the attornment of the tenant was not illegal, and the party getting possession through and from him is not the tenant of the plaintiffs so as to entitle them to recover without showing title in themselves. *Miller v. Williams*, 15 Gratt. 213.

**Conveyance by Landlord during Term.**—Although a tenant can not deny his landlord's title at the time of the lease, he can show that subsequently the landlord has conveyed the land to another, in an action of unlawful detainer against the tenant for possession. *Dobson v. Culpepper*, 23 Gratt. 352.

**b. Lease Taken under Mistake Induced by Fraud, or Duress.**

Where a person possessing and claiming title to land, by mistake supposes another to have better title, and takes a lease from him, in an action by lessor to recover possession, he may set up such mistake and show he had good title to the land; provided, such mistake was induced by the lessor through misrepresentations amounting to fraud. *Alderson v. Miller*, 15 Gratt. 279; *Locke v. Frasher*, 79 Va. 409; *Emerick v. Tavener*, 9 Gratt. 220; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 210. See also, *Jones v. Fox*, 20 W. Va. 370, 380; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154.

To enable a tenant to dispute his landlord's title, he must prove not only that he entered into the lease under a "mistake and misapprehension of fact," but also that such mistake was induced by the lessor through misrepresentations amounting to fraud. The difference is most important, and the failure in the offer, in the case at bar, to include anything amounting to a charge that the lease was procured by fraudulent misrepresentations on the part of any one, still less of the landlord or plaintiff, is fatal. *Locke v. Frasher*, 79 Va. 409, 411. But see West Virginia cases, which do not seem to draw this distinction between mistake merely and mistake induced by fraud, and according to them it would seem that either mistake or fraud would be sufficient.

"To come within the exception to

the general rule, that the tenant can not gainsay his landlord's title, he must prove all that is necessary to constitute the exception; and his offer of proof must include all the substantive facts necessary." *Locke v. Frasher*, 79 Va. 409, 412.

Other decisions have gone much further, holding that where the tenant, under a mistake, is induced to accept a lease from a person having no title, or if he be threatened with a suit upon a paramount title, the threat, under the circumstances, is equivalent to an eviction, and he may thereupon submit in good faith and attorn to the party holding a valid title to avoid litigation. *Turpin v. Saunders*, 32 Gratt. 27, 33.

The exception in favor of the landlord as against his tenant is a departure from the strict rule of law. But a principle adopted to promote justice and good faith must not be used as an instrument of fraud and violence. *Alderson v. Miller*, 15 Gratt. 279, 282; *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200, 210.

**Exhibition of Forged Title.**—"A tenant may impeach his landlord's title whenever he can show that he was induced to accept the lease by misrepresentation and fraud, and the exhibition of a title founded in forgery to induce a person already in possession to accept of a lease, was an act of an unequivocal character; and the evidence was admissible to show that the agreement was obtained by imposition and deceit." *Alderson v. Miller*, 15 Gratt. 279, 283.

To lay a foundation to impeach his right to a restoration of the possession, it was incumbent on the tenant to show that he had held possession previous to the lease, under some claim of title, and that he was induced to surrender possession, if in fact he did surrender possession, and to take a lease, by fraud and imposition of the landlord. To this end the deed to him was proper evidence, and the decree

also as showing the exception in favor of those who came into possession under his vendors prior to the 23d of March, 1837. *Alderson v. Miller*, 15 Gratt. 279, 286.

**c. After Surrender of Possession.**

A tenant who surrenders possession at the end of his term, or from whom possession is recovered, is not concluded by the existence of such tenancy at one time, or by the deed of lease which he executed, from contesting the title of his former landlord. *Wild v. Serpell*, 10 Gratt. 405. See *Creekmur v. Creekmur*, 75 Va. 430.

**d. After Purchase of Reversion.**

"And it is clear, when a tenant purchases the fee, his estoppel to deny the landlord's title ceases, because the tenancy ceases. *Campbell v. Fetterman*, 20 W. Va. 398; 2 Tayl., Landl. & Ten., § 502. He may thereafter set up his own title in fee against rent. *Wood, Landl. & Ten.*, 373." *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169, 170.

And surely a tenant can make a purchase of the fee after he becomes a tenant. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169, 170.

**e. After Disclaimer and Notice to Landlord—Surrender Unnecessary.**

It is settled law in Virginia and West Virginia that a tenant may sever the relation of landlord and tenant without first surrendering the possession of the premises, but in order to hold adversely he must make a clear, positive and continued disclaimer and disavowal of the title of his landlord, who must be put on notice of the adverse claim before a foundation can be laid for the operation of the statute of limitations against him. *Neff v. Ryman*, 100 Va. 521, 523, 42 S. E. 314; *Erskine v. North*, 14 Gratt. 60, 66; *Creekmur v. Creekmur*, 75 Va. 430; *Wilcher v. Robertson*, 78 Va. 602, 619; *Campbell v. Fetterman*, 20 W. Va. 398; *Swann v. Young*, 36 W. Va. 57, 14

S. E. 426, 431. See *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

A person who, while in the possession of land, accepts a lease therefor from one claiming to be the owner, may, after his term expires, by disclaimer and notice to such person, terminate his tenancy; and he will not, in such case, be required to surrender the possession before he will be allowed to set up an adverse title in himself, or a third person, *Voss v. King*, 33 W. Va. 236, 10 S. E. 402; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423.

Or perhaps the reason is that where the tenant was in possession when he took the lease, and did not acquire possession thereby, he need not surrender such possession before he can set up an adverse claim at the end of the tenancy. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

See *Emerick v. Tavener*, 9 Gratt. 220, 223, 237, where it is said: "A tenant can not be permitted to question or impugn the title of his landlord during the continuance of the tenancy, nor until he has restored the possession or done what would be regarded as equivalent."

And a doubt is expressed, whether if a tenant acquires rights adverse to his landlord not subsequent to the creation of the relation, he must not surrender the property before he can assert such adverse rights. *Emerick v. Tavener*, 9 Gratt. 220. See also, *quære*, to same effect, in *Creigh v. Henson*, 10 Gratt. 231.

And in *Wild v. Serpell*, 10 Gratt. 405, 415, it is said: "It is admitted that a tenant will not be permitted to dispute his landlord's title during the continuance of the tenancy or until he shall have restored the possession, or at least (as would seem to be intimated in some of the cases) until he shall have made a formal disclaimer to hold further as tenant with full notice to the landlord that he will claim to hold

in adversary possession for the future."

**Relation Ceases on Notice.**—As a general rule a tenant is not permitted to question his landlord's title; yet from the time that the landlord has notice that the person, who formerly held as tenant, claims to be in possession, not as tenant, but in his own right, the relation of landlord and tenant ceases. *Campbell v. Fetterman*, 20 W. Va. 398; *Emerick v. Tavener*, 9 Gratt. 220; *Alderson v. Miller*, 15 Gratt. 279.

In *Voss v. King*, 33 W. Va. 236, 10 S. E. 402, it is said: "If the tenant, with notice to the landlord, disclaims the tenure, and claims the fee adversely, in right of himself or a third person, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right; and the landlord's right of entry is complete, and he may sue at any time within the period of limitation from that time." Citing *Wild v. Serpell*, 10 Gratt. 405; *Miller v. Williams*, 15 Gratt. 213, 219; *Cooley v. Porter*, 22 W. Va. 120. And see *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426; *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423, 425; *Campbell v. Fetterman*, 20 W. Va. 398; *Allen v. Paul*, 24 Gratt. 332.

**Fullness and Certainty of Notice Required.**—"The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it, without full notice of his disclaimer or assertion of adverse title, (distinctly brought home to the landlord). *Emerick v. Tavener*, 9 Gratt. 220, 237; *Creekmur v. Creekmur*, 75 Va. 430, 436." *Reusens v. Lawson*, 91 Va. 226, 238, 21 S. E. 347. And see *Hulvey v. Hulvey*, 92 Va. 182, 23 S. E. 233; *Neff v. Ryman*, 100 Va. 521, 524, 42 S. E. 314; *Wilcher v. Robertson*, 78 Va. 602, 618; *Voss v. King*, 33 W. Va. 236, 10 S. E. 402;

*Swann v. Young*, 36 W. Va. 57, 14 S. E. 426; *Gale v. Oil Run, etc., Co.*, 6 W. Va. 200.

A tenant has no right to question the title of the party under whom he claimed, until he has shown a proper disclaimer and some title to the possession in himself. *Voss v. King*, 33 W. Va. 607, 18 S. E. 762, 764.

"In *Genin v. Ingersoll*, 2 W. Va. 558, it is held, that to enable a tenant to set up adverse claim he must either restore possession to the landlord, or bring home notice to him of adverse claim." *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423, 425.

The tenants can not set up any right or title adverse to the plaintiffs, unless they prove that they disclaimed to hold of them, or bona fide abandoned possession of the premises, or asserted and claimed an adverse right to the premises, with notice thereof to the plaintiffs or their predecessors, three years before the institution of the suit. And quære, if the mere disclaiming the landlord's title and claiming to hold in fee for three years, is sufficient to defeat the plaintiff's recovery in unlawful detainer. *Allen v. Paul*, 24 Gratt. 332.

"If it was conceding too much to say that the tenant might turn his possession to an adversary possession by disclaiming his landlord's title, and claiming to hold in fee, it was not error to the prejudice of the defendants." *Allen v. Paul*, 24 Gratt. 332, 342.

But such notice need not be so conclusive as to preclude all doubt. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

**Not Inferred from Long Possession.**—"Such knowledge can not be inferred from the long possession of the tenant. The inference, if it had been proper, should have been found as a fact by the jury. But it would have been an improper inference even for the jury to make from the mere fact

of continued possession by the tenant. If his possession commenced as tenant by sufferance, it so continued after the sale by the trustee; and it should be referred to the same fiduciary relation until it was determined by the will of the legal owner, or at least until the title of the legal owner was disclaimed with his knowledge." *Creigh v. Henson*, 10 Gratt. 231, 234.

Although tenant continues to hold over after his lease expires, unless his landlord have notice of an adverse claim by some act open and notorious. *Wilcher v. Robertson*, 78 Va. 602; *Campbell v. Fetterman*, 20 W. Va. 398; *Bodkin v. Arnold*, 45 W. Va. 90, 30 S. E. 154, 159.

But he may disavow after termination of lease. *Creekmur v. Creekmur*, 75 Va. 430.

**Must Be Open, Continuous and Consistent.**—The disclaimer must be open, continuous and consistently adverse. *Voss v. King*, 38 W. Va. 607, 18 S. E. 762.

**Acceptance of Deed from Another and Notice of Claim Thereunder.**—Though a tenant can not deny his landlord's title while the relation of landlord and tenant exists, yet if the tenant accept a deed from another, purporting to convey the land to him in fee, and later conveys it in fee to another, and both he and his alienee claim the land in their own right under such conveyances, and the landlord has knowledge of such conveyances and claim, possession by such tenant and his alienee after such knowledge on the part of the landlord for the period fixed by the statute of limitations will be adversary, and will bar the landlord's right. *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423; *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426.

**Acceptance of Lease When in Possession.**—So a lessee in possession may accept a lease from one claiming to be the owner, and after the termination of his term terminate his tenancy by disclaimer and notice to such

person, without surrender. *Voss v. King*, 38 W. Va. 236, 10 S. E. 402.

**Alienation in Fee as Disseisin.**—Conveyance in fee by tenant is no disseisin of the lessor, except at the latter's election. *Emerick v. Tavener*, 9 Gratt. 220, 237.

And so where one acquires possession under an absolute conveyance in fee from the tenant, the rule applies. *Emerick v. Tavener*, 9 Gratt. 220.

One by entering upon part of the land as purchaser from tenant, thereby became subject to the same relations held by tenant towards his lessor and neither could set up an adverse title, unless he showed he had restored the possession to lessor, or had disclaimed and held adversely, with full notice to him for the periods of limitation prescribed by the statutes. *Emerick v. Tavener*, 9 Gratt. 220.

But in *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426, 430, it is said: "In this state (West Virginia) such a deed by the tenant, and possession by the grantee under it, with knowledge thereof certainly and definitely brought home to the landlord, has somewhat the same effect as an actual disseisin under the common law. It renders such possession adverse, which, if permitted to continue for ten years after knowledge of such disclaimer, will bar the landlord's better right, and will be just as efficient in a court of equity as in a court of common law." And this case cites *Emerick v. Tavener*, 9 Gratt. 220.

And a deed of special warranty, conveying the land in fee simple, will have the same effect. *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426, 430.

**Can Not Put Landlord to Proof of Title.**—"But he can not dispute the landlord's title, in the sense of putting him to the proof of it, because he entered under it. But, even with this qualification, it is obviously liable to great abuse, and should be subjected to the most rigid scrutiny and strictness of proof." *Swann v. Young*, 36



W. Va. 57, 14 S. E. 426. See *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; S. C., 33 W. Va. 236, 10 S. E. 402; *Creigh v. Henson*, 10 Gratt. 231.

For if the tenant has once recognized the title of the plaintiff and treated him as his landlord, by accepting a lease from him or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted. *Voss v. King*, 33 W. Va. 236, 10 S. E. 402.

#### **B. ESTOPPEL BY SEALED ACKNOWLEDGMENT OF TITLE.**

And as to the supposed estoppel created by the acknowledgment under seal of lessor's title, that at the utmost could only be held to affect such right and title as lessee had at the time it was executed. It can not preclude him from setting up a title he may have subsequently acquired. *Wild v. Serpell*, 10 Gratt. 405, 415; *Wynn v. Harman*, 5 Gratt. 157.

#### **C. ESTOPPEL TO DENY POWER OF LESSOR TO CONTRACT BY ASSUMED NAME.**

Where an action of unlawful detainer is brought by a mining company

in its proper corporate name against one of its tenants, although the lease was in writing, and executed by the company in a name different from its true corporate name, assumed for its own convenience, the tenant accepting said lease, and occupying the premises, and paying rent thereunder is estopped from denying the power of the corporation to contract in its assumed name. *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299.

#### **D. ESTOPPEL TO REPEL CLAIM FOR RENT.**

See ante, "Follows upon Enjoyment," IV, D, 1, a.

#### **E. ESTOPPEL TO CLAIM FORFEITURE.**

See ante, "On Ground of Estoppel," VI, B, 5, f, (2).

#### **F. ESTOPPEL TO PURCHASE AT TAX SALE.**

See the title TAXATION.

#### **G. ESTOPPEL TO DENY COVENANTS OR RECITALS.**

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### **Landmarks.**

See the title BOUNDARIES, vol. 2, p. 579.

### **Landowners.**

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### **Land Patents.**

See the title PUBLIC LANDS.

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# **LARCENY.**

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**CROSS REFERENCES.**

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As to jurisdiction of state courts over larceny from the United States mails, see the title CRIMINAL LAW, vol. 4, p. 8.

**I. Definitions.**

See post, "In General," II, A; "Repeal of Statutes Relating to Larceny," XIX.

**Common-Law Definition.**—Larceny, at common law, is the taking and carrying away of the personal goods of another, against his will or without his consent, and with a felonious intent. *Richards v. Com.*, 13 Gratt. 803.

Larceny is defined in the early authors to be "the wrongful taking of goods with intent to spoil the owner of them, *causa lucri*." *Starkie v. Com.*, 7 Leigh 752. But see *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098.

**Civil-Law Definition.**—"Furtum est contractio fraudulosa lucri faciendæ gratia, vel ipsius rei, vel etiam usus ejus, possessiones ve; quod lege naturali prohibitum est admittere;"—theft is a fraudulent taking of the thing itself, the use of it or the possession, for the sake of gain; and this is prohibited by the law of nature. *Just. Inst.*, lib. 4, tit. 1, § 1. *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098, 1102.

**Blackstone's Definition.**—Blackstone in his commentaries defines larceny to be the felonious taking and carrying away of the personal goods of another. *State v. Chambers*, 22 W. Va. 779, 785.

**Bishop's Definition.**—Mr. Bishop in his Criminal Law defines larceny "to be the taking and removing by trespass of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner of his own-

ership therein, and perhaps should be added, for the sake of some advantage to the trespasser." *State v. Chambers*, 22 W. Va. 779, 785.

**Archbold's Definition.**—Mr. Archbold says "simple larceny at common law, is the taking and carrying away of the personal goods of another of any value, against the will, or without the consent of another without any bona fide claim, or right with a felonious intent." *State v. Chambers*, 22 W. Va. 779.

**Wharton's Definition.**—Mr. Wharton defines it to be "the taking and carrying away of a thing unlawfully, without claim of right, with intention of converting it to a use, other than that of the owner." *Wharton, Cr. Law*, § 862. *State v. Chambers*, 22 W. Va. 779, 785.

**Lord Coke's Definition.**—Larceny, has been variously defined by the highest authorities, but all agree that the same elements enter into its composition. Lord Coke defines simple larceny to be "the felonious taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night in the house of the owner." *State v. Chambers*, 22 W. Va. 779, 785.

**Greenleaf's Definition.**—Mr. Greenleaf adopts as the most approved of all the definitions of larceny, that of Mr. East, namely: "The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to

his (the taker's) own use, and make them his own property without the consent of the owner." And this definition is adopted by Mr. Russel. 3 Greenl. Ev., § 150; 2 Russ. on Cr. L., ch. 10, p. 146; *State v. Chambers*, 22 W. Va. 779.

## II. Classification and Distinctions.

### A. IN GENERAL.

**Larceny.**—At the common law, larceny is distinguished into two sorts, the one called simple larceny, or plain theft unaccompanied with any other atrocious circumstances; and mixed or compound larceny—which also includes in it the aggravation of a taking from one's house or person. *State v. Chambers*, 22 W. Va. 779.

**Simple Larceny.**—Simple larceny, at common law, as it still is with us, was divided into grand larceny, where the property stolen exceeded in value twelve pence, and into petit larceny, where the value was twelve pence or under. *State v. Chambers*, 22 W. Va. 779.

### B. HOUSEBREAKING AND GRAND LARCENY DISTINGUISHED.

See the title BURGLARY AND HOUSEBREAKING, vol. 2, p. 654.

Housebreaking with intent to commit larceny, and grand larceny, are distinct offenses, and to each is affixed its own penalty, but they may be, and often are, one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either or both offenses, but there can be only one penalty imposed. If it is desired to punish for both offenses, in a case of this kind, a separate count for larceny must be inserted in the indictment. If there is a conviction generally, or of the grand larceny only, and it is substituted to, in either case, this is a bar to further prosecution. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

See also, *Speers v. Com.*, 17 Gratt. 570.

### C. SIMPLE LARCENY AND LARCENY FROM THE PERSON DISTINGUISHED.

In this state the distinction between simple larceny and larceny from the person, except where it is accompanied with such force and fear, as will raise the crime to robbery, does not exist, and all larceny not amounting to robbery, is simple larceny. *State v. Chambers*, 22 W. Va. 779. See the title ROBBERY.

Larceny from the person is either by private stealing, or by open and violent assault, which is usually called robbery. Privately stealing from the person, as by picking his pocket or cutting his purse, was not otherwise regarded or punished by the common law than as simple larceny, until the stat. of 8th Elizabeth, ch. 4. *State v. Chambers*, 22 W. Va. 779.

At the common law, every larceny from the person, necessarily included a simple larceny, for which the prisoner could have been convicted, even when indicted for the offense of larceny from the person, and a fortiori, when he was indicted for the simple larceny of the same property, he could only be convicted of that offense, although the facts proved on the trial, showed that he was in fact guilty of the graver offense of larceny from the person. *State v. Chambers*, 22 W. Va. 779, 784.

### D. PRIVATE STEALING AND PUBLIC STEALING DISTINGUISHED.

The court, in *Johnson v. Com.*, 24 Gratt. 555, says: "There is no such offense known to the law of Virginia as 'private' stealing, from the person of another or otherwise. The law makes no distinction between private and public stealing, except that robbery must, of necessity, be committed publicly. But it is not pretended that the offense in this case was robbery,

and therefore nothing further need be said here as to the nature of that crime. There is nothing in our law on the subject of 'pickpockets.'" See the title ROBBERY.

### **E. LARCENY DISTINGUISHED FROM MALICIOUS TRESPASS.**

The distinction between larceny and unlawful and malicious trespass is in the intent. In larceny there must be a felonious intent. *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098; *Wolverton v. Com.*, 75 Va. 909, 911. See the title TRESPASS.

In an action of trespass on the case against a common carrier, if it appears by a bill of exceptions to have been proved at the trial, that the defendant fraudulently opened certain packages and casks, being in his care, and belonging to the plaintiff; took therefrom a part of their contents and converted the same to his own use; but not that the said contents were feloniously carried away, such offense is to be considered as amounting to a trespass only and not a larceny but if the plaintiff had stated and proved that the said contents were feloniously carried away, it would have been larceny, although the said packages and casks were delivered to him as a common carrier. *Cook v. Darby*, 4 Munf. 445.

## **III. Elements and Nature of Offense.**

### **A. IN GENERAL.**

To constitute the crime of simple larceny, there must have been a felonious taking of the property from the possession of the owner, and the thief must, for an instant at least, have had complete and absolute possession of the stolen property, and during such possession and control, he must have feloniously removed the same from the place it occupied just before he grasped, seized or laid hold of the same. *State v. Chambers*, 22 W. Va. 779.

## **B. THE TAKING.**

### **1. In General.**

**Definition.**—All the authorities agree in stating that in every larceny, there must be an actual taking, or severance of the goods from the possession of the owner, and this taking must be felonious—"animo furandi." To "take" an article, signifies "to lay hold of, seize or grasp it with the hands or otherwise." *State v. Chambers*, 22 W. Va. 779. See ante, "In General," III, A.

**What Constitutes.**—Doing the same act, *animo furandi*, constitutes a felonious taking. *State v. Chambers*, 22 W. Va. 779.

### **2. By Trespass.**

In order to constitute a taking to support a charge of larceny, the act of taking must amount to a trespass, since if there be no trespass in taking goods, there can be no larceny in carrying them away. *Tanner v. Com.*, 14 Gratt. 635; *Richards v. Com.*, 13 Gratt. 803; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429; *State v. Chambers*, 22 W. Va. 779; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098.

**Instructions as to Definition of Trespass.**—In *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, the court said: "Instruction No. 2, asked for by the defendant was refused and it is claimed that the court erred therein. It was to the effect that, to constitute the crime of larceny, there must be a taking and a carrying away by a trespass of the personal property, etc., without any explanation of the meaning of the word 'trespass' or what amounts to trespass in such case. From what has been said on this subject, it is manifest that the instruction would have been misleading. It was, therefore, properly refused."

### **3. By Violence.**

While the act of taking, in order to constitute larceny, must be a trespass against the owner's possession,

actual violence is not necessary, for in these cases the fraud by which possession is acquired takes the place of force. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

#### 4. Fraud or Trick in Taking.

**In General.**—If by fraud or device the owner (not intending to part with his right) be induced to place his property in the hands of another, who acquires possession with a felonious intent to convert it to his own use, the "taking" and trespass are such as are required to complete the offense of larceny. *Vaughan v. Com.*, 10 Gratt. 758, 762; *Starkie v. Com.*, 7 Leigh 752; *Walker v. Com.*, 8 Leigh 743; *Johnson v. Com.*, 24 Gratt. 555; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429. See *Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351. See also, dissenting opinion in *Anable v. Com.*, 24 Gratt. 563.

Unless the delivery of the possession is made for the purpose of passing the title to the property as well as its possession. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

And where both possession and title are obtained by false pretenses with intent to defraud, the offense is obtaining money by false pretenses, in which case the statute declares that the offender shall be deemed guilty of larceny. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429. See the title FALSE PRETENSES AND CHEATS, vol. 5, p. 825.

**Pretense of Borrowing.**—Where a party, fraudulently and with intent to steal, obtains possession of a chattel with the consent and by the delivery of the owner, under pretense of borrowing, and converts the chattel to his own use, he is guilty of larceny. *Starkie v. Com.*, 7 Leigh 752.

**Questions of Law and Fact.**—Whether possession was obtained from a person by fraud or trick with intent to steal is a question for the jury. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

#### 5. Taking with Owner's Consent.

See ante, "Fraud or Trick in Taking," III, B, 4.

In *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, the court said: "Instruction No. 2 given for the state is complained of. It was substantially that there might be larceny even though the possession of the property stolen was willingly relinquished by its owner and that if the jury believed from the evidence, beyond a reasonable doubt, that the defendant obtained the possession of Dennison's money by means of false representations with felonious intent at the time of stealing it, and, after obtaining its possession he feloniously converted the same to his own use without the consent of Dennison, they should find the defendant guilty. This is a correct enunciation of the law, as has been shown, and the instruction was properly given."

But this distinction must be borne in mind: If the property is delivered with the intention on the part of its owner of parting with it altogether, passing both title and possession, the offense is not larceny but obtaining property by false pretenses; but if the owner is induced to deliver the possession only, the taker having a preconceived design to convert it to his own use when obtained, it is implied that the taking is against the will of the owner and the offense is larceny. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429. See also, *Starkie v. Com.*, 7 Leigh 752. See the title FALSE PRETENSES AND CHEATS, vol. 5, p. 835.

#### 6. Where Owner Has Possession.

The goods, at the time of the larceny, must be in the actual or constructive possession of the owner in order to constitute a taking within the definition of larceny, since if the owner has no possession there can be no trespass. *State v. Chambers*, 22 W. Va. 779, 46 Am. Rep. 550; *Richards v. Com.*, 13 Gratt. 803. See also, *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

**7. Where Taker Has Possession.****a. In General.**

Where the goods are in the possession, actual or constructive, of the taker, if he converts the goods he can not be guilty of larceny. *Richards v. Com.*, 13 Gratt. 803. See also, *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

**b. Distinction between Bare Charge and General Bailment or Possession.**

See ante, "Taking with Owner's Consent," III, B, 5.

"The distinction (says Russell), between a bare charge or special use of goods, and a general bailment of them, seems to be sufficiently intelligible; and it seems consistent with principle, that in the former case the legal possession should be considered as remaining in the owner; and in the latter as having passed to the bailee; and that therefore in the former case larceny may be committed of them by the person to whom they have been delivered, and that in the latter it may not, unless there be a determination of the privity of contract; but it is in the application of this doctrine to particular cases that the distinctions seem to become absecure." 2 Russ. 108, quoted in *Richards v. Com.*, 13 Gratt. 803.

The possession of the owner must be actual or constructive. If it appear that although there is a delivery by the owner, yet the legal possession still remains exclusively in him, larceny may be committed exactly as if no such delivery had been made. Thus, if a person to whom goods are delivered has the bare charge, custody or use of them, and the legal possession remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use. *Richards v. Com.*, 13 Gratt. 803.

**Application of Rule.**—The most familiar application of the rule is to the case of servants, whose possession of

their master's goods by his delivery or permission is the possession of the master himself. 2 Russ. 197; 2 East P. C. 564, 682, 683; *Walker v. Commonwealth*, 8 Leigh 743. And to the case of a guest at an inn, who may be guilty of larceny in taking a piece of plate or other thing set before him for his accommodation; for he hath not the possession delivered to him, but merely the use. 2 Russ. 107; Arch. 192; 1 Hale 506; 1 Hawk., ch. 33, § 1. *Richards v. Com.*, 13 Gratt. 803. See also, *Parrish v. Com.*, 81 Va. 1, 11.

Hence, if a person fraudulently converts to his own use a piece of plate, or other thing delivered to him for his accommodation as a guest in the tavern of the prosecutor, he would be guilty of larceny. If he had so converted to his own use a book handed to him to read for his amusement while he continued to be such guests, there can be no doubt he would have been guilty of larceny. *Richards v. Com.*, 13 Gratt. 803.

A person employed by a mercantile firm as a salesman in their store, having full control over the goods in the store room, and the money in the cash drawer, for the purposes of his employment, abstracts a part of the goods and money, with a fraudulent intent to convert the same to his own use; held, he is guilty of larceny. *Walker v. Com.*, 8 Leigh 743.

A person is staying at a tavern, and the landlord offers him a gun to go and shoot robins, which he takes, and after shooting one or twice near the house, goes off with the gun and disposes of it. Held, under the circumstances of the case, he is guilty of larceny, since he had the bare charge, and not the legal possession. *Richards v. Com.*, 13 Gratt. 803.

**Presence or Sight of Owner—Relation of Master and Servant—Landlord and Guest.**—The rule does not require that the property should be converted in the presence or the sight of the



owner. Nor indeed does it require that the relation of master and servant, or landlord and guest, should exist between the owner of the property and the person converting it. No writer has laid down the rule under any such restriction. As laid down by all the writers, it only requires that the person converting the property should be entitled merely to a charge or special use, and not the legal possession of it. *Richards v. Com.*, 13 Gratt. 803. See also, *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

#### c. Bailment.

See ante, "Distinction between Bare Charge and General Bailment or Possession," III, B, 7, b.

Generally, though not always, where property is delivered to a person who is not a servant or guest of the owner, or a member or visitor of his family, and to be used elsewhere than in the owner's presence, a bailment, and not a mere charge or special use, is created, and hence the bailee has the legal possession and not the bare custody and can not be guilty of the larceny thereof. *Richards v. Com.*, 13 Gratt. 803. See also, *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429. See the titles BAILMENTS, vol. 2, p. 223; FALSE PRETENSES AND CHEATS, vol. 5, p. 825.

#### C. THE CARRYING AWAY.

In General.—In any simple larceny there must be a felonious and complete severance of the property from the possession of the owner thereof, and the thief must have had, at least for an instant of time, complete and absolute control and possession of the stolen property; but where the property has been feloniously taken, the slightest removal, even if it be but a hair's breadth, with intent to steal the same, is sufficient. *State v. Chambers*, 22 W. Va. 779, 799; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182; *Wolverton v. Com.*, 75 Va. 909; *Barker v. Com.*, 2 Va. Cas. 122.

**Length of Time of Possession—Distance—Restitution—Interruption.**—All the authorities agree, that if the taking of the property be felonious, and the slightest removal of the property from the place it occupied before, be made by the party so taking the same, his guilt does not depend upon the length of time he held absolute possession and control thereof, nor upon the distance to which he may have removed the same; nor whether he released or relinquished his grasp, seizure or hold thereon, because he repented of his act, or was hindered, interrupted or prevented by any cause whatever from carrying the property away, for the crime was completed by the very first act of felonious removal of said property. *State v. Chambers*, 22 W. Va. 779.

**Illustrations.**—If a person thrust his hand into the pocket of another with intent to steal his pocketbook and the money contained therein, and seize or grasp said pocketbook, and lift or raise the same to the top of the pocket, and upon being detected, release his grasp thereon, and the pocketbook be left hanging partly out of the pocket, then such taking and removal, is a sufficient "taking and carrying away" to complete the offense of simple larceny. *State v. Chambers*, 22 W. Va. 779.

In such a case, although the whole article has not been removed from the whole space, which the whole article occupied before it was so taken; yet every part of the article be removed from that particular space, which that particular part occupied just before it was so taken, such removal is a sufficient asportation to complete the offense of simple larceny. *State v. Chambers*, 22 W. Va. 779.

#### D. GOODS OF ANOTHER.

See ante, "Definition," I.

In order to "be goods of another," the owner must have an actual or constructive possession. *Richards v. Com.*, 13 Gratt. 803, 806.

Hence where the owner gives the charge or use of the property to a servant and the servant steals the property, the servant will be guilty of larceny, since the master has a constructive possession. *Walker v. Com.*, 8 Leigh 743.

Where a guest was staying at a hotel, and the landlord lent him his gun, it was held, that he gave him merely the bare charge or use of the gun and hence if the guest disposed of it he would be guilty of larceny. *Richards v. Com.*, 13 Gratt. 803.

## E. INTENT.

### a. In General.

To constitute the crime of simple larceny there must have been a felonious taking of the property from the possession of the owner—*animo furandi*. *State v. Chambers*, 22 W. Va. 779; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182; *Barker v. Com.*, 2 Va. Cas. 122; *Blunt v. Com.*, 4 Leigh 689. See also, *Jones v. Morris*, 97 Va. 43, 33 S. E. 377.

And it was said in *Wolverton v. Com.*, 75 Va. 909, 911, that a felonious intent is an essential ingredient in the crime of larceny whether grand or petit and distinguishes it from a mere trespass.

**Illustration.**—A. was standing in a street in R., holding six dollars in his open hand, which he was counting, and J. passing by took the money out of his hand and walked off; no force being used beyond what was necessary to withdraw the money. A. asked J. for it several times as she walked off, but she would not return it. This is grand larceny under the statute if done *animo furandi*. *Sess. Acts, 1866-67, ch. 283, § 14. Johnson v. Com.*, 24 Gratt. 555.

Where the obligor of a bond takes it wrongfully from the holder and destroys it, he is guilty of larceny, since he has the intent to destroy the evidence of debt and relieve himself from liability. *Vaughn v. Com.*, 10 Gratt. 758.

**Question of Law and Fact.**—Whether she did it *animo furandi* or not was a question which belonged to the jury, and they decided it against the prisoner, and the court below refused to set aside their verdict. *Johnson v. Com.*, 24 Gratt. 555. See also, *Booth v. Com.*, 4 Gratt. 525.

### 2. When Intent Must Exist.

**The Original Taking.**—It must be shown that the original taking was felonious, but the jury has a right to infer from all the facts and circumstances of the case, the felonious intent in the original taking. *Tanner v. Com.*, 14 Gratt. 635; *Booth v. Com.*, 4 Gratt. 525; *Blunt v. Com.*, 4 Leigh 689; *Hall v. Com.*, 78 Va. 678; *Perrin v. Com.*, 87 Va. 554, 13 S. E. 76; *Dul. v. Com.*, 25 Gratt. 965; *Richards v. Com.*, 13 Gratt. 803; *Shinn v. Com.*, 32 Gratt. 899. See *Jordan v. Com.*, 22 Gratt. 943.

If a person obtain possession of a watch from the owner by a false and fraudulent pretense of buying it for cash, and then carry it away without the consent or knowledge of the owner, he is yet not guilty of larceny, unless it was with a felonious intent that he so obtained possession of the watch and carried it away. *Blunt v. Com.*, 4 Leigh 689.

If a person is insane at the time of committing the offense of larceny he can not be convicted as he has not a sufficient intent. *Gruber v. State*, 3 W. Va. 699. See the title *INSANITY*, vol. 7, p. 668.

### 3. Proof of Lack of Intent.

**Intoxication.**—Where it appeared upon a trial for burglary that three persons, much intoxicated, went into a store and called for cider, which they drank and paid for, went out and came in again and called for more, which was poured out to them and delivered to them in glasses on the counter, and a pistol was discharged in the house, and they all went out leaving the cider in the glasses on the

counter, and they returned and found the store lighted, it being about 10 o'clock at night, and pushed against the door which was locked and it broke open, and they went in, followed by other persons against whom there was no charge or suspicion, and there in the light and in the presence of the other persons drank the cider, the refusal of an instruction that tells the jury under these circumstances that if they in good faith believed they had a right to drink the cider, that it was theirs, then they did not have the intent to steal the same, is error. *State v. Shores*, 31 W. Va. 491, 7 S. E. 413.

H., in a drunken spree, unhitched and mounted a horse in the presence of its owner and of the warehouseman, and of a number of factory hands, in the daytime, in the warehouse yard, where the horse was hitched, claimed the horse as his own, and attempted to ride it out of the lot homeward. He was arrested, remanded to jail, indicted, tried, and found guilty of larceny of the horse. He moved for a new trial, which was denied. On error, held, the facts do not evince felonious intent, nor warrant the verdict. *Hall v. Com.*, 78 Va. 678.

**Presence of Owner—Openly.**—Judge Moncure in his dissenting opinion in *Vaughan's Case*, 10 Gratt. 764, said: "That property is taken openly, in the presence of the owner, affords a strong presumption that it was not taken feloniously. This presumption may be repelled by evidence; but strong evidence should be required for that purpose, when the property taken is the parties' own bond." Quoted in *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 416.

**Good Faith of Defendant.**—The court in speaking of the intent in larceny, in *Jones v. Morris*, 97 Va. 43, 33 S. E. 377, say: "If, Morris, having received the money of his employer, fraudulently converted it to his own use, he was guilty of larceny; but, if, having the money of his employer in

his possession, he stood ready to account for any balance that he believed to be due, and claimed the right to retain for a debt what he believed due himself, then he was not guilty of larceny."

Where the defendant was indicted for stealing his wife's goods, the court said: "Under the circumstances in this case, if the defendant in good faith believed that the goods with the larceny of which he is charged were the property of Mary J. Hedrick, he did not enter the milk house with the intent to steal the goods, and therefore could not be convicted of the charge. From the whole evidence in the case, as shown in the record, the proof of the intent to steal the goods as charged in the indictment is not sufficient to sustain the charge, and, when defendant moved to exclude the state's evidence when the prosecutor rested the state's case, the motion should have been sustained. The judgment will be reversed, the verdict set aside, and a new trial awarded." *State v. Flanagan*, 48 W. Va. 115, 35 S. E. 862.

**Quære, does a mere bona fide claim of right to the thing itself exclude larceny, if there is no such claim of right to do the act by which it is obtained?** *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098.

**Injury to Owner.**—A. was secretary of the board of supervisors of the county of H., and there was to his credit on the books of the treasurer for claims held by him against the county, \$1,649. Blank warrants signed by the chairman of the board, were left with him, and he filled up and sold warrants to a considerably larger amount than the sum due to him. Warrants to near the amount due are registered, and among these one for \$350, sold to W.; but there were other warrants sold before the one sold to W., and if they had been registered before W.'s, the fund would have been exhausted, and would have left nothing

ing to be applied to W.'s warrant. Upon an indictment of A. for larceny of the check given by W. for payment of the warrants, held, the warrants are to be paid in the order in which they are registered, and there being sufficient to pay W.'s warrant, as well as all the warrants registered before it. A. can not be convicted of the larceny. *Anable v. Com.*, 24 Gratt. 563.

#### F. LUCRI CAUSA.

Lucri causa, for sake of gain, does not form an essential element in the constitution or definition of larceny. *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098. See *Starkie v. Com.*, 7 Leigh 752; *Blunt v. Com.*, 4 Leigh 689; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182.

#### G. VALUE.

See post, "In General," IV, A.

#### H. SECRECY.

See ante, "Proof of Lack of Intent," III, E, 3.

### IV. Property Subject to Larceny.

#### A. IN GENERAL.

**Value.**—At common law, an article to be the subject of larceny must be of some value. It is sufficient, however, it is said, if it be worth less than the smallest coin known to the law. *Wolverton v. Com.*, 75 Va. 909.

An article to be subject to larceny must be of some value; but it may be worth less than the smallest coin. The indictment in this case charged the value of the lock stolen to be thirty cents. There was no distinct proof of any specific value, nor was that necessary: the evidence showed that it had a key in it, and was used in fastening a door. Held, this was sufficient to show that it was of some value. *Wolverton v. Com.*, 75 Va. 909.

**Beehives and Honey.**—Beehives and honey are subjects of larceny. *Harvey v. Com.*, 23 Gratt. 941.

#### B. PARTICULAR CLASSES.

##### 1. Animals.

**Feræ Naturæ.**—Animals or other creatures, not domestic, but which are feræ naturæ, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed (and known to be so) or confined. *Harvey v. Com.*, 23 Gratt. 941. See the titles ANIMALS, vol. 1, p. 373.

**Dogs.**—"By the common law, the property in dogs and other inferior animals is not such as that a larceny can be committed by stealing them, though the possessor has a base property in them, and may maintain a civil action for injuries done to them." *Davis v. Com.*, 17 Gratt. 617; *Com. v. Maclin*, 3 Leigh 809. But see Va. Code, 1904, § 3711. See the title ANIMALS, vol. 1, p. 373.

**Bees.**—See the title ANIMALS, vol. 1, p. 373.

##### 2. Lost Property.

See post, "Presumption and Burden of Proof," XI, C.

Lost property may be the subject of larceny. *Tanner v. Com.*, 14 Gratt. 635; *Perrin v. Com.*, 87 Va. 554, 13 S. E. 76; *Hunt v. Com.*, 13 Gratt. 757.

To constitute larceny in the finder of goods actually lost, it is not enough that the party has general means by the use of proper diligence, of discovering the true owner. He must know the owner at the time of the finding, or the goods must have some mark about them understood by him or presumably known by him, by which the owner can be ascertained. And he must appropriate them at the time of finding with intent to take entire dominion over them. *Hunt v. Com.*, 13 Gratt. 757; *Tanner v. Com.*, 14 Gratt. 635; *Perrin v. Com.*, 87 Va. 554, 13 S. E. 76.

##### 3. Bonds, Notes, Coupons and Bank Bills.

**Bond.**—An obligor who obtains possession of his bond by fraud lucri causa, is guilty of the larceny thereof.

And it is no defense that he did not know that his act amounted to larceny. *Vaughn v. Com.*, 10 Gratt. 758.

**Coupons.**—Coupons stolen after the day when they had become due and payable, though they afterwards come into the hands of a bona fide holder for value, can not be held by him against the rightful owner. *Arents v. Com.*, 18 Gratt. 750.

**Banknotes in General.**—Under the act of 1806, a prosecution may be had for stealing banknotes. The passing of the note as genuine is prima facie evidence that the note is of some value. *Robinson v. Com.*, 32 Gratt. 866; *Cummings v. Com.*, 2 Va. Cas. 128; *Com. v. Moseley*, 2 Va. Cas. 154; *Angel v. Com.*, 2 Va. Cas. 228; *Pomeroy v. Com.*, 2 Va. Cas. 342; *Moore v. Com.*, 2 Leigh 701; *Leftwich v. Com.*, 20 Gratt. 716; *Adams v. Com.*, 23 Gratt. 949; Va. Code, 1887, § 3708.

The law of 1806, which made it felony to steal any banknote, embraced any available chose in action bearing that name; that law being re-enacted in 1819, should not be taken to be altered by implication, when incorporated with other laws on the same subject, unless that implication be unopposed by matter calling for the original construction. *Pomeroy v. Com.*, 2 Va. Cas. 342; *Com. v. Moseley*, 2 Va. Cas. 154; *Cummings v. Com.*, 2 Va. Cas. 128.

An indictment will lie for the larceny of checks, banknotes, and United States treasury notes. *Boyd v. Com.*, 1 Rob. 691.

**Bank Notes of Other States.**—A prosecution may be maintained under the act of 1806, for stealing a banknote of North Carolina or any other sister state. *Cummings v. Com.*, 2 Va. Cas. 128; *Robinson v. Com.*, 32 Gratt. 866.

**Chartered Banks.**—By the 8th section of the said act of 1819, the legislature did not design to restrict the meaning of the term banknote, to those of chartered banks, because it makes the stealing "of any other writing, or paper of value," to be larceny, which

expression would include any available chose in action called a banknote. The term banknote ought not, therefore, to be considered as used in this restricted sense. *Pomeroy v. Com.*, 2 Va. Cas. 342.

**Warrant or Certificate.**—In the said 8th section, the words "or any other writing, or paper of value," furnish a good rule for limiting and explaining the words "warrant or certificate," in the same section; which mean papers of that description, being of value, and capable of conversion. *Pomeroy v. Com.*, 2 Va. Cas. 342.

#### 4. Gaming Checks.

Checks, kept and used for gambling contrary to the statute, can be the subject of larceny. To hold otherwise would be to run the hazard of encouraging larceny by discouraging gaming. *Bales v. State*, 3 W. Va. 685. See the title GAMING, vol. 6, p. 692.

#### 5. Slave.

In *Davenport v. Com.*, 1 Leigh 588, it was held, that a slave was a subject of larceny. Va. Code, 1887, § 3713. See Va. Code, 1887, §§ 3710, 3711, 3713, 3717, 3718, 3719. See the title SLAVES.

#### 6. Stealing Brass from Railroad.

See the title FRAUD AND DECEIT, vol. 6, p. 448. See also, the title RAILROADS.

#### 7. Things Savoring of Realty.

**Statutory Provision.**—The Code, ch. 192, § 17, p. 789, declares that "things which savor of the realty, and are, at the time they are taken, part of the freehold, whether they be of the substance or produce thereof, or affixed thereto, shall be deemed goods and chattels of which larceny may be committed, although there be no interval between the severing and taking away. *Davis v. Com.*, 17 Gratt. 617. See Va. Code, 1904, § 3710. W. Va. Code, 1899, ch. 145, § 17.

### V. Who May Commit Larceny.

#### A. FINDER OF LOST PROPERTY.

See ante, "Lost Property," IV, B, 2.

The finder of lost property who, knowing or having reason to know the true owner, appropriates it to his own use is guilty of the larceny thereof. *Tanner v. Com.*, 14 Gratt. 635; *Perrin v. Com.*, 87 Va. 554, 13 S. E. 76; *Hunt v. Com.*, 13 Gratt. 757. See the title LOST PROPERTY. See post, "Presumption and Burden of Proof," XI, C.

#### B. CROPPER.

Where a landowner contracts with one to crop his land and to give him part of the crop after paying all advances, and the crop has not been divided, such cropper is not a tenant, but a mere employee, and the ownership of the entire crop is in the landowner, and if the cropper forcibly, or against consent of landowner, takes the crop from the possession of the latter, such taking is larceny, robbery, or other offense, according to the circumstances of the case. *Parrish v. Com.*, 81 Va. 1. See the titles CROPS, vol. 4, p. 94; LANDLORD AND TENANT, ante, p. 112.

#### C. HUSBAND OR WIFE.

If a wife carry away and convert to her own use her husband's goods, it is no larceny at common law, as husband and wife are but one person; and if a person merely assists a married woman, who has not committed, or intended to commit, adultery, in carrying away the goods of her husband, without the knowledge or consent of the latter, though with intent to deprive the latter of his property, he can not be convicted of stealing the goods. *State v. Flanagan*, 48 W. Va. 115, 35 S. E. 862.

### VI. Restitution of Stolen Property.

See ante, "The Carrying Away," III, C.

**Intent to Make Restitution.**—Where a person was charged with the larceny of a check from a corporation, the jury after retiring to consult of their verdict returned into court and

propounded the following question: "The jury wish to know if the accused drew the money on the check with the intention of using the same for his own purposes, and not for the purposes for which it came into his possession, but probably with the intention to return the same at some future day to the association. Can they find him not guilty?" To which the judge replied, "I answer in the negative." It was held, that this was the law and that an intention to make restitution is no defense. *Shinn v. Com.*, 32 Gratt. 899. See the title EMBEZZLEMENT, vol. 5, p. 63.

After a larceny is complete, voluntary abandonment of the property by the thief, no matter how soon after the larceny, and an offer to restore it to the owner is no defense. *State v. Chambers*, 22 W. Va. 779; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182.

**Execution for Return of Property.**—Motion for an execution, to be issued on a judgment entered in favor of A. against B. upon conviction of B. for larceny, for money mentioned in the indictment, overruled. *Henley's Case*, 1 Va. Cas. 145.

### VII. Accomplices and Accessories.

**In General.**—See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74.

**Civil Action.**—If a party be present at the time goods are taken, participating, aiding and assisting in the taking, or countenancing and encouraging those who took them, or taking and receiving the goods, he is liable in an action of trespass for the value of all the goods then taken. *Shepperd v. McQuilkin*, 2 W. Va. 90. See the titles RECEIVING STOLEN GOODS; TRESPASS; TROVER AND CONVERSION.

### VIII. Former Jeopardy.

See post, "Justice of the Peace," IX, E; "Variance," XII. See generally, the

title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 181.

**Conviction of Grand Larceny as an Acquittal of Housebreaking with Intent to Commit Larceny.**—The plaintiff in error was convicted on one trial for the offense of housebreaking with intent to commit larceny, and on the other for grand larceny, but both being of equal degree, upon applying for and obtaining a new trial on each occasion, he waived his jeopardy as to both, both being charged in the same count, and he was rightly put upon trial upon the whole indictment. The trial court, therefore, committed no error in sustaining the demurrer to the pleas and rejecting them. *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

**Acquittal on Ground of Variance.**—On a trial for stealing certain bank-notes, "the numbers and denomination of which are unknown to the jurors," the evidence of the commonwealth shows that the number and denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence, the court, on the motion of the prisoner, excludes the evidence; and then, against the objection of the prisoner, discharges the jury. On a second indictment for the same offense, held, that if the jury had, on the first trial, rendered a verdict in favor of the prisoner, it would not, under the statute, Code of 1860, ch. 199, § 16, have been a bar to another indictment and trial for the same offense; and therefore the discharge of the jury was no injury to the prisoner. *Robinson v. Com.*, 32 Gratt. 866.

**Omission of Word "Feloniously" from Warrant.**—The omission of the word "feloniously" from a warrant charging an accused with larceny will not vitiate a judgment of acquittal. No objection having been taken to the omission, and the charge having been fully investigated, the judgment of acquittal is a complete bar to any further prosecution for the same offense.

*Jones v. Morris*, 97 Va. 43, 33 S. E. 377. See the title *WARRANTS*.

**Sufficiency of Record.**—A record showing that defendant was convicted of petit larceny, and sentenced by a justice of the peace to three months' imprisonment, and that, on appeal, the county court by consent set aside the judgment, and ordered defendant to be confined for two months instead of three, conclusively shows a previous conviction for petit larceny, though such order did not specify the offense. *Pryor v. Com.*, 2 Va. Dec. 479.

## IX. Jurisdiction.

See the title *JURISDICTION*, vol. 8, p. 842.

### A. WHEN STOLEN GOODS CARRIED INTO ANOTHER COUNTY.

"All the writers on common law lay it down, that, if goods be stolen in one county, and carried into another, the offender may be indicted in either, because the offense is complete in both. If the original taking be felonious by the common law, the felon can acquire no color of right thereby, and every act of possession constitutes a felony. No principle in respect to larceny seems to be more clearly settled than this; and it has been repeatedly sanctioned in this state." Per May, J., in *Com. v. Cousins*, 2 Leigh 709. See also, *Strouther v. Com.*, 92 Va. 789, 22 S. E. 852.

### B. STOLEN GOODS CARRIED INTO ANOTHER COUNTRY.

This rule of the common law, however, was never extended further than to counties. It seems to be a question somewhat mooted, whether a thief who has stolen goods in one country and brought them into another, can in the latter country be punished for the theft of the goods, in the absence of statute. The preponderance of authority, however, holds that the offense is not punishable in the country in which the criminal seeks refuge and is found.

Thus, an accused was indicted in Virginia for larceny of a horse in the county of Berkley, West Virginia. The charge was that the plaintiff on a certain day in the county of Berkley, in the state of West Virginia, did then and there feloniously, etc., carry away from the county of Berkley, etc., in the state of West Virginia, etc., and bring into the city of Winchester, etc., one iron gray horse, against the peace and dignity of the commonwealth of Virginia. The court held, that: "Where goods were stolen in one country and brought by the thief to another country, the latter country, by the English common law, had no jurisdiction" to try the offense. *Strouther v. Com.*, 92 Va. 789, 22 S. E. 852. The court cited as authority for this proposition, *Whart. Cr. Law* (9th Ed.), § 291; *Stanley v. State*, 24 Ohio State 166; *Com. v. Uprichaerd*, 2 Gray (Mass.) 434. But see, in this connection, *Va. Code*, 1887, § 3890.

**Offense Committed Outside the Commonwealth.**—Under act of 1786, re-enacted in 1792, a prisoner was indicted, tried and convicted of feloniously stealing the horse of another citizen of this commonwealth, in a place beyond the limits of the same. *Com. v. Gaines*, 2 Va. Cas. 172.

#### C. JURISDICTION OF MAYORS.

See the title MUNICIPAL CORPORATIONS.

#### D. JURISDICTION OF COUNTY OR CORPORATION COURT.

**Triable in County Court.**—An indictment for petit larceny alleging that the prisoner has been twice before convicted of a like offense is triable in the county court. *Pryor v. Com.*, 2 Va. Dec. 479; *Rider v. Com.*, 16 Gratt. 499.

**Evidence.**—It is error for a circuit court to refuse to set aside the verdict of a jury and grant a new trial, where a party is convicted of larceny, when no evidence is produced at the trial, showing the offense to have been

committed within the jurisdiction of the court hearing the case. *Hoover v. State*, 1 W. Va. 335.

#### E. JUSTICE OF THE PEACE.

A justice of the peace has jurisdiction either to try and punish a prisoner charged with petit larceny, or to examine and send him on to the county court to be indicted and tried therefor; and where he exercises only the latter jurisdiction, on the trial in the county court, the plea of "twice in jeopardy" will not lie. *Wolverton v. Com.*, 75 Va. 909. See the title JUSTICES OF THE PEACE, ante, p. 68.

Under act of March 15, 1832, a free negro or mulatto for simple larceny to the value of \$20 or less, must be tried by a justice of the county or corporation, and a court of oyer and terminer has no jurisdiction of the case. *Cropper v. Com.*, 2 Rob. 842.

#### X. The Indictment.

##### A. CERTAINTY IN CHARGING OFFENSE.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 371.

##### Larceny Must Be Properly Laid.

In an indictment for larceny, the charge of larceny, must be laid in proper form in order to convict of that offense, if the prisoner should be acquitted of the charge of burglary. *State v. McClung*, 35 W. Va. 280, 283, 13 S. E. 654.

But the allegations of larceny in an indictment for burglary need not allege the larceny with the same formality, as on an indictment for actual larceny. *Speers v. Com.*, 17 Gratt. 570; *Vaughan v. Com.*, 17 Gratt. 576; *Wright v. Com.*, 82 Va. 183. See the title BURGLARY AND HOUSEBREAKING, vol. 2, p. 654.

An indictment charging that goods were feloniously and burglariously taken from a dwelling house, without charging that this was done in the nighttime, is not a good indictment for



burglary, but is only an indictment for a larceny. *Thompson v. Com.*, 4 Leigh 652.

**Removal of Goods Distrained.**—An indictment for fraudulently removing goods which have been levied on or distrained, which by Va. Code, 1837, § 3712, is made larceny, may either be for larceny generally or in terms of the statute or language equivalent thereto. *Duff v. Com.*, 92 Va. 769, 23 S. E. 643.

**Clerical Error.**—An indictment for grand larceny, charged the goods to have been stolen on the 21st of December, one thousand, eight hundred and eighty-three, leaving out the r, in the last word. This is cured by the statute of jeofails. *Aldridge v. Com.*, 2 Va. Cas. 447.

## B. JOINDER OF COUNTS.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 371.

**Statutory and Common-Law Offenses.**—Where, under statute, larceny may be committed in several ways, some of which would not constitute the offense at common law, it is not necessary that the indictment should inform the accused in which of the ways he is charged, and an indictment in common-law form will be good for a statutory larceny not existing at common law. *Anable v. Com.*, 24 Gratt. 563; *Dowdy v. Com.*, 9 Gratt. 727; *Leftwich v. Com.*, 20 Gratt. 716; *Price v. Com.*, 21 Gratt. 846; *State v. Halida*, 28 W. Va. 499, 503; *Fay v. Com.*, 28 Gratt. 912; *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683; *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834.

**Conspiracy to Commit Larceny and Larceny in Accordance with the Conspiracy.**—It was not misjoinder for an indictment to charge in one count a conspiracy to commit larceny and in another count charge the larceny in accordance with the conspiracy. *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834.

**Obtaining Money by False Pretenses and Larceny.**—Obtaining money or other property by false pretenses with intent to defraud is made larceny by statute, if the property so obtained may be the subject of larceny; and it is, therefore, not misjoinder to add such a count to a count for simple larceny. *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834.

**Counts for Larceny and Receiving Stolen Goods.**—So if an indictment contains several counts, one for larceny, others for receiving stolen goods knowing them to have been stolen, and others for aiding another person to conceal stolen goods knowing them to have been stolen, but the charges in all the counts, however, relate to the same goods, which in different counts are laid to be the goods of different persons, or of a person unknown, it is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried. *Dowdy v. Com.*, 9 Gratt. 727; *State v. Halida*, 28 W. Va. 499; *Anable v. Com.*, 24 Gratt. 563; *Leftwich v. Com.*, 20 Gratt. 716; *Price v. Com.*, 21 Gratt. 846.

**Several Articles Stolen at Same Time.**—Where several articles of property are stolen at the same time and place, though the stolen goods belong to different persons, the stealing is regarded as one transaction, and, therefore, as one offense which may be charged in a single count. *Alexander v. Com.*, 90 Va. 809, 20 S. E. 782.

And it is held, that, if any one of several articles charged in an indictment is not the subject of larceny a conviction may be had for the larceny of the others. *Harvey v. Com.*, 23 Gratt. 941.

**Articles Belonging to Different Owners.**—Where several articles are stolen at one time and place, the stealing is regarded as one transaction and may be charged in a single count, though

the articles belong to different persons. *Alexander v. Com.*, 90 Va. 809, 20 S. E. 782.

**Count Charging Goods of "N. L." and of Person Unknown.**—If a person be examined for stealing three bags of cotton, "of the goods and chattels of Nathaniel Land," he may be indicted in two counts for stealing three bags of cotton, first of the goods and chattels of N. L.; secondly, of the goods and chattels of a person unknown. And he may be convicted and sentenced on the second count, and acquitted of the first. *Lithgow v. Com.*, 2 Va. Cas. 297.

**Charging Burglary and Completion of Larceny.**—Moreover, it is well settled that an indictment for burglary is not bad for duplicity because it charges the completion of the larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *Vaughan's Case*, 17 Gratt. 576; *Butler v. Com.*, 81 Va. 159.

And in *State v. McClung*, 35 W. Va. 280, 13 S. E. 654, it is further laid down, that under an indictment for burglary which also charges the consummation of the theft, a conviction can be had for larceny upon failure of the conviction for burglary. But in other cases the charge of larceny is construed literally as a mere substitute for the charge of an intent to steal, and conviction for larceny can not be had under such an indictment. *Butler v. Com.*, 81 Va. 159.

Furthermore, if in an indictment for burglary all the elements of burglary are not charged, but those of larceny are charged, the indictment will be good for the latter offense. *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919.

Thus, on an indictment, which charged not only the breaking and entering, but also the stealing of a trunk and its contents of stated value, the prisoner though acquitted of the burglary, may be found guilty of the larceny. *Clarke v. Com.*, 25 Gratt. 908.

And in *State v. Reece*, 27 W. Va. 375, 377, it was held, that if an indictment for burglary is defective as such, it

may, if it contains sufficient averments, be a good indictment for grand larceny. The charges in regard to the breaking and entering the storehouse may be treated as surplusage. See *Speers v. Com.*, 17 Gratt. 570; *Clarke v. Com.*, 25 Gratt. 908; *State v. McClung*, 35 W. Va. 280, 13 S. E. 654.

### C. CONCLUSION.

Indictments for horse stealing need not conclude *contra formam statuti*; and even if it were proper that they should, the omission would be cured by the statute of jeofails. *Chiles v. Com.*, 2 Va. Cas. 260. See also, Va. Code, 1887, § 3999; Va. Const., art. 6, § 26; W. Va. Const., art. 2, § 8; *Lemons v. State*, 4 W. Va. 755; *Com. v. Hays*, 1 Va. Cas. 122. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 371.

### D. PARTICULAR ALLEGATIONS.

#### 1. The Taking and Carrying Away.

See ante, "The Taking," III, B; "The Carrying Away," III, C.

In prosecutions for stealing from the person, it has always been held necessary to allege and prove that the thing taken was removed completely from the person, and where it appeared that the thing taken was not so removed, the prosecution for this particular form of the offense failed, even where the facts proved were sufficient to show the asportation necessary to be proved, in a simple larceny of the same property, for, as we have already shown, every larceny from the person includes the simple larceny of the same property. *State v. Chambers*, 22 W. Va. 779.

An indictment under § 49, ch. 192, Va. Code, 1860, contained three counts, in each of which the offense was set out specially, and not in general terms as in the case of a larceny at common law. The prisoner was convicted and sentenced for three years in the penitentiary under the said indictment. He contended in the appellate court

that the counts of the indictment ought to have been quashed, because they were not in form as for larceny at common law, and did not allege the stealing, taking and carrying away of a subject of larceny. It was decided by the court that it certainly would have been competent for the pleader to have counted as for a larceny of the subject in the form of an indictment for larceny at common law, and proof of the special facts set down in the act as constituting the offense, would have sustained the charge. *Dowdy v. Com.*, 9 Gratt. 727, 734. See also, *Leftwich v. Com.*, 20 Gratt. 716.

## 2. Ownership of Property.

See post, "Possession of Property," X, D, 3.

**Necessity of.**—The record of the examining court need not show that the goods stolen were the property of any person. An indictment should, however, give the name of the owner or state that the goods belong to a person or persons to the jurors unknown; and a statement defective in this respect is not cured by the statute of jeofails. *Halkem v. Com.*, 2 Va. Cas. 4; *Mabry v. Com.*, 2 Va. Cas. 396; *Barker v. Com.*, 2 Va. Cas. 122; *Dowdy v. Com.*, 9 Gratt. 727; *Com. v. Moseley*, 2 Va. Cas. 154.

In an indictment for larceny, the name of the owner of the property charged to have been stolen, must be stated. *Hughes v. Com.*, 17 Gratt. 565; *Alexander v. Com.*, 90 Va. 809, 811, 20 S. E. 782.

Where the larceny of several articles belonging to different owners was charged in one count of an indictment, and the ownership of each article specifically set forth, the indictment was held good. *Alexander v. Com.*, 90 Va. 809, 811, 20 S. E. 782.

However, three beehives to the value of five dollars, and three swarms of bees, to the value of three dollars, and forty pounds of honey, to the value of five dollars, with an allegation of

ownership, was held to be good after verdict, it being taken by intendment that the bees were reclaimed and that the honey was the property of the alleged owner. *Harvey v. Com.*, 23 Gratt. 941.

**Ownership of Banknotes.**—However, if the indictment for stealing banknotes does not charge that they are the banknotes of, or belong to, some person or persons by name, or of, or to, some person, to the jurors unknown, the defect is fatal, and is not cured by the statute of jeofails. *Barker v. Com.*, 2 Va. Cas. 122.

But an indictment which charges a larceny of banknotes "of the money, goods and chattels of one G. F. and from the said G. F.," is a sufficient averment of property in the said notes in G. F., the person from whom they were stolen, after verdict. *Com. v. Moseley*, 2 Va. Cas. 154.

So when an indictment charges that the prisoner committed a larceny of certain banknotes, "purporting on their faces to be, and being banknotes of and issued by bank charter," etc., the latter part of the charge may be rejected as surplusage, because it constitutes an independent allegation of an immaterial fact, and the fact constituting the offense is fully charged without it. It is not, therefore, necessary in such case to give proof of the charters of those banks. *Pomeroy v. Com.*, 2 Va. Cas. 342.

**Property of Corporation.**—Where the thing stolen is alleged to be the property of a corporate body by name, it is not necessary to aver the political existence of the corporation. Its existence is a matter of evidence, and, after verdict it is inferred from its corporate name. Thus, where an indictment alleged that the notes and dollars charged to have been stolen, were the property and effects of the "President, Directors and Company of the Farmers of Virginia." After verdict, the court is bound to presume, that on

the trial, the capacity of this company to hold property; that is, their corporate existence, was proved to the jury, or admitted by the prisoner; for, it is quite clear, that he might have exacted this proof and if it was given, he must have been acquitted on the count. *Lithgow v. Com.*, 2 Va. Cas. 297.

**Married Woman.**—An indictment for larceny should not allege ownership in a married woman, but goods in her possession should be laid as the goods of her husband. *Hughes v. Com.*, 17 Gratt. 565. See Va. Code, 1887, ch. 103.

But if a horse is owned by one who dies intestate leaving a widow and infant children, and no administrator has qualified on the estate of the decedent, and the horse remains on the farm of the decedent; and there has been no sale or distribution of the decedent's estate, but the horse as well as the children remain on the farm under the control of the widow, and while so under her control the horse is stolen, it may properly be described in an indictment for such stealing as the property of the widow. *State v. Heaton*, 23 W. Va. 773.

**General and Special Ownership.**—“There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a special property in them; and that they may be laid as the goods and chattels of such person in the indictment. A lessee for years, a bailee, a pawnee, a carrier and the like have such special property; and the indictment will be good, if it lay the property of the goods either in the real owners, or in the person having only such special property in them.” *Russell on Crimes*, vol. 2, p. 288, quoted, with approval, in *State v. Heaton*, 23 W. Va. 773. See *Minor's Syn. Cr. Law* 168.

**Sufficient Allegations after Verdict.**—In an indictment charging the prisoner with breaking and entering in the nighttime the shop of Hugh F. Lyle,

“then and there being found,” and with stealing certain articles “then and there being found,” it was objected that the articles alleged to be stolen were not described as the property of any person. It was held, that the allegation that the prisoner broke and entered the shop with intent to steal the goods of Lyle “then and there being found” and that he “then and there stole the goods described,” is a sufficient averment after verdict that the goods stolen were the property of Lyle. *Vaughan v. Com.*, 17 Gratt. 576, 578.

### 3. Possession of Property.

See ante, “Ownership of Property,” X, D, 2.

**In General.**—But in larceny, at common law, the indictment need not charge that the goods were stolen from the possession of the owner, or of any other person. *Thompson v. Com.*, 2 Va. Cas. 135. As was said in *Angel v. Com.*, 2 Va. Cas. 228, in an indictment for the larceny of bank notes under the statute of 1819, it is not necessary that it should charge that the stealing was from the possession of any one.

**Horse Stealing.**—An indictment for horse stealing need not state the horse to be in the possession of any person. *Halkem v. Com.*, 2 Va. Cas. 4.

**Larceny of Slave.**—But an indictment for the larceny of a slave, of the goods and chattels of E. E. and out of the possession of the said E. E. was held, not sufficient, it appearing that the slave was hired to D. and at the time of the larceny in the actual possession of B. *Com. v. Williams*, 1 Va. Cas. 15.

**Statutory Rule.**—“In a prosecution for stealing it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of the personal estate stolen, was in the person alleged in the indictment to be the owner thereof.” *State v. Heaton*, 23 W. Va. 773. Ch. 158, § 7, W. Va. Code.

*State v. Chambers*, 22 W. Va. 779. Va. Code, 1904, § 3996. See also, *Richards v. Com.*, 13 Gratt. 803.

#### 4. Description of Property.

##### a. Personal Property in General.

An indictment charged the stealing of "one lot of queen's ware" without further description. It was objected that the prisoner could not, if subsequently indicted for stealing the specific articles comprised in the said "lot of queen's ware" avail himself of the plea of former conviction in the case. The court held that the description of the goods stolen as "a lot of queen's ware" is sufficient after verdict. And that upon a subsequent indictment for stealing the specific articles embraced in the "lot of queen's ware," the prisoner would not lose the benefit of the plea of former conviction because he would have the right to establish the identity of the articles by proof. 3 Greenleaf Evidence, § 36; 2 Leading Criminal Cases 500-556; *Vaughan v. Com.*, 17 Gratt. 576, 578.

**Bees Described as "Goods and Chattels."**—Three swarms of bees were described to be of the goods and chattels of one Vincent Shelton; this was held to be, in effect, an averment, that when stolen they were his property and in his possession. *Harvey v. Com.*, 23 Gratt. 941, 943.

**One Keg of Wine of the Value of \$15.**—An indictment alleged that the prisoner did break and enter the cellar, "and one keg of wine, of the value of fifteen dollars, of the goods and chattels of J. W. Hale in the said house and cellar then and being found, then and there feloniously did steal," etc. It is good as an indictment for petit larceny. *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919.

##### b. Writings and Papers—Money.

In an indictment under the statute making writings and papers of value the subject of larceny, a description of the papers by the name and designation by which they are usually known,

and which properly avers the value thereof, is sufficient. *Fredrick v. State*, 3 W. Va. 695; *Pollard's Supp.* 1900, § 3994.

But an indictment charging the prisoner with stealing certain papers of the value of \$110, yet not otherwise describing the papers charged to have been stolen, is fatally defective. *Robinson v. Com.*, 32 Gratt. 866.

"There ought to have been some description of the paper, so as to inform the defendant of the nature of the charge she was called upon to answer. The charge of stealing certain paper was altogether too vague and indefinite. It might have been wall paper, or writing paper, or wrapping paper, paper written or printed upon; paper whose value was determined by what was written or printed thereon, or paper the value of which was intrinsic in itself. It is true banknotes, promissory notes and bonds, and other writings of value, are, in a certain sense, all paper, but their value is estimated not as paper, but according to the value of the obligation thereon written or printed. It is not sufficient, therefore, in an indictment to charge the larceny of certain paper. There must always be some description, at least to the extent to notify the defendant of the specific charge he is called upon to answer." *Robinson v. Com.*, 32 Gratt. 866, 870. See *Whalen v. Com.*, 90 Va. 544, 546, 19 S. E. 182.

In *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182, an indictment charged the larceny of divers United States treasury and national banknotes, and also "one paper purporting to be a check for the payment of one hundred and twenty-five dollars, of the value of one hundred and twenty-five dollars, the goods and chattels of one H. A. Ricketts, then and there being upon the person of the said Ricketts." It was contended that the description of the check was vague and indefinite, and especially because there was no allega-

tion that any part of it remained due and unsatisfied at the time of the alleged larceny. The court held this objection to be untenable, giving as a reason for their position that the offense of stealing the check, or promissory note, or anything of that sort is altogether statutory, being made a crime by § 3708 of the Code of 1887; that it is laid down as a well established rule that where a statute, simple, and in terms not limited, makes indictable the larceny of "any promissory note," it is adequate to say "one promissory note for the payment of, etc., of the value of," etc.; that § 3709 of Code 1887 which provides that in a prosecution like the present the money due on or secured by the writing in question, "and remaining unsatisfied," shall be deemed to be the value of the article stolen, merely prescribes a rule for estimating the value of the paper, and is not a part of the necessary description, although the words "remaining unsatisfied" are usually in the indictment in such cases.

And an indictment under the act approved February 28, 1874, entitled "An act to amend § 6, ch. 201, of the Code of 1873," charging a larceny of "divers notes of the national currency of the United States" is precisely the same in meaning and effect as a charge of larceny of the "United States currency" and is sufficient. The addition of the word "national" in the indictment can certainly make no difference. *Dull v. Com.*, 25 Gratt. 965, 973.

A general description of a bank note current in the United States, is sufficient in an indictment for a larceny thereof. *Com. v. Moseley*, 2 Va. Cas. 154.

But an indictment for obtaining "United States currency" by false pretenses is not sufficient. There is no law making the stealing of "United States currency," *eo nomine*, larceny. Such an indictment is too vague. *Leftwich v. Com.*, 20 Gratt. 716.

In an indictment under § 49, ch. 192, Va. Code, 1860, for obtaining money upon a false pretense, it is not sufficient to describe it as "ninety dollars in United States currency;" because "United States currency" may be gold, or silver, or treasury notes, or banknotes. Proof that any of these subjects were obtained by the false pretense alleged would be perfectly consistent with the indictment, which, therefore, is too vague. It ought to show what kind of United States currency was obtained. *Leftwich v. Com.*, 20 Gratt. 716.

Under act of February 28, 1874, amending § 6, ch. 201, of Code of 1873, an indictment charging the larceny of "United States currency" is sufficient. *Dull v. Com.*, 25 Gratt. 965, 974; Va. Code, 1887, § 3994.

In an indictment for stealing certain notes "purporting on their faces to be, and being notes of banks chartered, etc.," held, the words "and being notes of banks chartered" may be rejected as surplusage, and no proof of such charter is necessary. *Pomeroy v. Com.*, 2 Va. Cas. 342.

#### c. Animals.

If *prima facie*, the thing taken is not the subject of larceny, as an animal *feriæ naturæ*, the indictment must show it to be dead, tame or confined, in which state it may be the subject of individual property, and hence subject of larceny. *Harvey v. Com.*, 23 Gratt. 941. See ante, "Animals," IV, B, 1.

An indictment for stealing a horse need not state that it is a live horse; for, upon a general averment that a party stole the animal, it is intended he stole it alive. *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40.

#### 5. Means.

If the possession of property is obtained from the owner by means of fraud or trick, the indictment need not specify the means by which the larceny was effected. *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429. See

*Dowdy v. Com.*, 9 Gratt. 727; *Leftwich v. Com.*, 20 Gratt. 716; *Price v. Com.*, 21 Gratt. 846; *Anable v. Com.*, 24 Gratt. 563; *Fay v. Com.*, 28 Gratt. 912; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429.

#### 6. Owner's Consent.

**Consent.**—An indictment for taking and removing a slave from one county to another, with intent to defraud the owner, should state that such taking and removing was without the consent of the owner. *Com. v. Peas*, 2 Gratt. 629.

#### 7. Value.

**Rule at Common Law.**—At common law no rule of criminal pleadings was better established than that which required that in indictments for larceny the value of the property should be stated. The reason of the rule was to distinguish between grand and petit larceny. This rule applied to every species of property, to banknotes and other money as well as to other property. And before a party could be convicted of grand larceny, it was necessary to charge and prove the value of the thing stolen to be at least of that amount which the law makes grand larceny. But it is competent for the legislature to modify these rules and to declare what shall constitute grand larceny without respect to the value of the thing stolen; and what shall be deemed the value of certain specified property irrespective of its real value. *Adams v. Com.*, 23 Gratt. 949. See also, *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40.

**Under Statute.**—Under the statute making banknotes the subject of larceny no value need be shown. The statute now provides that they shall be deemed to be of the value expressed on their face. *Adams v. Com.*, 23 Gratt. 949; *Whalen v. Com.*, 90 Va. 544, 19 S. E. 182; Va. Code, 1887, § 3709; *Cumming v. Com.*, 2 Va. Cas. 128. See Am. Crim. Pl. 46; 2 Bis. Crim. Proc. (3d Ed.), § 732.

**Grade of Offense.**—An indictment which alleges that the defendant stole property of the value of over \$50 is good as an indictment for grand larceny, and hence if the indictment is for housebreaking and the value is over \$50 it will be sustained as a valid indictment for grand larceny. *State v. Hupp*, 31 W. Va. 355, 6 S. E. 919; *Howe's Case*, 26 W. Va. 110; *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40. See also, *Reece's Case*, 27 W. Va. 375. See post, "Punishment," XVII.

The court in *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40, in speaking of the value, said: "The attorney general, with commendable industry and research, has furnished us with much curious information in regard to the uses of the words 'price' and 'value,' found in the black letter literature of the law, and the early precedents of indictments for larceny; the result of which is that, if the larceny be alleged of anything, the indictment must set down the price or value, in order that it may appear whether it be grand or petit larceny."

#### Substitution of "Price" for "Value."

—An indictment under our statute (§ 14, ch. 145, Code), which charges the accused with the larceny of "one gelding horse, of the price of \$100," instead of one gelding horse of the value of \$100, according to the words of the statute, is sufficient. The word "price," as used here, is equivalent to the word "value," used in the statute. *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40.

**Indictment for Living Thing.**—When the theft is charged in the indictment for a living thing, as a horse or sheep, the regular way is to say pretii. 5 Saund. & C. *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40.

**Indictment for Dead Thing.**—If it be of a dead thing that it is estimated in the indictment by weight or measure, there also it ought to be pretii; and so it may be if it be of any single thing, though dead, and not estimated by

weight or measure. But if it be dead things in the plural number, then it ought to be *ad valentiam*. *State v. Sparks*, 30 W. Va. 101, 3 S. E. 40.

### 8. Intent.

**Felonious Intent.**—In an indictment for stealing under act of 1806, it should be charged that the goods were feloniously stolen, although by the act it is not denominated a felony; and this error is not cured by the statute of criminal jeofails. *Barker v. Com.*, 2 Va. Cas. 122. See ante, "Intent," III, E.

**Felonious Taking.**—On an indictment for horse stealing it is not necessary to charge the felonious taking; stealing is sufficient. *Halkem v. Com.*, 2 Va. Cas. 4.

**Guilty Knowledge.**—Indictment at common law, charging defendant with rescuing property that had been distrained by a sheriff for public dues, from bailee to whose safe-keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it. Held, indictment defective for not averring that the defendant had such knowledge. *Com. v. Israel*, 4 Leigh 675.

## XI. Evidence.

See the title EVIDENCE, vol. 5, p. 295. See post, "Trial," XIV.

### A. ADMISSIBILITY.

See post, "Presumption and Burden of Proof," XI, C.

**Other Offenses.**—On indictment for stealing a watch, proof of the theft of a clock is inadmissible. To allow it would suffer the prisoner to be taken by surprise and would tend to prejudice the jury against him. *Walker v. Com.*, 1 Leigh 574; *Robinson v. Com.*, 32 Gratt. 866.

**Intoxication.**—On an indictment for larceny it is competent to show that the accused was intoxicated at the time of the theft since it negatives the felonious intent. *Hall v. Com.*, 78 Va. 678;

*State v. Shores*, 31 W. Va. 491, 7 S. E. 413.

**Letters.**—On an indictment for larceny of a horse, evidence tending to show that a purchaser from a subsequent vendee of the accused had gotten a letter from the previous owner, describing the animal so accurately, as to cause delivery of the animal to such owner, is admissible against the defendant. *Taylor v. Com.*, 77 Va. 692.

**Evidence of Ownership.**—Upon an indictment for stealing a horse, it is entirely competent for the commonwealth to establish the ownership of the animal by the son in the absence of the father from the state. *Taylor v. Com.*, 77 Va. 692.

**Res Gestæ.**—On indictment for larceny the commonwealth may prove the presence of the prisoner in the hotel on the night in question, and his acts and conduct therein, not for the purpose of establishing another distinct felony, but as a part of the whole transaction. *Burr v. Com.*, 4 Gratt. 534.

Testimony that certain corn found in the house of one on trial for larceny thereof, was the corn stolen, in the witness' opinion, and to the best of his knowledge and belief, founded on the fact that certain articles were in it that were also in the stolen corn. Held, unobjectionable. *Combs v. Com.*, 90 Va. 88, 17 S. E. 881. See *Gravely's Case*, 86 Va. 396, 402, 10 S. E. 431.

**Confessions.**—W. was indicted for stealing \$150, the money of S. On the trial it was proven that J., a detective, arrested W., who made a confession, which was made under a promise, and was excluded as evidence. In this confession he directed J. to go to certain gamblers and get the money back from them. J. sent for the gamblers named, told them what W. had said, and they paid over to J. for S. \$104, though one of them protested that W. had not been at his house, and the others denied that he had lost the money claimed



with them; the balance of the money, \$46, was paid over by the father of W. Held, it not being proved that the money paid to J. was the same lost by S., the statement of W. to J. and of what passed between J. and the gamblers and the father of W. is not competent evidence. *Williams v. Com.*, 27 Gratt. 997. See the title CONFESIONS, vol. 3, p. 79.

## B. SUFFICIENCY OF PROOF.

**Connecting Ownership with Name in Indictment.**—On a trial for larceny, to convict the prisoner, there must be satisfactory proof that the property stolen was the property of the person stated in the indictment. *Jones v. Com.*, 17 Gratt. 563; *Prather v. Com.*, 85 Va. 125, 7 S. E. 178; *Robinson v. Com.*, 32 Gratt. 866; *Mabry v. Com.*, 2 Va. Cas. 396.

The ownership of the property must be proved as laid in the indictment. *Mabry v. Com.*, 2 Va. Cas. 396. But it is sufficient if proved as laid in either count of the indictment. Where a pocketbook and money were in the actual possession of a defendant, at the time the prisoner thrust his hand into her pocket, and seized, and attempted to abstract the same; the proof of this fact, is sufficient proof of her ownership of the property as laid in the second count in the indictment. *State v. Chambers*, 22 W. Va. 779, 784.

In a prosecution for stealing any personal estate it shall be sufficient to prove that when the offense was committed, the actual or constructive possession in whole, or any part of such estate was in the person alleged in the indictment to be the owner thereof. *State v. Chambers*, 22 W. Va. 779, 784; Va. Code, 1887, § 3996; *State v. Heaton*, 23 W. Va. 773, 781; *Richards v. Com.*, 13 Gratt. 803.

**Proof of Value of Note.**—In a prosecution for the larceny of a banknote, if it is proved that the prisoner feloniously

stole the note, and afterwards passed it away as genuine, this act of his affords prima facie evidence that the note is of some value, and dispenses with further proof on the part of the commonwealth, of the note being genuine and of value. *Cummings v. Com.*, 2 Va. Cas. 128. See ante, "Value," X, D, 7.

To support the allegation in an indictment, that the banknotes purport on their faces to be notes of certain banks, the notes produced in evidence must correspond therewith. *Pomeroy v. Com.*, 2 Va. Cas. 342.

**Proof of Embezzlement Sustains Indictment for Larceny.**—Where, under an indictment for larceny, the defense attempted to show that proof of embezzlement would not sustain a common-law indictment for larceny, the court said: "Whatever doubt may have existed upon this subject formerly, and however the rule may be in other courts, it is too well established in Virginia to be any longer the subject of controversy. Section 3716 of the Code says that if 'any person embezzle any money, note, bill, check, order, draft, bond, receipt, bill of lading or any other property which he shall have received from another, \* \* \* he shall be deemed guilty of the larceny thereof.'" *Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351; *Shinn v. Com.*, 32 Gratt. 899; *Fay v. Com.*, 28 Gratt. 912. See the title EMBEZZLEMENT, vol. 5, p. 63.

**Conviction of Larceny under Charge of Kindred Offense.**—Where the indictment or information charges a kindred offense which embraces the essential elements of larceny, there may be a conviction of larceny thereunder. *State v. McClung*, 35 W. Va. 280, 285, 13 S. E. 654; *Vaughan's Case*, 17 Gratt. 576; *Butler v. Com.*, 81 Va. 159.

**Indictment for Larceny Sustained by Proof That Goods Were Stolen by Another and Received by Accused.**—And if a person be indicted for the simple

larceny of a thing, and the proof be that it was stolen by some other person, and received by the accused knowing it to have been stolen, the proof will sustain the charge; the act making the receiving of a thing stolen, knowing it to have been stolen, larceny. Code, 1860, p. 789, § 20; Price v. Com., 21 Gratt. 846; Hey v. Com., 32 Gratt. 946; State v. Halida, 28 W. Va. 499; Anable v. Com., 24 Gratt. 563; Leftwich v. Com., 20 Gratt. 716; Dowdy v. Com., 9 Gratt. 727; Fay v. Com., 28 Gratt. 912; Pitsnogle v. Com., 91 Va. 808, 22 S. E. 351. See Va. Code, 1887, §§ 3402, 3412; Va. Code, 1904, § 3715. See the title RECEIVING STOLEN GOODS.

**Conviction of Larceny on Indictment for Housebreaking.**—Housebreaking with intent to commit larceny, and grand larceny, are different offenses and to each is affixed its own penalty, but they may be, and often are, one continued act, and may be charged in the same count of indictment. Upon such count the accused may be found guilty of either or both offenses, but there can be only one penalty imposed. If it is desired to punish for both offenses, in a case of this kind, a separate count for larceny must be inserted in the indictment. If there is a conviction generally, or of the grand larceny only, and it is submitted to, in either case, this is a bar to further prosecution. Benton v. Com., 91 Va. 782, 21 S. E. 495.

**Indictment for Larceny Sustained by Proof of Obtaining Goods under False Pretense.**—Upon an indictment simply charging larceny, the commonwealth may show either that the subject of larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense. Anable v. Com., 24 Gratt. 563; Leftwich v. Com., 20 Gratt. 716; Dowdy's Case, 9 Gratt. 727; Price v. Com., 21 Gratt. 846; Fay's Case, 28 Gratt. 912; Dull's Case, 25 Gratt. 965; Shinn's Case, 32 Gratt. 899; Pitsnogle

v. Com., 91 Va. 808, 22 S. E. 351; Anthony v. Com., 88 Va. 847, 14 S. E. 834; Mangus v. McClelland, 93 Va. 786, 22 S. E. 364. See also, Hoback v. Com., 28 Gratt. 922; Page v. Com., 26 Gratt. 942. A similar rule prevails in West Virginia. See State v. Halida, 28 W. Va. 499, 503; State v. Edwards, 51 W. Va. 220, 41 S. E. 429.

In Fay v. Com., 28 Gratt. 912, a person was indicted for the larceny of certain notes of United States currency. The proofs referred to the prisoner obtaining the money from the owner by false pretenses. To sustain the prosecution it was necessary for the commonwealth to prove every fact which would be required to be alleged in an indictment for obtaining money on false pretenses. Therefore it would be a material allegation that the money was obtained by the false pretense alleged; consequently, it is necessary to be proved under the indictment for larceny in order to a conviction.

This case is cited in Pitsnogle's Case, 91 Va. 808, 811, 22 S. E. 351, to support the proposition that on an indictment for larceny, proof of embezzlement is sufficient to sustain the charge. See also, Shinn's Case, 32 Gratt. 899. In State v. Halida, 28 W. Va. 499, 503, the court says: "Both counts in the indictment are good as counts for simple larceny. It is therefore not important whether or not the first count is also good as an indictment for obtaining the mule under false pretenses, because under the decisions above cited, all the evidence which could be introduced to sustain an indictment for obtaining the mule by false pretenses can also be introduced in support of an indictment for simple larceny, the legal offense as well as the punishment in both cases being precisely the same." Citing Fay v. Com., 28 Gratt. 912; Dull's Case, 25 Gratt. 965. See also, Anable's Case, 24 Gratt. 563; Leftwich's Case, 20 Gratt. 716; Dowdy's Case, 9 Gratt. 727; State v. Reece, 27 W. Va. 375.

**Charging Grand Larceny Conviction of Petty Larceny.**—Upon an indictment for grand larceny there can be a conviction of petit larceny, as the major includes the minor offense, plainly so in the instance of grand and petit larceny. *Howes' Case*, 26 W. Va. 110; *Whart.*, Crim. Pl., § 246; *Hardy's Case*, 17 Gratt. 592; *Canda's Case*, 22 Gratt. 899; *Code*, § 18, ch. 159; *State v. McClung*, 35 W. Va. 280, 13 S. E. 654.

**Charge of Larceny from Building.**—And under an insufficient charge of larceny from a building, a conviction for simple larceny may be had, if the indictment is sufficient in other respects. *Vaughan v. Com.*, 17 Gratt. 576.

**Defeating a Distress.**—Under *Code*, § 3712, making it larceny to "fraudulently" dispose of or receive goods with intent to defeat a distress or levy made thereon, proof of the facts constituting the offense is sufficient to sustain an indictment for larceny. *Duff v. Com.*, 92 Va. 769, 23 S. E. 643.

**Gold Watch Alleged—Represented as Such—Conviction.**—Where an indictment alleged the larceny of a "gold" watch, evidence of the owner that he gave \$30 for it, and that when he purchased it, it was represented to be gold, is sufficient to sustain conviction. *Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351.

### C. PRESUMPTION AND BURDEN OF PROOF.

See the title PRESUMPTIONS AND BURDEN OF PROOF.

**Mere Possession of Lost Goods.**—The mere possession of goods which had been actually lost does not furnish any conclusive or prima facie proof of guilt; of itself it does not raise the suspicion of guilt. *Hunt v. Com.*, 13 Gratt. 757; *Tanner v. Com.*, 14 Gratt. 635; *Perrin v. Com.*, 87 Va. 554, 13 S. E. 76. See also, *Walker v. Com.*, 28 Gratt. 969; *Wash v. Com.*, 16 Gratt. 530. See

ante, "Lost Property," IV, B, 2. See the title LOST PROPERTY.

**Exclusive Possession of Goods Recently Stolen—Virginia Rule.**—Exclusive possession of goods recently stolen raises a presumption that the one in possession is the thief. What possession is such recent possession is a question for the jury. *Price v. Com.*, 21 Gratt. 846; *Porterfield v. Com.*, 91 Va. 801, 22 S. E. 352; *Taliaferro v. Com.*, 77 Va. 411. See contra, *State v. Heaton*, 23 W. Va. 773; *State v. Reece*, 27 W. Va. 375, 379. See *Gravely v. Com.*, 86 Va. 396, 10 S. E. 431; *Walker v. Com.*, 28 Gratt. 969; *Bundick v. Com.*, 97 Va. 783, 34 S. E. 454; *Wright v. Com.*, 82 Va. 183; *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858; *Branch v. Com.*, 100 Va. 837, 41 S. E. 862.

**Exclusive Possession of Stolen Goods—West Virginia Rule.**—While the possession of stolen goods, especially at a remote time after the larceny, is not, in this state, prima facie evidence that the possessor is the thief, even when unaccompanied by a reasonable explanation of how the possession was acquired, still evidence of such possession is admissible and proper to be considered by the jury, in connection with other evidence and circumstances appearing on the trial. *State v. Heaton*, 23 W. Va. 773, 793; *Walker's Case*, 28 Gratt. 969, 973; 3 *Greenl. Ev.*, §§ 31, 32; *Taliaferro v. Com.*, 77 Va. 411; *State v. Reece*, 27 W. Va. 375, 379.

**Application in Case of Compound Larceny.**—*Quære*: If the rule of evidence which applies to simple larceny, in regard to effect of the accused being found in possession of the stolen property recently after the larceny thereof, applies to a case of compound larceny, as where larceny is a component part of the offense of burglary or housebreaking. *Walker v. Com.*, 28 Gratt. 969. See the title BURGLARY AND HOUSEBREAKING, vol. 2, p. 654.

**Question of Law and Fact.**—The

presumption arising from the possession of stolen goods is one wholly of fact and not of law. *Price v. Com.*, 21 Gratt. 846; *State v. Heaton*, 23 W. Va. 773; *State v. Reece*, 27 W. Va. 375, 379; *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858, 3 W. Va. Law Reg. 99.

If in an indictment for larceny the court at the instance of the state gives the following instruction to the jury: "The jury is instructed that if property be stolen and recently thereafter be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient grounds for a presumption of fact, that he was the thief, and in order to repel the presumption makes it incumbent on him on being called on for the purpose to account for such possession consistently with his innocence. If he gives a reasonable account of it, then it devolves upon the state to prove that such account is untrue. If he gives an unreasonable account of it, then it devolves upon the prisoner to sustain his statement by other evidence;" and the prisoner files a bill of exception to the giving of such instruction, the appellate court will reverse the judgment against the prisoner and award a new trial because of the giving of such instruction, it being an unwarrantable interference by the court with the province of the jury. Disapproving of *Price's Case*, 21 Gratt. 847, so far as it approved of giving to the jury the instruction set out in the seventh point of the syllabus of that case. *State v. Heaton*, 23 W. Va. 773. See *Wash v. Com.*, 16 Gratt. 530.

## XII. Variance.

See the title VARIANCE.

The indictment against J. is for stealing six dollars of "United States treasury notes." Upon an exception to the refusal of the court to grant J. a new trial, the certificate of facts states that A. was holding "some money," etc. The facts certified do not sustain the

verdict. *Johnson v. Com.*, 24 Gratt. 555.

**Idem Sonans.**—As to what constitutes a variance, it is held that if an indictment allege the larceny of a watch belonging to "Edmond Bolden," while the evidence shows it to be the property of "Ed Bolen," the names are idem sonans, and no variance is caused thereby. *Pitsnogle v. Com.*, 91 Va. 808, 22 S. E. 351.

### Variance in Averment of Ownership.

—And where two counts in an indictment, in each of which the ownership of the house entered was described to be in different persons and in each of them the accused was charged with having broken and entered the said house, not only with intent to commit a larceny therein, but with also having actually committed such larceny, to wit; of one trunk and its contents of certain specific value respectively set out, and all of the aggregate value of \$85.85 of the goods and chattels of the said Joseph Dabney, in the said dwelling house then and there being found, it was held that the person could be acquitted of the felonious and burglarious breaking and entering in of the dwelling house, but convicted of the larceny as charged in the indictment. *Clarke v. Com.*, 25 Gratt. 908, 919.

An indictment which alleges ownership in a person, and the proof shows that the person is a married woman, the variance is fatal, since the allegation should lay the property in her husband. *Hughes v. Com.*, 17 Gratt. 565.

So a variance is not material where the indictment charges the stolen goods to be the property of Rober Buster, if the proof is that the owner of the goods is a certain James Robinson Buster, who is sometimes called Rob, Robin and Bob Buster, and that he accepted and answered to these names. This for the reason that it does not appear that the owner of the goods is another and a different person, therefore the variance is clearly

not fatal. *State v. Reece*, 27 W. Va. 380. Moreover, if the record of an examining court charges the stealing of a dark bay horse, or the stealing of two horses and a halter, chain and collar, of the value of \$150, and the indictment charges the stealing of a dark bay gelding, or the stealing of two horses of the value of \$75 each, these variances are not sufficient to quash the indictment. *Halkem v. Com.*, 2 Va. Cas. 4. As to the effect of a variance, the question arose in *Robinson v. Com.*, 32 Gratt. 866. The prisoner was on trial for stealing certain bank notes, "the numbers and denomination of which were unknown to the jurors;" the evidence of the commonwealth showed that the number and the denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence, the court, on the motion of the prisoner excluded the evidence; and then against the objection of the prisoner, discharged the jury. On a second indictment for the same offense, the prisoner put in a special plea of "once in jeopardy." The court held that, if the jury had, on the first trial, rendered a verdict in favor of the prisoner, that verdict could not have been pleaded to the second indictment because the acquittal was effected in consequence of a variance between the allegations and the proof, which under Va. Code, 1860, ch. 199, § 16, is no bar to a new indictment.

**Endorsement of Check.**—*W.* having bought his warrant of *N.*, an agent of *A.*, and having given a check payable to the order of *N.*, and the indictment charging the larceny of the check of *W.* endorsed by *N.*, and the proof being that *N.* endorsed his name after receiving the check; quære, if this is a variance. *Anable v. Com.*, 24 Gratt. 563.

### XIII. Election.

See the title ELECTION OF REMEDIES, vol. 4, p. 921.

Where an indictment contains two counts each of which is sufficient for simple larceny, the defendant can not compel the state to elect and try him on one count only unless it appears that the counts charge separate and distinct offenses. *State v. Halida*, 28 W. Va. 499. See ante, "Joinder of Counts," X, B.

It is not error on an indictment for larceny for the state to charge the incidental circumstances of the crime in various ways to meet the varying pleas of proof. And in such case the court will not compel the prosecutor to elect a single count on which to try the prisoner. *Dowdy v. Com.*, 9 Gratt. 727; *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683; *Anthony v. Com.*, 88 Va. 847, 14 S. E. 834.

### XIV. Trial.

**Production of Stolen Articles.**—In an indictment for larceny of banknotes, it is not indispensably necessary to produce the stolen notes upon the trial. *Moore v. Com.*, 2 Leigh 701, cited in *Kirk v. Com.*, 9 Leigh 631.

**Trial by Jury.**—Under acts of 1870-71, p. 326, a person tried by a justice of the peace, and convicted, is entitled to a trial by jury. *Read v. Com.*, 24 Gratt. 618.

**Charge of Clerk.**—If on an indictment for larceny, the clerk charges the jury in the usual form, and on the trial it appears that the money charged to have been stolen was obtained by false pretenses, another charge by the clerk is neither necessary nor proper. *Dull v. Com.*, 25 Gratt. 965, 966. See the title INSTRUCTIONS, vol. 7, p. 701.

**Contradicting Existence of Building Fund Association—Estoppel.**—Upon an indictment against the secretary of a building fund association for the larceny of a check, whether the building fund association was organized strictly in conformity with the requirements of the statute, is not a proper subject of enquiry, the accused having as secre-

tary of the association, received and willfully appropriated its funds or property, can not be heard, upon a criminal prosecution therefor to contradict its legal existence. *Shinn v. Com.*, 32 Gratt. 899.

**Insanity.**—On indictment for larceny the plea of "not guilty" puts the prisoner's sanity in issue. If at the time of the trial there is reasonable ground to doubt the prisoner's sanity the trial should be suspended until this question is determined. *Gruber v. State*, 3 W. Va. 699; *Va. Code*, 1887, § 4031; *W. Va. Code*, 1899, ch. 159, p. 1020. See the title *INSANITY*, vol. 7, p. 668.

**Judgment of Outlawry.**—Where a person is indicted for larceny and found guilty but escapes from jail and four writs of capias ad respondeum are issued, and returned "not found," followed by an exigent, which is returned "quinto exactus;" the attorney for the commonwealth moves for a writ of outlawry, it was held, that upon the execution of the writ of exigency awarded and before the return day thereof, judgment of outlawry ought to have been pronounced by the coroner of the county. *Com. v. Anderson*, 2 Va. Cas. 245.

## XV. Verdict.

See post, "Arrest of Judgment," XVI; "Punishment," XVII. See the title *VERDICT*.

**In General.**—A verdict which does not ascertain what goods were stolen, nor their value, nor whether they are forthcoming, or not, nor what articles are not forthcoming, if any, nor the value of such as are not forthcoming (but merely finds the prisoner guilty of petit larceny on an indictment for grand larceny), will not be set aside as erroneous. *Poindexter v. Com.*, 6 Rand. 667, 688. See also, *Walker v. Com.*, 1 Leigh 574.

**Surplusage.**—In *Harvey v. Com.*, 23 Gratt. 941, the jury, though not authorized so to do, fixed the punish-

ment of the prisoner. The court sentenced him accordingly. Held, the jury's act was mere surplusage, the imprisonment being the act of the court. *House v. Com.*, 8 Leigh 755.

**Conviction of Lower Offense on Indictment for Higher Offense.**—A conviction of petit larceny on an indictment for grand larceny is sufficient though the verdict does not ascertain what goods were stolen nor the value of said goods. *Poindexter v. Com.*, 6 Rand. 667; *Walker's Case*, 1 Leigh 574.

**Former Conviction of Similar Offense.**—On indictment the prisoner was charged in one count with petit larceny; in another count with petit larceny after a previous conviction of the same offense. The jury found her guilty on both counts and fixed the punishment at five years in the penitentiary. Held, the verdict was not open to objection. *Stroup v. Com.*, 1 Rob. 754; *Va. Code*, 1887, §§ 3903, 3907; *Stover v. Com.*, 92 Va. 780, 22 S. E. 874.

**General Verdict.**—The indictment charged that the prisoner "one paullock, of the value of thirty cents, \* \* \* feloniously did steal, take and carry away." The verdict rendered was, "We, the jury, find the defendant guilty." On objection to the verdict, on the ground that it convicts the prisoner of a felony; held, the verdict must be read in connection with the charge in the indictment, which is a misdemeanor, and the verdict is sufficient. The word "feloniously" was used in the indictment simply to characterize the intent with which the taking, etc., was done. *Wolverton v. Com.*, 75 Va. 909.

Upon a general verdict of guilty on a count, alleging both burglary and larceny, the sentence would be for burglary, not for both larceny and burglary, or for larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654. See the title *BURGLARY AND HOUSEBREAKING*, vol. 2, p. 654.

**Amendment of Verdict by Prosecuting Attorney.**—The jury brought in their verdict in the following words: "We, the jury, find the defendant, A. F. Porterfield, guilty of grand larceny, as charged in the indictment, and fix his punishment at confinement in the state penitentiary for the period of two years and six months." This verdict was amended by the commonwealth's attorney so as to read as follows: "We, the jury, find the defendant, A. F. Porterfield, guilty as charged in the within indictment, and fix his punishment at confinement in the state penitentiary for the period of two years and six months," and, as amended and assented to by each member of the jury, was received by the court over the objection of the accused. The practice of allowing the verdict of a jury to be put in form in open court is a proper, and in many cases, a necessary practice; but the amendment made in this verdict was not as to a matter of form, but of substance. By the verdict returned by the jury the accused was acquitted of feloniously entering the barroom, and found guilty of grand larceny. By the amended verdict he is found guilty, as charged in the indictment, which embraces both the offense of entering the barroom and of grand larceny. The fact that the jury was polled, and each member assented to the amended verdict, would, perhaps, have cured the irregularity, but as the cause has to be reversed upon other grounds it is unnecessary to decide that question, and we are not to be understood as expressing any opinion upon it. The proper practice in such cases is for the trial court to see that the verdicts of the juries are put in proper form before they are discharged, but if any change in the substance of the verdict is to be made, the jury should be sent back to their room, where they can, untrammelled by the presence or influence of others, find such verdict as they deem proper.

*Porterfield v. Com.*, 91 Va. 801, 806, 22 S. E. 352. See the title CRIMINAL LAW, vol. 4, p. 1.

## XVI. Arrest of Judgment

If an indictment against an accused for the second offense of petit larceny alleges a former conviction and punishment of the accused for a like offense, but does not in terms allege that the court in which the first offense was tried had competent authority to try the same; nor that the former conviction remains in force; nor that such conviction appears by the record; nor that the accused formerly convicted is the same person who is charged with the subsequent offense, and there is a verdict of guilty, none of the omissions aforesaid in the indictment is a ground for arresting the judgment. *Stroup v. Com.*, 1 Rob. 754.

If one of three subjects mentioned in an indictment, might be the subject of larceny, judgment will not be arrested. *Harvey v. Com.*, 23 Gratt. 941.

A prisoner was indicted for breaking open a storehouse, and stealing therefrom goods to the value of more than four dollars. The verdict found him guilty of grand larceny, and fixed his imprisonment at seven years. The judgment ought not to be arrested, but the verdict is too imperfect, and uncertain, to render any judgment on it. It ought, therefore to be set aside, and a *venire facias de novo* awarded. *Com. v. Smith*, 2 Va. Cas. 327.

## XVII. Punishment.

See ante, "In General," II, A; "Housebreaking and Grand Larceny Distinguished," II, B; "Simple Larceny and Larceny from the Person Distinguished," II, C; "Verdict," XV.

### A. IN GENERAL.

**Punishment for Two Offenses.**—A count for larceny may be added to a count for housebreaking with intent to steal, and in such case the jury may find the prisoner guilty on both counts and fix a several punishment for each

offense. *Speers v. Com.*, 17 Gratt. 570. See the title BURGLARY AND HOUSEBREAKING, vol. 2, p. 654.

### B. GRAND LARCENY.

**By Statute.**—In this state "simple larceny of goods and chattels, if they be of the value of twenty dollars or more, shall be deemed grand larceny and punished by confinement in the penitentiary not less than two, nor more than ten years." Code, ch. 145, § 14. This was also the law of Virginia from which our statute was taken. Code, Va., p. 789, § 14. *State v. Chambers*, 22 W. Va. 779.

Where the evidence is sufficient to warrant the jury in finding that the check stolen was of a value exceeding five dollars, the prisoner is guilty of grand larceny under the statute. Code, § 3707; acts, 1893-94, p. 219. Code, § 3709; *Adams' Case*, 23 Gratt. 949; *Whalen v. Com.*, 90 Va. 544, 548, 19 S. E. 182.

**At Common Law.**—At common law both grand and petty larceny were felonies, and were distinguished by the punishments inflicted, that of grand larceny being death, and of petit larceny, whipping or some corporal punishment. To many felonies at common law, the benefit of clergy attached, whereby the party convicted thereof, was, for the first offense, exempted from capital punishment, but it was never allowed in high treason, petit larceny, nor in any misdemeanor. *State v. Chambers*, 22 W. Va. 779.

Lord Hale lays down that if a thief at the same time steals goods of A. to the value of sixpence, goods of B. to the value of sixpence, and goods of C. to the value of sixpence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, at common law, because it is one entire felony done at the same time, though the person had several properties, and therefore if in one indictment they make grand larceny. 1 Hale, P.

C., 531. *Alexander v. Com.*, 90 Va. 809, 810, 20 S. E. 782.

An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for a felony. *Rider v. Com.*, 16 Gratt. 499; *Pryor v. Com.*, 2 Va. Dec. 479.

**Verdict.**—A verdict which finds "the goods stolen to be of the value of \$30," is sufficient to constitute grand larceny under the statute. Section 14, ch. 145, Code, p. 863. *State v. Reece*, 27 W. Va. 375.

**Punishment for Third or Subsequent Conviction of Petit Larceny.**—The punishment prescribed for the third, or any subsequent, conviction of petit larceny, is regulated by § 3907 of the Code. Section 3906 does not apply to successive convictions of petit larceny, but must be read in connection with § 3905, which applies to offenses which are felonies in themselves, punishable by confinement in the penitentiary, and not made so because of prior convictions of a less offense. *Stover v. Com.*, 92 Va. 780, 22 S. E. 874.

**Punishment under Act of 1823.**—The first section of the act of February 21st, 1823, ch. 32, does not extend to grand larceny, nor to any offense which at the time of the passage thereof, might have been punished by imprisonment in the penitentiary, for more than two years. *Com. v. Shelton*, 2 Va. Cas. 384.

**Punishment of Negro for Grand Larceny.**—The third section of the act of February 21st, 1823, embraces the case of grand larceny, when committed by free negroes and mulattoes, that offense being punishable formerly for a period not less than one, nor more than three years, and was consequently punishable for more than two years. Under this law, a free person of color may be condemned to be sold as a slave, and transported and banished beyond the limits of the United States. *Aldridge v. Com.*, 2 Va. Cas. 447.



**Sufficiency of Description.**—An indictment which charges burglary with intent to commit larceny, which alleges that the defendant stole "one pair of pants and other goods," of the value of \$24, which does not specify the other goods stolen, is not sufficient to convict of grand larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 634.

**Benefit of Clergy.**—In nearly all felonies, including grand larceny, the convicted felon was entitled to the benefit of clergy, and Blackstone in his Commentaries lays it down as a rule, that in all felonies, whether new created, or by common law, clergy is now allowed unless taken away by express words or act of parliament. 4 Blk. Com., p. 373. *State v. Chambers*, 22 W. Va. 779.

### C. PETIT LARCENY.

See ante, "Grand Larceny," XVII, B.

In this state simple larceny of goods and chattels of less value than twenty dollars shall be deemed petit larceny and punished by confinement in jail not exceeding one year. Code, ch. 145, § 14. This was also the law of Virginia from which our statute was taken. Code, Va., p. 789, § 14. *State v. Chambers*, 22 W. Va. 779.

Petit larceny is a misdemeanor and imprisonment in jail is a proper punishment. *Harvey v. Com.*, 23 Gratt. 941.

Where a person who finds a pocket-book which contained only \$10.79, and appropriated it, he could be found guilty of only petit larceny. *Perrin v. Com.*, 87 Va. 554, 557, 13 S. E. 76.

**Grade of Offense.**—When the evidence shows larceny of goods (not from the person) whose aggregate value is less than fifty dollars the offense is not a felony. *Alexander v. Com.*, 90 Va. 809, 20 S. E. 782; *Benton v. Com.*, 89 Va. 570, 16 S. E. 725.

### D. PUNISHMENT FOR HORSE-STEALING.

Under acts of 1865-6, p. 88, the minimum punishment for horse stealing

was five years. The jury found accused guilty of that offense and fixed his punishment at confinement for three years. In such case, on reversal of the judgment, the prisoner will not be discharged, but remanded for a new trial. *Jones v. Com.*, 20 Gratt. 848.

The punishment prescribed by law to the crime of horse stealing, where that crime has been committed by a free negro, is imprisonment in the penitentiary house. How shall he be hereafter tried and punished for the offense? He shall not be tried by a jury in the circuit court, nor punished by that court, but he shall be tried and punished by the justices of oyer and terminer in the same manner as slaves are now tried and punished. The circuit court can have no jurisdiction to try and punish him for that offense, because death is not the punishment annexed by law to that crime. The justices of the county court, sitting as a court of oyer and terminer, are expressly invested by this statute, with the jurisdiction to try, convict and punish him. *Thompson v. Com.*, 4 Leigh 652.

Separate verdicts found each of the prisoners guilty of feloniously stealing a horse of the value of £20, on the 29th of September, 1793. Prisoners severally prayed benefit of clergy. Held, the prisoners are entitled to the benefit of clergy; the court ought not to proceed to judgment, and a new indictment ought not to be preferred. *Com. v. Stewart*, 1 Va. Cas. 114. See *State v. Chambers*, 22 W. Va. 779.

### XVIII. Appeal and Error.

See the title APPEAL AND ERROR, vol. 1, p. 418.

**Conviction of Larceny before Justice.**—An appeal of right is given by statute to one convicted of petit larceny before a justice without assigning errors. *Read's Case*, 24 Gratt. 618; *Harrison v. Com.*, 81 Va. 491.

One convicted of petit larceny before a justice moved the county court

to review the judgment. An endorsement on warrant showed that the witnesses had been recognized to appear before the county court. After trial and conviction in county court, then defendant objects that there is no endorsement of "appeal" on the warrant by the justice. Held, the objection comes too late. *Harrison v. Com.*, 81 Va. 491.

**Writ of Error from Corporation Court to Circuit Superior Court.**—A free negro was convicted of grand larceny in the corporation court under statute of 1831-32, ch. 22. Held, a writ of error does not lie to that court from the circuit superior court. *Anderson v. Com.*, 5 Leigh 740.

### **XIX. Repeal of Statutes Relating to Larceny.**

By statute of 1819, grand larceny is defined as stealing goods to value of \$4, and upwards, and punished by im-

prisonment, etc., not less than one nor more than three years; by statute of 1824, larceny committed after 1st of May, 1824, to value of \$10, and upwards, is defined grand larceny, and punished as grand larceny therefore was; and larceny of goods of less value than \$10, is defined petit larceny, and punished as petit larceny theretofore was; and the latter statute neither makes provisions as to larcenies committed before 1st of May, 1824, nor contains any express repeal of the former statute. Held, that latter statute does not repeal the former, as to larcenies committed before 1st of May, 1824. *Allen v. Com.*, 2 Leigh 727.

The act of 1819, 1 Rev. Code, ch. 152, p. 575, in relation to horse stealing was repealed by the act of March 14th, 1848, ch. 4, § 15. *Lanthrop v. Com.*, 6 Gratt. 671; Va. Code, 1887, § 3707; Pollard's Supp. 1900, § 3707.

### **Lascivious Cohabitation.**

See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 187.

**LASTLY.**—In *Cogbill v. Cogbill*, 2 Hen. & M. 467, 507, it is said: "The word *lastly*, too, in the conclusion of the paper, denotes that the intentions of the testator, with relation to the subjects of that paper, were final; and the 'et cætera,' which concludes the paper, is undoubtedly in lieu of mere formal and supererogatory words, declaring all former wills, conflicting with it, to be revoked, etc." See generally, the title WILLS.

**LAST SICKNESS.**—See *Page v. Page*, 2 Rob. 424; *Reese v. Hawthorne*, 10 Gratt. 548, 554. And see the title WILLS.

**LAST WILL.**—See *Francis v. Marsh*, 54 W. Va. 545, 556, 46 S. E. 573. And see the title WILLS.

**LATENT AMBIGUITY.**—In *Hawkins v. Garland*, 76 Va. 149, 152, it is said: "As defined by Lord Bacon, 'a *latent ambiguity* is that which seemeth certain and without ambiguity for any thing that appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.' See Bacon's Law Torts, p. 99." See the title PAROL EVIDENCE.

### **Latent Defects.**

See the title WARRANTY.

**LATERAL RAILROADS.**—See **BRANCH RAILROADS**, vol. 2, p. 612. And see generally, the title **RAILROADS**.

### **Lateral and Subjacent Support.**

See the title **ADJOINING LANDOWNERS**, vol. 1, p. 176.

**LAW.**—See the titles **COMMON LAW**, vol. 3, p. 17; **STATUTES**.

"**Laws** are rules of civil conduct prescribed for, and attaching themselves to, the future actions of men." *Jones v. Com.*, 86 Va. 661, 662, 10 S. E. 1005.

**Law.**—In *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 627, it is said: "However much Blackstone's definition of 'municipal law' has been criticised, it remains with slight modifications (expressing, perhaps, what is already implied) the definition given by common-law courts to this day. See 1 Hammond's Bl. Comm., p. 95, notes of editor; 1 Bish. Crim. Law, §§ 1, 2, note; Bouv. Law Dict.; Black, Law Dict. Municipal law is a rule of civil conduct, prescribed or recognized by the supreme power of a state, commanding what, in its opinion, is right or convenient, and prohibiting what is wrong or inconvenient. The rule of civil conduct is based upon certain principles, which can neither be ignored nor left out. These principles, controlled in their application by custom, constitute the common law."

In *Currie v. Mutual Assur. Society*, 4 Hen. & M. 315, 346, it is said: "In order to show that the act in question is no law, and therefore, it is further urged, is a compact, and as such is beyond the power of a succeeding legislature, Blackstone's definition of municipal law has been relied on. Municipal law is defined by him to be 'a rule of civil conduct prescribed by the supreme power of the state, commanding what is right, and prohibiting what is wrong;' and it is argued, that the act in question is no law, under this definition, for want of the generality implied by the term 'rule' and because it is said to be not so much in the nature of a command by the legislature, as of a promise or contract proceeding from it. When we consider, that mere private statutes and acts of parliament, are (even by this writer himself) universally classed among the municipal laws of England; nay, even that the particular customs of that kingdom, are admitted to form a part of the Municipal Code, it is evidence, that this definition of municipal law, is by far too limited and narrow. I would rather adopt the definition of Justinian, that civil (or municipal) law, is, 'quoad puisque sibi populus constituit;' bounded only in this country in relation to legislative acts, by the constitutions of the general and state governments; and limited also by considerations of justice. It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge Blackstone was scarcely hardy enough to contend for, under the doctrine of the boasted omnipotence of parliament."

**Decision of Court.**—In *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193, it is said: "It was held, that a case overruling a former one, and thus affecting prior oil leases, must test rights under it, on the ground that a decision of a court was not a 'law' impairing contracts. In *Bradshaw v. Duluth Imperial Co.*, 52 Minn. 59, 53 N. W. 1066, the syllabus is: 'An erroneous decision is not bad law. It is no law at all, and never was the law. It is the law of the particular case, and binding on the parties before the court, but does not conclude parties having rights dependent on the same question.'"

In *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446, 454, it is said: "The fed-

eral constitution contains a clause that no state shall make any law impairing the obligation of a contract. Again and again the United States supreme court has decided that under that provision a decision of a court is not a law, and that only an act of the legislature is a law. Cases just cited, and *Land Co. v. Laidley*, 159 U. S. 103, 112, 16 Sup. Ct. 80, 40 L. Ed. 91, and *Brown v. Smart*, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773." See also, the title CONSTITUTIONAL LAW, vol. 3, p. 213.

### **Law and Fact.**

See references under QUESTIONS OF LAW AND FACT.

### **Lawful Heir or Issue.**

See the titles DESCENT AND DISTRIBUTION, vol. 4, p. 588; WILLS.

### **Law Merchant.**

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

### **Law of the Case.**

See the titles APPEAL AND ERROR, vol. 1, p. 418; FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 261.

**LAW OF THE LAND.**—Law of the land and due process of law are equivalent. *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 387; *Com. v. Byrne*, 20 Gratt. 165, 188. And see the title CONSTITUTIONAL LAW, vol. 3, p. 207.

In *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283, 285, it is said: "Coke's old definition of law of the land says that it is that which is according to the 'old law of the land.' 2 Inst. 50. 'Tax laws are laws of the land, and tax proceedings conducted under equal and uniform laws are due process of law.' *Bardwell v. Collins* (Minn.), 20 Am. St. Rep. 554, note (S. C., 46 N. W. 315)."

### **Law of the Road.**

See the title STREETS AND HIGHWAYS.

### **Lawyer.**

See the titles ATTORNEY AND CLIENT, vol. 2, p. 144; LICENSES.

**LEADING QUESTIONS.**—In *Cluverius v. Com.*, 81 Va. 787, 800, it is said: "What are leading questions? 'It should never be forgotten that leading is a relative, not an absolute term. There is no such thing as leading, in the abstract; for the identical form of question which would be leading, of the grossest kind, in one case or state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.' Best on Evid., 1 American Edition, 2 vol., § 641; 2 Phil. Evid., 5 American Edition, p. 745, note 575." See generally, the title WITNESSES.

### **Lease and Release.**

See the title DEEDS, vol. 4, p. 364.

### **Leases.**

See the titles LANDLORD AND TENANT; MINES AND MINERALS.

**LEAST.—At Least.—At least**, used in an affidavit for an attachment, is synonymous with, and fairly equivalent to, the phrase **at the least**, as used in the statute relating to such affidavits. *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583. See the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 93.

**LEAVE**.—See **GIVE**, vol. 6, p. 737.

A return stating that service was made by "posting an office copy hereof on the front door of each of their dwelling houses," is defective, because it does not appear that he left a copy posted at the front door, as the statute prescribes. *Lewis v. Botkin*, 4 W. Va. 533. See the title **SERVICE OF PROCESS**.

**LEAVING ISSUE**.—See *Tinsley v. Jones*, 13 Gratt. 289, 292; *Dunn v. Bray*, 1 Call 338; *Jiggetts v. Davis*, 1 Leigh 368, 424; *Pleasants v. Pleasants*, 2 Call 319, 337; *Hill v. Burrow*, 3 Call 342, 350; *Bradley v. Mosby*, 3 Call 50, 69; *Moon v. Stone*, 19 Gratt. 130, 175; *Burfoot v. Burfoots*, 2 Leigh 119, 132. And see the title **WILLS**. See also, **ISSUE**, vol. 8, p. 42.

### **Leave of Court.**

See the titles **AMENDMENTS**, vol. 1, p. 352; **BILL OF REVIEW**, vol. 2, p. 396; **JUDGMENTS AND DECREES**, vol. 8, p. 535; **RECEIVERS**.

### **Ledgers.**

See the title **DOCUMENTARY EVIDENCE**, vol. 4, p. 775.

### **Legacies and Devises.**

See the title **WILLS**.

### **Legacy Tax.**

See the title **SUCCESSION TAXES**.

### **Legal Assets.**

See the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 520.

## **LEGAL CONCLUSIONS.**

### **I. General Rule, 243.**

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A. Duty, 244.

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### **CROSS REFERENCES.**

See the titles **ANSWERS**, vol. 1, p. 389; **DEMURRERS**, vol. 4, p. 456; **PLEADING**.

## I. General Rule.

It is only necessary to state facts, and never is it necessary to aver matter of law in a declaration. *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

In a pleading a statement of what is only a conclusion of law, without facts given, or what is only the opinion of the party on facts not given, is bad. *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487; *Ward v. Reasor*, 98 Va. 399, 404, 36 S. E. 470. See the title EQUITy, vol. 5, pp. 125, 129.

"The object of pleading is to give notice to the opposite party of the character of the claim or charges against him. A mere legal conclusion is not a fact which can be met by proof. If the facts are stated, the law determines the conclusion; but the law will not infer the facts when the conclusion merely is stated. A plaintiff can no more recover without a sufficient averment in his bill than he can without proof of his averments, if properly made. The one is as essential as the other, and both must concur, or relief will not be granted." *Pusey v. Gardner*, 21 W. Va. 469, 476; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 806. See also, *Hood v. Morgan*, 47 W. Va. 817, 35 S. E. 911; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

## II. Effect of Rule.

### A. ADMISSION BY DEMURRER.

See the title DEMURRER, vol. 4, p. 472.

### B. SURPLUSAGE.

Allegations of legal conclusions may be treated as surplusage, as it will not vary or prescribe the proof. *Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217.

## III. What Are Conclusions of Law.

### A. ALLEGATIONS OF DUTY.

An allegation of duty is only a conclusion of law, and where the facts al-

leged show the duty, and are stated with sufficient clearness to prevent surprise, and enable the court to proceed upon the merits of the cause, the declaration is sufficient. *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Thomas v. Electrical Co.*, 54 W. Va. 395, 398, 46 S. E. 217.

### B. ALLEGATIONS OF FRAUD.

See generally, the title FRAUD AND DECEIT, vol. 6, p. 498.

Fraud is a conclusion of law, and the facts relied on to constitute it must be stated in the bill, and must, when taken together, be sufficient to make out a case of fraud. It is not sufficient simply to charge fraud, without stating the facts which constitute it, nor to state the facts tending to show fraud, if they are followed by other statements contradictory thereof. *Dickenson v. Bankers' Loan, etc., Co.*, 93 Va. 498, 25 S. E. 548. See also, *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553; *Vanbibber v. Beirne*, 6 W. Va. 168; *Steed v. Baker*, 13 Gratt. 380.

The burden of charging, as well as proving fraud, is on the party alleging it; and while it is not necessary or proper that he should spread out in his pleading the evidence on which he relies, he must aver fully and explicitly the facts constituting the alleged fraud; mere conclusions will not avail. *Hale v. West Virginia Oil, etc., Co.*, 11 W. Va. 229. See the title FRAUD AND DECEIT, vol. 6, p. 504.

Generally, fraud should be charged by setting forth the particular manner in which the act was done, and the end and design to be accomplished. If these show that fraud was designed and perpetrated it is not necessary to aver the legal conclusion that they constitute fraud. *American Net, etc., Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

Ground for Attachment.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 94.

**Charge of Intent to Hinder, Delay and Defraud.**—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 655.

### C. ALLEGATIONS OF FRAUD, MISREPRESENTATION AND UNDUE INFLUENCE.

"The same rule, both in respect to pleading and proof, applies with equal force to charges of fraud, misrepresentation, and undue influence." *Pusey v. Gardner*, 21 W. Va. 469, 477; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804, 806.

### D. ALLEGATION OF MISTAKE.

See generally, the title MISTAKE AND ACCIDENT.

In cases of mistake the averments must distinctly show in what the mistake consists, so that the court may not only discover whether it is such a mistake of fact as can be corrected, but also that it is not a mistake of law. *Pusey v. Gardner*, 21 W. Va. 469, 476.

### E. ALLEGATION OF JURISDICTION.

See generally, the title JURISDICTION, vol. 8, p. 842.

An indictment which charges that an offense was committed "within the jurisdiction of the court," but does not state where the offense was committed, is bad on demurrer. Jurisdiction is matter of law. The place where an offense is committed is a matter of fact. It is necessary to aver and prove

the place where the offense is alleged to have been committed. *Early v. Com.*, 93 Va. 765, 24 S. E. 936.

## IV. Allegations of Both Law and Fact.

### A. DUTY.

"Pleadings should state facts not law. Facts only are necessary to be stated, not arguments and inferences. Where a declaration, after stating facts, alleges that it thereupon became the duty, etc., the allegation is to be understood as a mere legal liability supposed to result from the facts, and as an assertion that the defendant became bound in law to a legal liability, and not as a substantive allegation. The allegation of duty is superfluous where the facts show a legal liability, and is useless where they do not. 1 *Chitty*, Plead. 236; 2 *Id.* 476. It is not claimed that the facts stated in this count do not raise a duty. The matter complained of is surplusage. It would not vary or prescribe the proof." *Thomas v. Electrical Co.*, 54 W. Va. 395, 398, 46 S. E. 217.

### B. FRAUD.

Where a declaration contained a statement of fraud and deceit on the part of the plaintiff, but contains a statement of facts sufficient to show fraud, and damages, it was held good on demurrer. *Lane v. Black*, 21 W. Va. 617.

## Legal Cruelty.

See the title DIVORCE, vol. 4, p. 736.

## Legal Fraud.

See the title FRAUD AND DECEIT, vol. 6, p. 453.

## Legal Holidays.

See the title SUNDAYS AND HOLIDAYS.

**LEGALLY.**—In *Com. v. McCullough*, 90 Va. 597, 601, 19 S. E. 114, it is said: "It would seem to follow, as a matter of course, that any coupon cut from bonds issued under either of said acts, that has not on its face the words 'receivable, after maturity, for all taxes, debts, dues, and demands, due,' etc., is not a **legally** receivable coupon; or, in other words, is a coupon issued without authority of law."

In *Marcum v. Ballot Comm'rs*, 42 W. Va. 263, 26 S. E. 281, 283, it is said: "And note that § 89 declares generally that 'any officer or person upon whom any duty is devolved by this chapter may be compelled to perform the same by writ of mandamus,' not using the adverb **legally**; but, in giving the writ from the supreme court, it grants it to 'compel any officer herein to do and perform **legally** any duty herein required of him.' Why use the word **legally**? The power to compel performance is given in general word in the opening of the section, but later in the section it grows more specific, by using the word **legally**, thus using it sedately. We must give every word a meaning, especially as the lawmaker grew more precise or emphatic by that word. It is an implication quite strong in connection with other features that the officer should be compelled to perform all duties, of every cast, ministerial or judicial, according to law."

### **Legal Presumptions.**

See the title PRESUMPTIONS AND BURDEN OF PROOF.

**LEGAL PRIVITY.**—In *Harper v. Middle States Loan, etc., Ass'n*, 55 W. Va. 149, 153, 46 S. E. 817, it is said: "Persons standing in **legal privity**, therefore, are persons who succeed to the rights of the debtor by virtue of law, and not by contract. The definitions and classifications of privies show a distinction between succession by contract and succession by law, and the use of the word 'legal' clearly indicates that the latter kind of succession is referred to in the above quotation. 23 Am. & Eng. Ency. Law (2d Ed.) 101; *Stacy v. Thrasher*, 6 How. (U. S.) 44, 59." See PRIVY.

**LEGAL REMEDY.**—The statute provides that any person bound for the payment of confederate states treasury notes might tender the amount demandable according to the provisions of the act, and if the obligee should refuse to accept the amount so tendered and fail to institute legal proceedings within three months he should be barred and precluded from all **legal remedies**. It was held, that **legal remedy** included the remedy by sale under the deed of trust. *Compton v. Major*, 30 Gratt. 180.

**LEGAL REPRESENTATIVE.**—See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483. And see REPRESENTATIVE.

### **Legal Tender.**

See the titles PAYMENT; TENDER.

**LEGAL VOTERS.**—See *Literary Fund v. Dalby*, 4 Gratt. 528.

### **Legatees and Distributees.**

See the titles EXECUTORS AND ADMINISTRATORS, vol. 5, pp. 508, 642; FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 306; MARSHALING ASSETS AND SECURITIES.



## **Legislative Power.**

See the titles CONSTITUTIONAL LAW, vol. 3, p. 161; STATUTES.

**LEGISLATURE.**—See GOVERNMENT, vol. 6, p. 739. And see the titles CONSTITUTIONAL LAW, vol. 3, p. 161; STATUTES.

## **Legitimacy.**

See the title BASTARDY, vol. 2, p. 334.

**LEND.**—See the title LOANS.

**LESS.**—**Less than Perfect Title.**—A policy contained the following provision: "Any interest in property insured, not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company and expressed in this policy in writing, otherwise the insurance shall be void." The court said: "The word less is a term denoting quantity; an estate or interest less than a perfect title may therefore mean one that is limited in its extent and duration—as an estate for life, for years, or at will—less than an estate in fee simple, or than one of unlimited duration. If this be not the true construction, I am still of opinion that under no proper construction can these words be taken to have been intended to guard against mere incumbrances." *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 375.

## **Lessor and Lessee.**

See the title LANDLORD AND TENANT.

## **Letters.**

As to authentication of letters, see the title EXECUTION AND PROOF OF DOCUMENTS, vol. 5, p. 412. As to proof of handwriting of letter, see the title HANDWRITING, vol. 7, p. 31. As to letter as will, see the title WILLS. As to admissibility of letter as evidence, see the titles BEST AND SECONDARY EVIDENCE, vol. 2, pp. 355, 365; BREACH OF PROMISE OF MARRIAGE, vol. 2, pp. 613, 614; DOCUMENTARY EVIDENCE, vol. 4, pp. 756, 763; DIVORCE, vol. 4, pp. 734, 744; EVIDENCE, vol. 5, pp. 295, 313; LARCENY, *ante*, p. 297. As to sufficiency of letter as writing required by statute of frauds, see the title FRAUDS, STATUTE OF, vol. 6, pp. 516, 536. As to letter as subject of forgery, see the title FORGERY AND COUNTERFEITING, vol. 6, p. 241, 252. As to injunction against publishing letters, see the title INJUNCTIONS, vol. 7, p. 512. As to letters as criminal offense, see the title THREATS AND THREATENING LETTERS.

## **Letters of Administration.**

See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 504.

## LETTERS OF CREDIT.

### CROSS REFERENCES.

See the title GUARANTY, vol. 6, p. 770.

**Letter of Credit as Guaranty.**—A letter written by a party to merchants with whom he had been in the habit of dealing, introducing to them his brother who was a stranger to them, stating that this brother was going to their city to purchase goods, and requesting them to introduce him to some of the houses at which the writer dealt, "with assurance that any contract of his will and shall be promptly paid," is a guaranty. *Moore v. Holt*, 10 Gratt 284.

Letters of credit are regarded as mercantile instruments and should receive a fair and reasonable interpretation, according to what the circumstances indicate to have been the intention and understanding of the parties; and their effect is to bind the writer to indemnify the person, who, on the faith of their guaranty, parts with his property, and continues to bind the writer until he revokes the guaranty. *Moore v. Holt*, 10 Gratt.

284; *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. 370.

**Revocation.**—But the revocation of a letter of credit prevents any liability on the writer for goods sold subsequent to its revocation. *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. 370.

**Terms Binding if Complied with.**—If a guarantor specify in the letter of credit which he gives, the terms on which he will be bound, if these terms are complied with he is bound, though the law, in the absence of all prescription of terms in his letter of credit, would have prescribed the performance of other acts by the parties seeking to subject him upon his guaranty. *Wadsworth v. Allen*, 8 Gratt. 174.

**Wrong Direction of Addressee.**—A letter of credit addressed to W. & W. may be proved to have been intended for W., W. & Co., so as to hold the writer bound to the latter upon it. *Wadsworth v. Allen*, 8 Gratt. 174.

## Letters Patent.

See the title PUBLIC LANDS.

## Letters Rogatory.

See the title DEPOSITIONS, vol. 4, p. 549.

## Letters Testamentary.

See the title WILLS.

## Levy.

See the titles ATTACHMENT AND GARNISHMENT, vol. 1, p. 101; EXECUTIONS, vol. 5, p. 449; SPECIAL ASSESSMENTS; TAXATION.

As to wrongful levy, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 120. As to satisfaction of judgment by levy, see the title JUDGMENTS AND DECREES, vol. 8, p. 441. As to liability of officers, see the title SHERIFFS AND CONSTABLES. As to levy of distress warrant, see the title LANDLORD AND TENANT.

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See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 187.

## **Lewdness.**

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## **Lex Loci, Lex Fori, Lex Domicilii.**

See the title CONFLICT OF LAWS, vol. 3, p. 100.

**LIABILITY.—Liability in the Sense of Debt.**—In *Witz v. Mullin*, 90 Va. 805, 20 S. E. 783, it is said: "The term **liabilities** was evidently used synonymously with 'debts,' for, after specifically mentioning many debts, it was added: 'And all other debts or **liabilities** of D. F. Kagey & S. W. Miller individually and as partners, etc., without any preference or priority to any of the debts hereinbefore set forth or referred to,' etc."

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**I. Definition, Nature and Distinctions.****A. DEFINITIONS.**

**Definition of Insult.**—To insult, says Webster, is "to leap upon, to treat with abuse, insolence or contempt; to commit an indignity upon, as to call a man a liar." But, as a general rule, each case must be governed by its own circumstances and surroundings, and the chief circumstance to be considered is the animus of the defendant in using the words complained of. It is often difficult to determine what is an insult, as it may depend upon a variety of circumstances. *Chaffin v. Lynch*, 83 Va. 106, 116, 1 S. E. 803; *Brooks v. Calloway*, 12 Leigh 466; *Moseley v. Moss*, 6 Gratt. 534; *Corr v. Lewis*, 94 Va. 24, 26 S. E. 385.

**Definition of Defamation.**—All common-law defamations are insults, and many of them sometimes more. The term "defamation" is used indiscriminately to designate both libel and slander. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *Moseley v. Moss*, 6 Gratt. 534, 547.

**Definition of Libel.**—It is sufficient to constitute a libel, that the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt, and it is not necessary that the writing should contain the imputation of an offense which may be indicted or punished; and, provided the meaning is plain, it is not necessary that the libelous utterances be in the form of positive assertion, but it is equally libelous if they are in the form of insinuation. The publica-

tion may be either by writing, printing or pictures. *Adams v. Lawson*, 17 Gratt. 250, 255; *Chaffin v. Lynch*, 83 Va. 106, 116, 1 S. E. 803; *Johnson v. Brown*, 13 W. Va. 71, 122; *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, 588; 4 Min. Inst. (4th Ed.), 470, 471.

**"Lynch Law"—"Judge Lynch."**—For the meaning and definition of "Lynch Law" and "Judge Lynch," see *State v. Aler*, 39 W. Va. 549, 20 S. E. 585.

**B. NATURE OF ACTION.**

"A libel or a slander might deprive a man of employment, destroy his credit, ruin his business and greatly impair his estate; yet an action therefor would be an action for a personal injury, the effect of the wrong on the estate of the injured party being merely incidental. So in this case. The personal injury is the gravamen of the action, and the effect of the alleged malicious acts of the defendant upon the estate of the plaintiff is incidental merely. Such an effect is an element to be considered in assessing damages, but does not and can not change the character of the action." *Porter v. Mack*, 50 W. Va. 581, 593, 40 S. E. 459.

**C. DISTINCTIONS.**

**Difference between Slander and Libel.**—Slander is not a public offense, but only a civil injury; but libel is both a civil injury and a public offense. It is deemed a public offense because it endangers the public peace by the bad passions it engenders, and also because the means adopted for its publication render it more injurious to the party wronged, and demonstrate a more deliberate and malignant intent in the offender. 4 Min. Inst. (4th Ed.) 469.

## II. Right to Maintain Action.

### A. IN GENERAL.

#### 1. Written Words.

An action may lie for written words (as being a libel) which, if spoken only, would not be actionable. 4 Min. Inst. (4th Ed.) 465.

Written charges that the plaintiff has been guilty of dishonest acts such as the embezzlement of money, or that he is immoral, such as being a whore-master, or that he has been guilty of lying and instituting vexatious litigation, are actionable per se, when the same words, if spoken, would not be, unless special damage were alleged. *Johnson v. Brown*, 13 W. Va. 71; *Sweeney v. Baker*, 13 W. Va. 158; *Adams v. Lawson*, 17 Gratt. 250; *Moseley v. Moss*, 6 Gratt. 534.

#### 2. Spoken Words.

Words spoken, as distinguished from words written, which are actionable at common law, are classified as follows: 1. Words falsely spoken of a person, which impute to him the commission of some criminal offense, involving moral turpitude, for which, if the charge is true, he may be indicted and punished. 2. Words falsely spoken of a person, which impute that he is infected with some contagious disease which, if the charge is true, would exclude him from society. 3. Defamatory words, falsely spoken of a person, which impute to him unfitness to perform the duties of an office, or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a person, which prejudice such person in his or her trade or profession. 5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion such person special damage. *Womack v. Circle*, 29 Gratt. 192, 198; *Moseley v. Moss*, 6 Gratt. 534; *Hoyle v. Young*, 1 Wash. 150, 1 Am. Dec. 446.

Oral words charging another with

being a cheat, villian, rascal, coward, ruffian are not actionable, without allegation and proof of special damage, or without a colloquium to show that they were spoken under such circumstances as to impute the commission of a crime to the plaintiff. *Harman v. Cundiff*, 82 Va. 239; *Moseley v. Moss*, 6 Gratt. 534.

The common law does not give reparation for all derogatory or disparaging words. To make such words actionable, unless special damage be shown, they must impute some offense against the law, punishable criminally; or the having a contagious disorder tending to exclude from society; or which may affect one injuriously in his office or trust, or in his trade, profession or occupation; or which, in the case of a libel or written slander, tend to make the party subject to disgrace, ridicule or contempt. Words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or a want of refinement, delicacy or good breeding, are not regarded by the common law as sufficiently substantial injuries to call for redress in damages. *Moseley v. Moss*, 6 Gratt. 534.

No action of slander will lie by a tenant against the landlord for entering the premises and breaking and searching the trunks of the plaintiff. That action only lies for a defamation of character by speaking, writing, signs or pictures. Though the court was of opinion that if the defendants declared at the time that it was their intention to search for stolen goods, this might probably have given a foundation for an action of slander. *Faulkner v. Alderson*, 6ilm. 221.

**Oral Words Imputing Want of Chastity to Men or Women.**—Oral words charging a man with having been guilty of adultery, seduction or debauchery; or a woman with vulgarity, obscenity or incontinence; where such

defamation bears only on the feelings or general standing or reputation of the party implicated, and the misconduct imputed has not been made punishable by statute, is not actionable per se. *Moseley v. Moss*, 6 Gratt. 534.

### 3. Distinction between Words Actionable Per Se and Per Quod.

It is a settled rule of the common law that every publication of language which naturally and necessarily tends to injure another in his office, trade, or employment is, if without justification, libelous or slanderous as the case may be, and actionable per se. Thus to speak or write of a trader that he is insolvent, or of an innkeeper that his house is infected with a contagious disease, or to impute dishonesty or incapacity to one in his business, is actionable, without any proof of special damage, since, in all such cases, the law implies damage from the nature of the language used. When, however, the language does not import such defamation as will of course be injurious, and is therefore actionable only because it occasions special damage to the plaintiff, i. e., damage which, though the natural and immediate, is yet not the necessary result of the language used, there damage must be both alleged and proved. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520; *Harman v. Cundiff*, 82 Va. 239; *Mosely v. Moss*, 6 Gratt. 534; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Hoyle v. Young*, 1 Wash. 150.

And Judge Cooley, in his work on Torts (2d Ed.), p. 240, says: "In libel, as in slander, defamatory publications are classified as publications actionable per se and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionable per se if made orally. These cases, therefore, require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the pub-

lication can fairly be supposed to make it damaging. Thus, to say of a man, 'I look upon him as a rascal,' is no slander, unless shown to be damaging; but if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate. So to call a man in print 'an imp of the devil and cowardly snail, is libelous, though an oral imputation of the sort would be presumably harmless. So, to charge a teacher with falsehood in a report made to the official board, and with general untruthfulness, is libelous per se. *Moss v. Harwood*, 102 Va. 386, 391, 46 S. E. 385.

## B. WORDS CHARGING CRIME.

### 1. Written and Oral Words.

**Written words** charging anyone whatever with the commission of any crime, whether it be a felony or a misdemeanor, are actionable without allegation or proof of special damage. *Sweeney v. Baker*, 13 W. Va. 158; *Johnson v. Brown*, 13 W. Va. 71; *Com. v. Morris*, 1 Va. Cas. 175.

**Oral Words.**—It is well settled that slanderous words are actionable per se, when they impute a criminal offense involving moral turpitude, and no averment or proof of special damage is necessary to the recovery. *Harman v. Cundiff*, 82 Va. 239; *Womack v. Circle*, 29 Gratt. 192; *Shroyer v. Miller*, 3 W. Va. 158; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Moseley v. Moss*, 6 Gratt. 534; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

There is no difference between written and spoken words, in actions based on language imputing a criminal offense. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385.

### 2. Nature of Offense.

In order for words imputing a crime to be actionable per se at common law, they must impute guilt of some offense, for which the plaintiff, if guilty, might be indicted in the temporal courts, and punished as for an infam-



mous crime, at least punishable with imprisonment. *Hansbrough v. Stinnett*, 25 Gratt. 495.

To constitute a good count for slander at common law upon a charge of having committed an offense, it is held that the charge of the defendant, if true, must amount to such an offense or crime as would subject the plaintiff to the punishment annexed to it. *Shroyer v. Miller*, 3 W. Va. 158.

**Misdemeanor.**—In an action of trespass on the case, the count, without any special averments, charges that the defendant falsely and maliciously charged that the plaintiff attempted to bribe a negro woman to burn a wheat stack on his land, and the court held, that the statute, Va. Code, 1873, ch. 188, § 5, makes the malicious burning of a wheat stack a felony, more over, to solicit another to commit a felony, though the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, and also involves moral turpitude, therefore the charge of such a misdemeanor is actionable per se at common law. *Womack v. Circle*, 29 Gratt. 192.

### 3. Particular Crimes and Offenses Considered.

#### a. Adultery and Fornication.

As both adultery and fornication are crimes in Virginia, a charge that involves the commission of either offense, is actionable per se. Va. Code, 1887, § 3786; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

To say of a man that he is keeping a woman is actionable per se, because this is either adultery or fornication. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

**Oral Charge of Having a Bastard.**—An oral charge that a young girl of hitherto unblemished fame, had been delivered of a bastard child, is actionable. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791.

**How Actionable Charge Made.**—It would seem that it is not necessary to

impute unchastity in express terms, but if they are naturally and presumably understood by the hearers as imputing criminal intercourse it is sufficient. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

#### b. Embezzlement.

To write and publish of the chief of police of a city, who is chargeable with the collection from his subordinates of fines imposed by a police justice, that he "has within the last past twelve months collected certain fines of officer, P., which fines do not appear by the records of the police court to have been reported," does not impute to him the crime of larceny or embezzlement, nor are such words actionable under the Virginia statute against insulting words (Code, § 2897), in the absence of an averment in the declaration that from their usual construction and common acceptance they are construed as insults and tend to violence and a breach of the peace, or some equivalent averment; yet, when aided by the innuendo, operating within the scope of its proper functions, they impute to him conduct tending to injure his reputation in the common estimation of good citizens, and are therefore libelous. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385.

Where a party, with the intention to injure the reputation of a person who is at the time a merchant, falsely and maliciously says of him, that "he has received more tobacco than he has accounted for to the house," meaning the mercantile house of which the plaintiff and defendant were partners, is liable in an action for slander, without any colloquium being laid, these words being per se actionable, not only because they impute the crime of embezzlement, but because they tend to injure the plaintiff in his business. *Hoyle v. Young*, 1 Wash. 150.

To write that the plaintiff, who was general superintendent of a certain corporation, used the money, means

and credit of the company for his own private use, and that he used the company's money to pay his own employees, and other similar expressions, are not libelous in themselves, as meaning necessarily that the plaintiff embezzled the money of the company, and an innuendo giving them such a meaning improperly extends and enlarges the meaning of words, which it is not the office of the innuendo to do. *Johnson v. Brown*, 13 W. Va. 71. See *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

#### c. False Pretenses and Cheats.

If it sufficiently appears that the words were written of the plaintiff by the defendant, a charge that the plaintiff has raised money by fraud is actionable per se. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995; *Johnson v. Brown*, 13 W. Va. 71. In the latter case, however, a written charge that the plaintiff was defrauding a certain corporation, was held to be absolutely privileged because it was contained in a bill in chancery.

A written charge that another is cheating a corporation is not actionable when contained in a bill filed in chancery, but would be without the existence of such privilege, because it imputes to the plaintiff a crime. *Johnson v. Brown*, 13 W. Va. 71.

#### d. Forgery.

Words charging another with forgery are actionable. *Donaghe v. Rankin*, 4 Munf. 261. This case, however, went off on a question of pleading; the declaration containing no direct charge that the words were spoken by the defendant.

#### e. Larceny.

**In General.**—Both oral and written words, charging a plaintiff with being a thief, and with stealing, have been held actionable per se, as imputing the crime of larceny. *Harman v. Cundiff*, 82 Va. 239; *Bourland v. Eidson*, 8 Gratt. 27; *Johnson v. Brown*, 13 W.

Va. 71; *Sweeney v. Baker*, 13 W. Va. 158; *Dillard v. Collins*, 25 Gratt. 343.

To charge a plaintiff with stealing is actionable, without any averment or colloquium, as it clearly imputes a criminal offense. *Harman v. Cundiff*, 82 Va. 239.

**Sheep Thief.**—To call one a thief, to say of him that he stole sheep, or he stole my sheep, are words which impute a punishable offense, and are actionable. *Harman v. Cundiff*, 82 Va. 239. See *Bourland v. Eidson*, 8 Gratt. 27; *M'Alexander v. Harris*, 6 Munf. 465.

**Horse Thieves.**—A charge that the plaintiff, in an action for slander, and all his sons, are horse thieves and make their living by that means, and that they frequently harbored that kind of men, are actionable words, and the fact that the communication was made by a landlord to his tenant does not rebut the presumption of malice or bring it within the class of privileged communications, as there is no duty resting on a landlord to make such a communication. *Dillard v. Collins*, 25 Gratt. 343.

**He Is a Hog Thief.**—It is actionable per se at common law to say of a man that he is a hog thief, as it clearly imputes to him the crime of larceny. *Cheatwood v. Mayo*, 5 Munf. 16.

**Charge That Plaintiff Has Killed Another's Wild Hogs.**—To charge a plaintiff with killing wild hogs, and is advising him to pay the owner for them is libelous, and an innuendo is unnecessary to explain the meaning of these words. *Adams v. Lawson*, 17 Gratt. 250. See also, *Sweeney v. Baker*, 13 W. Va. 158.

**"Wouldn't Trust Him in Your Hen-Coop."**—To charge that a certain candidate for office is such a person, as you wouldn't trust in your hen-coop, conveys, in clear terms, an accusation that the party is a thief, and is actionable even when spoken of a candidate for office. *Sweeney v. Baker*, 13 W. Va. 158.

**"You Are a Rogue."**—A charge that plaintiff is a rogue, and has stolen, is actionable. *Bourland v. Eidson*, 8 Gratt. 27.

**Defrauding Corporation.**—A written charge that the plaintiff in the slander suit is conspiring to defraud the corporation and its stockholders, and divert the money, means, and credit of the company to his own use, is libelous without an innuendo to explain its meaning. *Johnson v. Brown*, 13 W. Va. 71.

**"He Killed My Beef."**—A charge that the defendant has "killed my beef" is not such a slanderous charge as is actionable per se at common law, unless the averment of extrinsic facts and the colloquium concerning them show that the defendant imputed to the plaintiff a felonious killing with an animus furandi. *Hansbrough v. Stinnett*, 25 Gratt. 495.

#### **Weight and Sufficiency of Evidence.**

—In an action of slander, for saying of the plaintiff, 1st, "G. Hancock (plaintiff) has stolen my slave;" 2d, "G. Hancock (plaintiff) has taken my slave, and I will have him sent to the penitentiary for it;" 3d, "G. Hancock," etc. Defendant, after pleading "not guilty" to the whole declaration plead justification to the 2d count i. e. because, etc., he did take a slave named Nan, the property of the defendant, out of his possession, in such manner and with such intention, as would subject him to the punishment mentioned by the defendant." Held, to support the plea of justification to the second count in this declaration, it was sufficient for the defendant to show that the slave Nan had been a long time in his possession as a slave, and was purchased by him as such, notwithstanding the pendency of a suit at that time by Nan for her freedom. *Hook v. Hancock*, 5 Munf. 546, 549.

#### **f. Perjury.**

See post, "The Plea," XII, B.

**Written and Oral Words Imputing Lack of Veracity.**—A written accusa-

tion against another that he has been making false representations, would be actionable, as charging a want of veracity, but oral words charging a want of veracity are not unless it appears that reference is had to a judicial forswearing. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995; *Moseley v. Moss*, 6 Gratt. 534. In *Argabright v. Jones*, however, it did not sufficiently appear that the words were written concerning the plaintiff, and hence the action was dismissed.

**Oral Words Charging Perjury.**—It is perfectly well settled that an oral charge of perjury is actionable per se at common law, without any allegation or proof of special damage, because it imputes a crime for which the plaintiff can be indicted and punished, if guilty. *Shroyer v. Miller*, 3 W. Va. 158; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Bourland v. Eidson*, 8 Gratt. 27; *Hinchman v. Lawson*, 5 Leigh 695; *Kirtley v. Deck*, 3 Hen. & M. 388; *Lincoln v. Chrisman*, 10 Leigh 338; *M'Nutt v. Young*, 8 Leigh 542; *Grant v. Hover*, 6 Munf. 13. See also, *Donaghe v. Rankin*, 4 Munf. 261; *Brooks v. Calloway*, 12 Leigh 466, which was an action under the statute of insulting words to suppress dueling.

**"Perjured Rascal."**—To accuse another of being a "perjured rascal" is actionable, as it implies that the plaintiff has been swearing falsely in a judicial proceeding, where he was called on to depose the truth according to his lawfully administered oath. *Grant v. Hover*, 6 Munf. 13.

#### **Written Charge of False Swearing.**

—To write to another, saying, "I hope you will stop swearing lies about the trees," and, "I will close this letter by advising you either to quit lying or preaching one," are libelous, because they tend to injure the reputation of the party, to throw contumely or to reflect shame and disgrace upon him, or hold him up as an object of scorn, although they do not necessarily impute the crime of perjury for which he

may be indicted and punished. *Adams v. Lawson*, 17 Gratt. 250.

**Oral Charge of False Swearing.**—To maintain an action at common law upon a charge of false swearing, the declaration must show not only the judicial proceeding in which the evidence was given, but that the charge of the defendant had reference to the evidence of the plaintiff in that case. *Hogan v. Wilmoth*, 16 Gratt. 80.

**Materiality.**—"I am not aware that it has ever been held, in an action for slander at common law, upon a charge of perjury, that it must be averred in the declaration that the facts sworn to by the plaintiff were material to the proceedings pending at the time of the alleged false swearing; or that it was indispensable to set out and charge all the facts constituting such offense with the same technical strictness as would be required in an indictment for the same offense." *Berkshire, J. Shroyer v. Miller*, 3 W. Va. 158. See also, *Hogan v. Wilmoth*, 16 Gratt. 80; *Kirtley v. Deck*, 3 Hen. & M. 388.

**"Loss of Ears"—Statutory Perjury.**—Now as the loss of ears is no part of the punishment of perjury at common law, and is a part of the punishment under the statute of 5 Eliz. a charge of false swearing, for which the plaintiff ought to have "lost his ears," is a charge of statutory perjury, and the materiality of the matter sworn to must be shown. *Kirtley v. Deck*, 3 Hen. & M. 388.

**Test of Materiality.**—In an action for slander based on a charge of perjury, the question whether a matter is material to the issue depends on the question whether its truth or falseness would affect the issue; and, if not, it is not material. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

#### **Evidence.**

**Record.**—In an action for slander based on a charge of perjury it is only necessary to introduce in evidence such parts of the record of another

proceeding as relate to the matters in issue. Section 4, ch. 158, of the West Virginia Code requires the consent of the accused before a part only of such record may be given in evidence in a criminal prosecution for perjury. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

**Best and Secondary Evidence.**—In an action for slander, upon a charge by the defendant that the plaintiff, as a witness before a court of record, was guilty of perjury, the record must first be produced to show that the evidence was material, the record being the best evidence of that fact, and until this is done a witness will not be allowed to testify to what was sworn upon the trial in question. *Kirtley v. Deck*, 3 Hen. & M. 388.

**Weight and Sufficiency.**—It seems well settled that when the defendant justifies to the charge of perjury, he must prove all the particulars which constitute the crime of perjury; that is, the deliberate deposition, the lawfully administered oath, the judicial proceedings, the absoluteness of the matter testified to, its materiality direct or collateral to the point in question and its falsity, and the falsity of the words must be proved by two witnesses or by one witness and strong corroborating circumstances, and the oath of the accused, who is presumed innocent until proved guilty, stands as the oath of a disinterested witness. *Hogan v. Wilmoth*, 16 Gratt. 80; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Kirtley v. Deck*, 3 Hen. & M. 388.

To sustain a plea justifying a charge of perjury, the defendant must prove; (1) that the evidence was false; (2) that it was about a matter or thing material to the investigation; (3) that it was willful, or corruptly, knowingly, and intentionally given contrary to the truth. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

**Proof beyond Reasonable Doubt.**—See the title REASONABLE DOUBT.

It is not necessary to establish the perjury beyond all reasonable doubt, as in a criminal trial, but the perjury must be shown to have been conclusively committed by at least a preponderance of testimony. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415, 417.

**g. Solicitation to Commit Crime.**

To solicit another to commit a felony, although the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, hence to say that the plaintiff solicited a negro woman to burn a stack of wheat is actionable per se. *Womack v. Circle*, 29 Gratt. 192.

**C. IMPUTATION OF CONTAGIOUS OR LOATHSOME DISEASE.**

Oral or written words are actionable per se at common law if they impute the having of a contagious disease, tending to exclude from society. *Moseley v. Moss*, 6 Gratt. 534; *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520. See also, *Hoyle v. Young*, 1 Wash. 150, 152.

In its common acceptation the word "pox," without any prefix, means syphilis, and explained the nature and peculiarities of that disease. *Swindell v. Harper*, 51 W. Va. 381, 384, 41 S. E. 117.

Defamatory words charging the plaintiff with having pox, a contagious, infectious and venereal disease, are actionable. *Swindell v. Harper*, 51 W. Va. 381, 41 S. E. 117.

It is error to introduce an expert medical witness to testify as to the meaning of the word "pox." It is for the jury to determine from the evidence what was meant. *Swindell v. Harper*, 51 W. Va. 381, 41 S. E. 117.

**D. IMPUTATIONS INVOLVING MORAL TURPITUDE.**

**Groundless Litigation.**—To write to a plaintiff, charging that all his object in appearing before a grand jury was to run him (defendant) to costs

is libelous, because it amounts to a charge that the plaintiff is instituting vexatious and groundless litigation, which act involves moral turpitude. *Adams v. Lawson*, 17 Gratt. 250.

**E. WORDS INJURING THE REPUTATION, AND EXPOSING ONE TO HATRED, RIDICULE OR CONTEMPT.**

**1. Written Words.**

The general rule is that any false and malicious writing published of another is libelous per se when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or to hinder virtuous men from associating with him. In other words, injury is presumed to follow the apparently deliberate act of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where mere vocal utterance to the same effect might be disregarded as possibly harmless. *Moss v. Harwood*, 102 Va. 386, 392, 46 S. E. 385; *Adams v. Lawson*, 17 Gratt. 250; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Moseley v. Moss*, 6 Gratt. 534; *Sweeney v. Baker*, 13 W. Va. 158; *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520.

If the words employed in a libel tend to injure a plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, they are actionable, although not imputing an indictable offense. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385, citing *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455.

The law is thus stated in *Newell on Slander and Libel*, at page 37: "In conclusion it may be said that any publication, expressed either by printing or writing, or by signs, pictures, or effigies, or the like, which tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to

scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous, is *prima facie* a libel, and implies malice in its publication." *Moss v. Harwood*, 102 Va. 386, 392, 46 S. E. 385.

**Charge That Another Is a Liar—"Quit Lying."**—A written charge advising another to "quit lying," is actionable *per se*, because it imports that he has been lying, and such language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon, or hold him up as an object of contempt. *Adams v. Lawson*, 17 Gratt. 250.

**Charge of Hypocrisy.**—A false publication in a newspaper, charging that a candidate for popular suffrage acts the part of a hypocrite, is actionable. *Sweeney v. Baker*, 13 W. Va. 158.

**Charges against Policemen.**—To write and publish of the chief of police of a city who is chargeable with the collection from his subordinates of fines imposed by a police justice, that he "has within the last past twelve months collected certain fines of Officer Padgett, which fines do not appear by the records of the police court to have been reported," while falling short of the imputation of a crime, while not in express terms charging a breach of official duty, yet, when aided by the innuendo, operating within the scope of its legitimate functions, does impute to the plaintiff conduct injuring his reputation in the common estimation of good citizens. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385.

**Charges against the Judiciary.**—On October 30, 1903, an article appeared in the Nelson County Times newspaper, signed by Burdett, in which he arraigns the conduct of the judge of the county court in a most severe and offensive manner. He charges substantially that the grand jury which found the indictments acted under the dictation and constraint exercised over them by the judge; that under his influence twelve indictments were found,

when the question of guilt or innocence could have been established by making one offense a test case; that he had wished to vindicate himself before the public, but had been forced to compromise the prosecutions against him, and to pay the fine and costs which had been imposed. He charges the judge with not only having acted towards him in a harsh and arbitrary manner, but that his conduct was actuated by vicious and corrupt motives. There can, therefore, be no doubt that the plaintiff in error was guilty of a gross and insulting libel. *Burdett v. Com.*, 103 Va. 838, 840, 48 S. E. 878, 68 L. R. A. 251, 106 Am. St. Rep. 916.

## 2. Oral Words.

Opprobrious epithets, such as cheat, villain, rascal, are not actionable at common law, without proof of special damage, or unless there is a colloquium to show that they were used in such a way, and under such circumstances, as to impute the commission of a crime to the plaintiff. *Harman v. Cundiff*, 82 Va. 239; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Womack v. Circle*, 29 Gratt. 192; *Moseley v. Moss*, 6 Gratt. 534.

## F. WORDS TENDING TO INJURE ANOTHER IN HIS TRADE, OCCUPATION OR CALLING.

### 1. In General.

**Oral or Written Words.**—It is a perfectly well-settled rule of the common law that words which tend to injure another in his trade, office or employment, are libelous or slanderous, as the case may be, without any allegation or proof of special damage. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520; *Womack v. Circle*, 29 Gratt. 192; *Moseley v. Moss*, 6 Gratt. 534; *Hoyle v. Young*, 1 Wash. 150; *Harman v. Cundiff*, 82 Va. 239.

### 2. Imputations upon Merchants.

#### Oral Imputations upon Merchants.

—False and malicious charges against a merchant, that tend to injure his reputation as a merchant, are actionable

per se at common law. *Hoyle v. Young*, 1 Wash. 150; *Harman v. Cundiff*, 82 Va. 239.

**Charge of Dishonesty against a Merchant.**—A false and malicious charge by one partner against the other, that the latter has failed to account for goods he has received, is actionable because it imputes dishonesty to the plaintiff and would naturally injure him in his business. *Hoyle v. Young*, 1 Wash. 150, 1 Am. Dec. 446.

### 3. Prematurely Filing a Mechanic's Lien.

The filing of a mechanic's lien by a subcontractor, prematurely, and without authority of law, is actionable per quod. Va. Code, § 2476; *Moore v. Rolin*, 89 Va. 107, 110, 15 S. E. 520, 16 L. R. A. 625.

### 4. Criticism of Candidates for Offices.

**In General.**—When one becomes a candidate for office to be elected by the people more freedom is allowed to criticism than in the case of other persons. Any one may comment freely upon his conduct and actions, and they may be canvassed and boldly censured even though the criticism be unjust, of which the party himself is the sole judge, provided always that the criticism be bona fide and without malice, and the acts or conduct commented on are, in fact, what they are represented to be. And besides the above-mentioned privileges, his talents and qualifications, mentally and physically for the office, which he asks from the people, may be freely commented on in the newspapers, though such comments be harsh and unjust or false and no malice will be implied. It must be observed, on the other hand, that no one has a right, by a publication, to falsely impute crimes to a candidate, or publish allegations affecting his moral character generally, nor to publish defamatory language, affecting his moral character, even though it is published as a criticism. If one accuse another of crime, it is presumptively false, and

malice is inferred therefrom, and that the plaintiff is a candidate for office is no excuse. *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Com. v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515.

**Rowdyism.**—Falsely charging him with rowdyism is actionable. *Sweeney v. Baker*, 13 W. Va. 158.

**Prize Fighter.**—To write of him that he is a representative from the prize ring, is actionable per se. *Sweeney v. Baker*, 13 W. Va. 158.

**"Pimp, Whoremaster."**—To write of anybody, even a candidate for popular suffrage, that he is a "pimp or whoremaster," is actionable per se because it holds the person up as an object of contempt, and tends to injure his reputation. *Sweeney v. Baker*, 13 W. Va. 158.

**"Social Leper."**—It is not libelous per se to charge a candidate for popular suffrage with being a "social leper" who should be "deodorized," unless it affects his moral character, for his talents mentally and physically for the office he asks, may be freely commented upon, though such comments be harsh and unjust. *Sweeney v. Baker*, 13 W. Va. 158.

**Lazy—Idle—Ignorant.**—Nor is a charge against a candidate, that he is lazy, idle, uneducated and ignorant, libelous per se. *Sweeney v. Baker*, 13 W. Va. 158.

**Gambler, Bully, Thief.**—A false charge, however, that a candidate for office is a professional gambler, bully and thief ought to be severely punished. The fact that the party is a candidate for an office to be bestowed by the votes of the people, so far from being a justification for such falsehood, makes the outrage all the greater. If published against a private person not seeking office, it is admittedly a great outrage, for which the law affords redress not only by civil action but by indictment. The moral traits of the character of a candidate for office can no more be attacked than those of other

persons. *Sweeney v. Baker*, 13 W. Va. 158.

**Specific Accusations Considered.**—To charge a candidate for a popular office with being uneducated, lazy, idle and ignorant, is not libelous; nor is it libelous per se to charge him with being "a social leper" who should be "deodorized." But otherwise to charge him with being a professional gambler, bully, thief and whoremaster. *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

**"Confessed Ignoramus."**—To charge a candidate for popular suffrage with being a "confessed ignoramus" is not libelous, because his mental capacity and fitness for the office he seeks, may be freely and even harshly commented upon. *Sweeney v. Baker*, 13 W. Va. 158.

**"Never Did an Honest Day's Work."**—Written charges against a candidate for popular suffrage, that "he never did an honest day's work," or "never earned an honest penny" are privileged, because they merely amount to a charge that he is idle and lazy, and unfit to represent the people, for his talents mentally and physically for the office he asks may be freely, and even harshly, commented upon. Such charges against a private person, would be actionable, however. *Sweeney v. Baker*, 13 W. Va. 158.

**What Candidates.**—Many remarks, however, are admissible against a candidate for an office to which he is elected by the people, that are not allowable against a candidate for office, the appointment to which is made by a board of limited numbers like a city council; in case of the latter officers, the freedom of speech is much more limited. *Sweeney v. Baker*, 13 W. Va. 158, 195.

## G. THE STATUTE OF INSULTING WORDS.

### 1. In General.

Statutes have been enacted in Virginia and West Virginia for the pur-

pose of suppressing duelling, and to give an action for such insulting words as were not actionable at common law. They provide that "All words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon." Va. Code, 1887, § 2897; W. Va. Code, ch. 103, § 2. *Chaffin v. Lynch*, 83 Va. 106, 112, 1 S. E. 803.

### 2. What Words Tend to Violence and Breach of the Peace.

**Insults to Another's Wife within the Statute.**—A letter written to a married woman, the wife of a neighbor, artfully and falsely asserting that in response to a letter from her, he is ready to meet her in an appointed place, is within the meaning of the statute of insulting words, as it tends to violence and breach of the peace, on account of the natural impulse of a woman to communicate this proposal to her husband, and send him to meet the would-be seducer. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.

### 3. Concurrent with Action at Common Law.

**May Proceed at Common Law or under the Statute.**—A statutory suit for insulting words can be brought, though the words used were such, as would sustain a suit at common law, and though they were published or written. *Sweeney v. Baker*, 13 W. Va. 158; *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534.

Although the words spoken are actionable at common law, they may also be declared on under the statute if the declaration or count satisfactorily shows that it was intended to be framed under the statute for insulting words, and not for common-law defamation. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.



**Common Law Not Abrogated by Statute.**—But the legislature did not intend, by passing the statute of insulting words, to interfere with the common-law actions for defamation, and a party aggrieved may still proceed at common law, as if the statute had never been passed. *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534; *Brooks v. Calloway*, 12 Leigh 466.

#### 4. Written and Spoken Words.

The ante-dueling act has been held to apply to written as well as spoken words. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695; *Sweeney v. Baker*, 13 W. Va. 158.

#### 5. Malice.

In actions for insults under the statute, no less than in common-law action for defamation, malice is the gist of the action, and must be expressly or substantially alleged. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

#### 6. Privileged Communications.

The rule as to privileged communications applies as well to actions under the statute of insulting words, as to common-law actions of libel and slander. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

#### 7. Publication.

All the publication that is necessary under the statute of insulting words is, the writing and sending of such words to the person libeled. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.

#### 8. Justification.

As the law formerly was, the truth of the allegation could not, in a suit for insulting words under the statute, be pleaded in bar to the action, but, as the majority of the court held in *Moseley v. Moss*, 6 Gratt. 534, might be given in evidence in mitigation of damages. See *Brooks v. Calloway*, 12 Leigh 466, cited in *Moseley v. Moss*, 6 Gratt. 534, 541, 548; *Sweeney v. Baker*, 13 W. Va. 158, 204; *Hogan v.*

*Wilmoth*, 16 Gratt. 80, 87; *Chaffin v. Lynch*, 83 Va. 106, 121, 1 S. E. 803.

But see *Brooks v. Calloway*, 12 Leigh 466, cited in opinion of Judge Allen in *Moseley v. Moss*, 6 Gratt. 534, 553, where that judge said that the same reasons which induced the court, in *Brooks v. Calloway*, 12 Leigh 466, to hold that a plea of justification was not admissible in bar of actions founded on the statute, should exclude such evidence when offered in mitigation of damages.

**But the rule now is to permit**, in an action brought under the statute of insulting words, any plea to be filed which is admissible in an action of slander at common law. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

It has been held, that the section of the Virginia Code allowing the defendant to justify by proving the truth of the words complained of, and to give in evidence in mitigation of damages an apology, applies as well to actions under this statute for insulting words, as to common-law actions of libel and slander. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

**Truth.**—Under the present statute of insulting words, the truth may be pleaded in justification. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

And this statute was construed in *Hogan v. Wilmoth*, 16 Gratt. 80, as changing the law theretofore existing in Virginia, and as permitting to be filed, as a plea in bar of an action for insulting words spoken or written, their truth, thus putting on the same footing in this respect common-law and statutory actions for defamation. *Brooks v. Calloway*, 12 Leigh 466.

In *Chaffin v. Lynch*, 83 Va. 106, 121, 1 S. E. 803, the court, in discussing this statute, said: "And it can not be doubted that if the statute had been the same as it now is when *Brooks v. Calloway* and *Moseley v. Moss* were decided, those cases would have been decided the other way, without the help of the statute, subsequently

passed, permitting the truth to be pleaded in justification, as it may now be done."

### 9. Questions of Law and Fact.

**Insulting Quality of Words.**—The insulting quality of words depends so largely upon the manner and circumstances in which they are uttered, that they defy all rules of technical import and precision, and hence must be submitted to the experience, observation, and common sense of the jury. *Brooks v. Calloway*, 12 Leigh 466; *Moseley v. Moss*, 6 Gratt. 534; *Bourland v. Eidson*, 8 Gratt. 27; *Corr v. Lewis*, 94 Va. 24, 26 S. E. 385; *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821, 827. See also, *Sweeney v. Baker*, 13 W. Va. 158.

Moreover, in actions founded upon the Virginia and West Virginia statute, making insulting words actionable, the jury is, by express provision contained in those statutes, made the sole judge of the insulting quality of these words. Va. Code, 1887, § 2897; W. Va. Code, ch. 103, § 2.

### 10. Demurrer.

The provision of § 2897 of the Code that no demurrer shall preclude a jury from passing on words made actionable by that section, was inserted for the benefit of plaintiffs in actions brought under that section, and may be waived by them if they so elect. *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664.

**Joinder in Demurrer to Evidence.**—As the statute of insulting words says that no demurrer shall preclude a jury from passing upon words that are insulting, it is improper to compel the plaintiff, in an action under this statute, to join in the defendant's demurrer to evidence. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.

## III. Interpretation and Construction.

### A. NECESSITY FOR.

**Words Actionable Ex Vi Termini.**—Some words are actionable ex vi ter-

mini, without any explanation whatever, because they convey the charge in such clear and unambiguous language, that no other possible construction can be put upon them; thus, when an indictable offense is charged, i. e., by saying that one is a thief, or words that convey the charge of perjury, or a criminal offense involving moral turpitude. *Harman v. Cundiff*, 82 Va. 239; *Johnson v. Brown*, 13 W. Va. 71; *Bourland v. Eidson*, 8 Gratt. 27; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

**Words Not Actionable Ex Vi Termini.**—Some words, however, are not actionable ex vi termini, but extraneous facts and circumstances, and the manner in which they were spoken may give to them an actionable quality, which they would not bear otherwise. Thus, to charge another man with killing your beef, or with swearing to a lie, is not ex vi termini actionable, but depends on other facts and circumstances to make it so. *Hansbrough v. Stinnett*, 25 Gratt. 495; *Harman v. Cundiff*, 82 Va. 239; *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71.

### B. MANNER OF MAKING CHARGE.

**Defamation Need Not Be in Express Terms.**—It seems that although the words do not import actionable defamation in express terms, or do so by insinuations, still it may be actionable; if, with reference to pre-existing or extrinsic facts, as shown by the conversation or discourse at the time the words were spoken, they do impute defamation, and provided the meaning is clear. *Hansbrough v. Stinnett*, 25 Gratt. 495; *Adams v. Lawson*, 17 Gratt. 250. See also, *Harman v. Cundiff*, 82 Va. 239; *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385.

**Words Defamatory Though in Form of a Question.**—The following defama-

tory language was held to be actionable, notwithstanding the fact that it was put in the form of a question. "Would you select a man to make laws, whom you would kick out of your house, and would not trust in your hen-coop?" *Sweeney v. Baker*, 13 W. Va. 158.

### C. SURROUNDING FACTS AND CIRCUMSTANCES.

In order to determine what is an insult the surrounding facts and circumstances must be taken into consideration, and the whole case must be looked at in the light of its own peculiar facts. For some words, when spoken contemptuously, or from ill will, would be universally construed as insulting and tending to violence and a breach of the peace, while the same words spoken under other circumstances, would be considered harmless and inoffensive. Words of praise, spoken ironically, may be intended and accepted as insults, while, many words usually considered insulting, may, when spoken in jest, or by friends, be unexceptionable. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Corr v. Lewis*, 94 Va. 24, 26 S. E. 385; *Brooks v. Callo-way*, 12 Leigh 466; *Moseley v. Moss*, 6 Gratt. 534, 540; *Hansbrough v. Stinnett*, 25 Gratt. 495, 499; *Bourland v. Eidson*, 8 Gratt. 27, 37.

### D. PLAIN AND POPULAR SENSE.

Words must be construed in the plain and popular sense in which the rest of the world would naturally understand them. It is not necessary that they should make the charge in express terms; it is sufficient if they consist of a statement of matters which would naturally and presumably be understood by those who heard them, as charging a crime. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, 588.

Words are to be construed in actions of this kind according to their common reception and it is for the jury to determine from the evidence what was

meant. *Swindell v. Harper*, 51 W. Va. 381, 384, 41 S. E. 117.

In determining, in an action of libel, whether or not the language used imputes a criminal offense, the words must be construed in the plain and popular sense in which the rest of the world would naturally understand them. The charge need not be made in express terms. It is sufficient if they consist of a statement of matters which would naturally and presumably be understood by those who heard them as charging a crime, and in this respect there is no difference between written and spoken words. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385, citing *Payne v. Tancil*, 98 Va. 262, 264, 35 S. E. 725.

It is a well-settled and familiar principle that in arriving at the meaning of the words, the court will understand the words of the writing as the rest of mankind would understand them; that is, according to their plain and ordinary import. *Adams v. Lawson*, 17 Gratt. 250; *Womack v. Circle*, 29 Gratt. 192.

**Illustration.**—For example, when it is said in reference to a woman that a man is "keeping her," or of a man that he is "keeping a woman," the ordinary and popular construction of such language is that the relation between the parties is one which involves criminal intercourse, and is actionable per se. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

### Ancient Rule of In Mitiori Sensu.—

In ancient times, the judges to discourage actions of slander, were very rigid in their decisions, from which arose the doctrine (long since exploded) that words should be taken in mitiori sensu. But it was found that this had the tendency to encourage actions, and a more rational and just principle was adopted: "That words should be understood in the sense they were understood by the bystanders." *Hoyle v. Young*, 1 Wash.

150, 1 Am. Dec. 446; *Cave v. Shelor*, 2 Munf. 193, 194; *Harman v. Cundiff*, 82 Va. 239, 249.

#### IV. Parties and Persons Liable.

##### A. CORPORATIONS.

It is well settled that a corporation is liable in an action for libel. *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358; *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

"The courts have shown a tendency to extend the liability of corporations in civil actions for the misfeasance of their agents, and as it seems now well settled that they may be held liable in suits for libel, and perhaps malicious prosecution, and for assaults and batteries committed by their agents in the performance of their duties, and in view of the further fact that they may in such suits, it is said, be subjected to exemplary or punitive damages, I hesitate to accede to the statement that they can not be held liable to an indictment for any offenses which derive their criminality from evil intention. The very basis of an action of libel, or for a malicious prosecution, is the evil intent, the malice of the party against whom such a suit is brought; and I can not now well see how it is possible to hold that a corporation may be sued for a libel, and punitive damages recovered, and at the same time hold that such corporation could not be indicted for such libel. The suits of libel and malicious prosecution are in their nature very like to criminal proceedings; and if they lie against a corporation, it would seem to follow, that there are cases for which indictments may lie against a corporation where the evil intention constitutes an element in the offense. And if a corporation is, as has been said, liable civilly for an assault and battery committed through its servants, it is perhaps going too far to say

that a corporation can in no case be liable criminally for any offenses against the person under any circumstances." *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 380, 36 Am. Rep. 803.

A corporation is responsible for the publication of a libel, or of insulting words under the statute, by its agent acting within the scope of his employment, and in the course of the business of the corporation. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

##### B. HUSBAND AND WIFE.

Though the common-law rule, making the husband liable for the slanders and other torts of his wife still prevails, yet it is a rule that has lost the reason for which it was originally laid down, since the married woman's acts have preserved to the wife such estate, and her earnings, as the wife's separate estate, free from the husband's control, enjoyment, or liabilities. The continuance of the rule is wholly out of joint with the times and the spirit of the age, and is an inequity and injustice calling loudly for legislative relief. It seems strange, unreasonable, and monstrous that the rule has stood so long. *Opinion of Brannon, J., in Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 317.

##### C. INSANE PERSONS.

It seems that insane persons are not liable for slander. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316; *Horner v. Marshall*, 5 Munf. 466.

##### D. NEWSPAPER PROPRIETORS.

A newspaper proprietor is just as liable as any other person for what he publishes in his newspaper, and is liable in the same manner and to the same extent. What a newspaper proprietor can publish, any other private citizen may publish, as the newspaper has no special privilege in the eyes of the law, and a misapprehension has, to a great extent, grown out of the mean-

ing of the terms "freedom of press" and "liberty of the press," some persons supposing that this gave newspaper proprietors a privilege to publish with impunity what others would be responsible for, but its proper meaning is that newspaper proprietors may publish, without license previously obtained, whatever they choose, but are to be responsible exactly as any one else would be for the publication. *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

### E. JOINT LIABILITY.

**Slander.**—"As a declaration for slander, it would be demurrable, for two persons can not be charged with the utterance of the same words at the same time and place or held liable for the same slander." *Porter v. Mack*, 50 W. Va. 581, 586, 40 S. E. 459.

## V. Certainty as to Person Defamed.

The law is thus stated in 13 Am. & Eng. Ency. Law (1st Ed.), p. 391: "Defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo can not make the person certain, which was uncertain before." *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995, approves and adopts this language. *Cave v. Shelor*, 2 Munf. 193.

Again, in *Odgers, Lib. & Sland.* 126, the law is stated thus: "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory." Quoted in *Argabright v. Jones*, 46 W. Va. 144, 146, 32 S. E. 995.

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no averment or innuendo can make them defamatory. An innuendo can not make the person certain which was uncertain before. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

**Illustrative Cases.**—Where the defamatory publication upon which the plaintiff's claim for damages is predicated, reads as follows: "It has been represented to the shop and railroad men that I had attached the wages of A. B. Argabright, at Graham, and that his wages were held on that account, and further that the debt was unjust; and on these false representations, money has been raised among the shopmen to help Argabright to carry on his lawsuits and support his family," it was held, on demurrer to the declaration that the publication lacked certainty as to the person alleged to have been defamed. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

## VI. Publication.

**In General.**—In order that a civil action for libel may be maintained, it must appear to have been communicated to one or more strangers; but the public offense is consummated by sending the libel to the party himself, although no one else shall see it. 4 Min. Inst. (4th Ed.) 471. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

### What Constitutes a Publication.

**General Circulation Not Necessary.**—It is not necessary that the contents of a writing should be made known to the public generally, to constitute a publication. It suffices if it is made known to a single person. *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Granger v. Com.*, 78 Va. 212, 214.

**Letters.**—It is undoubtedly well-recognized law that the sending of a letter through the mail is not a publication, as the sender is not responsible for what the recipient does with the letter after it is received. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 446, 44 S. E. 692.

A certain letter containing the libel is sent sealed, but the writer afterwards states in the presence of several persons that he had gotten another person to write the letter for him, and he had signed his own name to it, and kept a copy; and states the contents of the letter; but without producing it or a copy of it. Held, this was a publication of the libel. *Adams v. Lawson*, 17 Gratt. 250.

The dictation of a letter to a stenographer and having it written out on a typewriter, is a sufficient publication. *Sun Life Assur. Co. v. Bailey*, 101 Va. 423, 44 S. E. 692.

**Proof of Circulation.**—A letter stating that the writer had heard of a slanderous report, is admissible in evidence, to prove the circulation of the report, as this has important bearing on the question whether the plaintiff has been injured, and what is the extent of that injury; the handwriting of the person who wrote it being proved, it is complete evidence of the fact that the report had been heard by the writer. But the letter is not competent evidence to establish the fact that the defendant propagated the report. *Schwartz v. Thomas*, 2 Wash. 187, 1 Am. Dec. 479.

**Criminal Prosecution.**—In a criminal prosecution for libel, it does not show a purpose on the part of the prisoner to suppress the libel after its publication, because he refuses to give a handbill containing the libel, to a third person, and is not evidence in mitigation of punishment, especially when he adds after his refusal to give a copy away, "that he wished to consult his brother before circulating it," and still more when he said to the third party that "he would read it to him if he stepped into a saloon near by," for this latter offer would clearly have been a publication of it. *Granger v. Com.*, 78 Va. 212, 214.

**Publication under Statute of Insulting Words.**—Under the statute of insulting words, no publication is nec-

essary. That the words, according to their usual construction and common acceptance, are construed as insults, and tend to violence, and breach of the peace, is sufficient to render them actionable, and that is all the statute requires, for insults tend to violence and a breach of the peace, whether exhibited to a third person or not, even when spoken to another out of the presence of a third person. Va. Code, 1887, § 2897; Code, W. Va., ch. 103, § 2, p. 774; *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.

Thus the writing of a letter by the defendant, and its dispatch to the person libeled by a servant, is a sufficient publication of it. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. 695.

## VII. Malice.

See post, "Privileged Communications," VIII.

**In General.**—It is a well-settled rule of law, that in every instance of slander, verbal or written, whether for insults under the statute, or common-law actions for defamation, malice is an essential ingredient, and forms the gist of the action, and it must be expressly or substantially alleged, but it is not always necessary to prove malice expressly. The law infers malice from the unauthorized publication of matter which is insulting or defamatory. The plaintiff makes out a prima facie case by proving the words, written or spoken, as laid in the declaration. The one exception to the rule that malice is presumed, is in the case of privileged communications, and the legal effect of the exception is to change the burden of proving malice to the plaintiff. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Dillard v. Collins*, 25 Gratt. 343, 351; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71, 122; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

**Proof of Malice.**

**Prior and Subsequent Words.**—In action for slander, words spoken at

different times before suit brought, though not declared on, may be given in evidence to show the intent with which the words declared on were spoken, but words spoken after suit brought can not be given in evidence, for they may be the ground of another action. *Swindell v. Harper*, 51 W. Va. 381, 41 S. E. 117.

"Where the subsequent words impute the same crime, or may be fairly considered as equivalent to a renewal or repetition of the same defamatory charge as those already proved, they may be admitted as legitimate evidence of the original malice of the defendant speaker, but not as separate grounds of action where there is no additional count to embrace them." *Swindell v. Harper*, 51 W. Va. 381, 383, 41 S. E. 117.

For the purpose of proving malice, it is proper to admit evidence of slanderous words of the same and like character, spoken by the defendant of the plaintiff before the institution of the suit, though the action on them is barred by the statute of limitations. *Lincoln v. Chrisman*, 10 Leigh 338.

"But the court being of opinion that such evidence was inadmissible for any purpose, refused to permit evidence of slanderous, defamatory or insulting words spoken by the plaintiff to, of or concerning the defendant, at other times or on different occasions from the times and occasions on which the words charged in the declaration were spoken. In this decision of the circuit court, it seems to me there was no error." *Bourland v. Eidson*, 8 Gratt. 27, 38.

In an action for slander, in which the pleas were not guilty and not guilty within one year, the plaintiff, after proving that the words in the declaration mentioned were spoken by the defendant within a year prior to the institution of the suit, offered evidence to prove the speaking by the defendant of the same and like words more than a year before the suit was

instituted, and, on some occasions, several years prior thereto; held, the evidence so offered was admissible for the purpose of showing the defendant's malice towards the plaintiff. *Lincoln v. Chrisman*, 10 Leigh 338.

**Former Publication.**—In an action for a libel, the defendant may give in evidence a former publication of the plaintiff to which the libel was an answer, to explain the subject matter, occasion and intent of the defendant's publication, and in mitigation of damages. *Bourland v. Eidson*, 8 Gratt. 27, 36.

**Presumption of Malice.**—Malice may be presumed from the unauthorized publication of insults, and the plaintiff makes out a prima facie case by proving the words as laid in the declaration; but the rule is not inflexible, and circumstances may rebut the presumption of malice. *Chaffin v. Lynch*, 83 Va. 106, 117, 1 S. E. 803.

Though malice is essential to all defamation, still it is an implication of law that all unauthorized defamation is malicious, except in cases of conditionally privileged communications, and then express proof of malice is necessary to render the communication defamatory. *Hansbrough v. Stinnett*, 25 Gratt. 495, 506.

**Feelings and Motives of Defendant.**

—But it is inadmissible to ask a defendant his feelings and motives in making 'a slanderous charge, and whether it was made with ill will against the plaintiff, or only for the protection of his own rights and interests, as his feelings and motives are immaterial after the slanderous words are proven to have been spoken, and the law will not allow him to say that no malice was intended, or that he did not mean to make the charge that the words, according to the common understanding of men, convey. *Dillard v. Collins*, 25 Gratt. 343, 356; *McAlexander v. Harris*, 6 Munf. 465.

**Rebuttal of Malice.**—Although evidence tending to prove the truth of

the words is inadmissible under the plea of not guilty, yet facts, which induced the mistaken belief in the mind of the defendant, that the charge was well grounded, are admissible to rebut malice. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 875.

## VIII. Privileged Communications.

### A. IN GENERAL.

According to the authorities the following are the classes of privileged communications or publications: 1. Whenever the author or publisher of the alleged slander acts in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests, for example a friendly caution, or a confidential letter concerning a solicitor conveying charges injurious to his professional character in managing certain concerns in which the writer was interested, and when the person the letter is written to has employed the solicitor. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party concerning whom they are used. 4. publications duly made in the ordinary mode of parliamentary proceeding. In the above cases, of course, the burden of proving malice is shifted to the plaintiff, and he can no longer rely on the presumption of law in his favor, for this is all "privileged communication" means. *Dillard v. Collins*, 25 Gratt. 343, 352; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 875; *Johnson v. Brown*, 13 W. Va. 71, 120, 121, 122; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

### B. ABSOLUTE PRIVILEGE.

#### 1. In General.

If the occasion on which the words were uttered was one of absolute privilege, the defendant is entitled to judg-

ment, and the absence or presence of malice is immaterial. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873.

"It has been often decided that false and scandalous matter contained in a petition to parliament, and the delivery of such petition to the members, or in articles exhibited to the justices of peace, or in an affidavit before a court of justice, is not libelous. See 4th Coke 14b; also, *Lake v. King*, 1st Williams' Saunders, p. 131; *Astley v. Young*, 2 Burrow, p. 810, and 4th Bacon, p. 454." *Com. v. Morris*, 1 Va. Cas. 175, 181, 5 Am. Dec. 515.

#### 2. Words Used in Course of Judicial Proceedings.

**In General.**—The authorities, both American and English, fully establish the position, that there is a class of absolutely privileged communications, for which actions of slander and libel will not lie, though the defendants be ever so guilty of express malice, and that there should be such a class is absolutely essential to the untrammelled administration of justice, and is sustained by the soundest reasoning. It is absolutely essential to the ends of justice, that everybody should have a right to bring an action for any complaint; and that he should make his allegations with impunity; and the defendant should have a like immunity in any civil action. This is necessary to a thorough investigation of the truth. If the parties are to be placed in fear of suits for libel or slander for reflections cast upon the parties or others, or if their defense must depend upon the truth of what was said, or their ability to satisfy the jury of the absence of malice, then the trial of civil suits would be far less likely to lead to correct results, than where this embarrassment is not felt. Perfect freedom to say in these pleadings, whatever the parties chose to bring to the consideration of the court or jury, tends obviously to promote the intelligent administration of justice.



This perfect freedom is more important to secure than it is to prevent these unfounded reflections on character, and moreover, if they are unfounded, they will not generally cause any lasting injury, as their injustice will appear at the trial. Then the judge, too, will prevent an abuse of this privilege. *Johnson v. Brown*, 13 W. Va. 71, 130, 5 Va. Law Reg. 10.

**Jurisdiction of Court and Pertinency of Pleadings.**—Libelous matters published only in the due course of legal procedures, can not be the basis of a libel suit, provided the court, in which they were published, had jurisdiction of the cause, and they were pertinent to the suit, even if they be libelous reflections on the character of persons, not parties to the suit, if the suit was not resorted to merely for the purpose of conveying the scandal, and as a cover for the malice of the party, and not in good faith for the assertion of a right, or redress of a wrong. *Johnson v. Brown*, 13 W. Va. 71.

**Plaintiff Must Be a Party.**—The general American rule is that statements made in a judicial proceeding by witness, counsel or party, concerning one not a party to such proceedings, and not before court either as a party or witness, are not privileged, unless pertinent and relevant to the issue. *Johnson v. Brown*, 13 W. Va. 71, 122, et seq., is the only American authority to the contrary—a decision of much ability covering the entire neld of privileged communications in judicial proceedings. 5 Va. Law Reg. 1, 13.

**Broad Statement.**—But a number of authorities lay down the proposition broadly, that no action of libel can be maintained for any defamatory matter, contained in a pleading in a court having civil jurisdiction. This view, with some qualifications, was reached by the English courts, and the qualification was that the pleading must be filed in a court having jurisdiction of

the subject. *Johnson v. Brown*, 13 W. Va. 71, 112.

**Statements of Judges, Parties, Counsel, Witnesses—Persons Not before the Court.**—The whole subject of communications in judicial proceedings that are privileged, is very ably and exhaustively set forth by Mr. E. C. Pyle in an article in 5 Va. Law Reg. 1, 13, in which he reviews the American and English authorities on the subject with reference to judges, parties, counsel, and witnesses, the statements concerning persons not before the court.

**Bill in Chancery—Handbills.**—There is obviously a great difference between holding allegations in a bill in chancery of a libelous character not actionable, and holding that the publication of such a bill in handbills and circulation thereof is not actionable, and hence the controversy in England as to whether a true report, as to what passed in a court of justice, was or was not absolutely privileged, throws no light on the question whether the proceedings themselves in a court of justice are not thus absolutely privileged. Though public policy might require very rightly, that a plaintiff in asserting his rights before a court, should be allowed to insert in his bill libelous matter, as otherwise he might fear to allege what was necessary to attain justice, still such public policy may not permit the publication in such handbills of a bill in chancery, and the circulation thereof, as this could not help the plaintiff to assert his rights, and no reasons of public policy or justice seem to require such a circulation. *Johnson v. Brown*, 13 W. Va. 71, 125.

The libelous writing was alleged to be as follows: "The plaintiff was, through his own and his brothers' influence, placed and retained in the general management of said corporation during the years 1871, 1872 and 1873 for their own private and individual gain, and not the corporation's; that

especially during the year 1873 the plaintiff in the libel suit did use, and employ, the goods, money, means and credit of the said corporation for his own use, and his brothers' private use, business and benefit; that he took the goods and money of the said corporation to pay his own employees; that he borrowed money, and used it in his own business, and gave said corporation's notes therefor; that he and his wife purchased goods, wares and merchandise of divers persons and at various times during the years 1871 and 1872, and especially during the year 1873, for their own and friends' use, and had them charged to the corporation." The libelous matter, stated above, being contained in a bill in chancery, filed under the fifty-seventh section of chapter fifty-three of the Code of West Virginia, and the bill having alleged that the party, who was plaintiff in the libel suit, had been elected general superintendent by himself and brothers, who held a majority interest in the stock of said corporation; and that they still voted such stock; and asking a decree of the court dissolving said corporation, the said allegations were pertinent to the case, sought to be made by the bill, and the relief prayed for; and no libel suit could be instituted based on them, they being absolutely privileged publications. *Johnson v. Brown*, 13 W. Va. 71.

**Presumption of Malice.**—The defenses that libelous matter contained in pleadings was pertinent to the cause, that the court had jurisdiction, or that the defendants had reasonable cause for believing and did actually believe it to be pertinent to the cause may be shown under the general issue. And upon the trial of such an issue if it appear, that the libelous allegations were published in the due course of legal procedure, though it be proved, that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law

does not presume malice on the part of the defendant, but the plaintiff must prove express malice, to entitle him to recover. The simple fact, that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, rebuts the *prima facie* presumption of malice, and makes it incumbent on the plaintiff to prove express malice, the case being what is called a conditionally privileged communication. *Johnson v. Brown*, 13 W. Va. 71.

### C. QUALIFIED PRIVILEGE.

#### 1. Definition.

The proper meaning of a qualified privilege is only this: That the occasion, on which a communication is made, refutes the inference *prima facie*, arising from a statement prejudicial to the character of the plaintiff, and puts the onus upon the plaintiff to prove actual malice or malice in fact. *Johnson v. Brown*, 13 W. Va. 71, 126.

#### 2. In General.

In an action for insults, the question whether a letter is a privileged communication depends, (1) upon whether it was written on a privileged occasion; and if so, then (2) upon whether the occasion was used *bona fide*, and without malice. *Strode v. Clement*, 90 Va. 553, 19 S. E. 177; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

"If a person having information materially affecting the interest of another, honestly communicates it privately to such other party, in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the matter, and though no inquiry has been made of him, and though the danger to the other party is not imminent." 2 Greenl. on Evidence, § 421; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 876.

#### 3. Statute of Insulting Words.

A communication which would be privileged at common law, is, if made

under similar circumstances, privileged in an action for insults under the statute. Va. Code, 1873, ch. 145, § 2; Va. Code, 1887, § 2897; W. Va. Code, ch. 103, § 2; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

#### 4. Instances of Privileged Communications.

**In General.**—When a man writes to another, informing him that his servant is dishonest and untrustworthy; or writes to a woman informing her that the man she proposes to marry is unworthy of her hand; or where words are spoken of a tradesman to the effect that he will soon become a bankrupt, are all instances of privileged communications, and will be protected, when made, in confidence and friendship as a caution, bona fide and without malice, because they are made in the performance of a moral duty. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Dillard v. Collins*, 25 Gratt. 343.

"Where the defendant acts in performance of a duty, legal or social, or in defense of his own interests, the occasion is privileged. \* \* \* but strong or violent language, disproportioned to the occasion, may raise an inference of malice, and thus lose the privilege that would otherwise attach to it." *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295; *Farley v. Thalheimer*, 103 Va. 504, 508, 48 S. E. 644.

**Interest in the Subject Matter.**—In one case the plaintiff and defendant, having become involved in a dispute over the ownership of certain notes, the defendant wrote to the plaintiff, asking whether he could go through life with a breach of trust taint on his character, and stating that his account books would blast him for life, as they swarmed with false entries that he would not correct, and that his conduct would end in the total ruin of his character, and threatening a publication of the facts in a newspaper. It appeared that the defendant did own some of the notes in dispute, and there was no

proof of malice intended by the letter; that the defendant honestly believed some of the entries in the books were false, and was partially sustained by the facts, though the plaintiff explained how such entries were made. The court held that the communication was on a privileged occasion, since it was a matter in which the plaintiff was interested, and, that the presumption that the defendant acted without malice was not rebutted by the language of the letter. *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

**Social Duties.**—It is now a settled principle of law that a communication honestly made in the performance of a social duty, is no less privileged than one made in self-defense, or in the protection of one's interest. And a communication, made under such circumstances, and without malice, is protected, notwithstanding its imputations be false, or founded upon the most erroneous information. The rule has been extended in the interests of society, in order that a person's standing in the business and social world may be correctly known. *Chaffin v. Lynch*, 83 Va. 106, 118, 1 S. E. 803; *Dillard v. Collins*, 25 Gratt. 343; *Johnson v. Brown*, 13 W. Va. 71, 93; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 875. Newell, in his work on Slander (p. 389), in speaking of qualified privilege, says: "It extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character or imperfect obligation." Quoted in *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 875.

**Cause for Dismissing Servant.**—In *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664, an officer of the defendant company, after full investiga-

tion and inquiry as to alleged misconduct of the plaintiff, an employee of the company, and fully satisfying himself of the truth of the allegations, dismissed him from the service of the company, and published the following order: "A fireman has been dismissed from the service for intimating that an officer of the company had cast reflections upon the ancestry of another officer, which was proved to be untrue." There was no extrinsic evidence tending to show malice on the part of the company or any of its officers or agents, and the conclusion of the officer making the investigation is in accordance with the weight of the evidence. Held, the communication is privileged, was made in good faith, and hence is not actionable.

**Right of Self-Defense.**—A communication made in self-defense, if made bona fide and without malice, is privileged, because made in the performance of a moral duty. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

Although it is true that one insult can not be set off against another, yet if a man is attacked in a newspaper, he may reply; and if his reply is not unnecessarily defamatory of his assailant, and is honestly made in self-defense, it will be privileged. *Chaffin v. Lynch*, 83 Va. 106, 118, 1 S. E. 803; *Bourland v. Eidson*, 8 Gratt. 27, 40; *McAlexander v. Harris*, 6 Munf. 465.

**Right to Defend Character.**—The defendant published a statement in a newspaper that the plaintiff had attempted to decoy away his customers, and clients. The plaintiff denied the charge in the same newspaper, and in his denial he styled the defendant's statement as "a contemptible, cowardly, and malicious lie." The defendant replied by publishing a card in which he referred to the plaintiff's "known character as a liar," and that any person who was "scoundrel enough" to have acted as the plaintiff had "would be unprincipled enough to

deny it when charged with it." The court held, that the occasion of the defendant's reply was privileged, because "every man has a right to defend his character against false aspersion, and, indeed, it is a duty which he owes to his family. If I am attacked in a newspaper, I may write to that newspaper to rebut the charges, and may at the same time retort upon my assailant, when such retort is a necessary part of my defense, and fairly arises out of the charges he has made against me." And it ought to have been left to the jury to say whether he abused his privilege, and had acted with malice, or honestly, and in the protection of his own interest. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

#### **Complaints against Public Officers.**

—A letter from a citizen to the mayor of a city informing him of alleged misconduct of a policeman, is a privileged communication. *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295.

#### **Communications to Creditors Concerning Debtor.**

**"He Is All Broke Up."**—To say to a creditor of a plaintiff that "he is all broke up," and similar expressions, is a privileged communication, as the pecuniary condition of a debtor is a matter about which a creditor is interested, and about which he is entitled to know. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177; *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358.

Where the evidence shows that the persons to whom the defendant stated that the plaintiff was "broken up," or would be unable to meet his liabilities, was a creditor of the plaintiff, and was in a confidential manner consulting with the defendant, such communication is privileged. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873.

**Landlord and Tenant.**—There is nothing in the relation of landlord and tenant that will bring disclosures by

the former to the latter within the class of privileged communications, and rebut the presumption of malice, especially when the tenants own their property and the landlord continues to warn them against the plaintiffs on the ground that they are thieves. In such a case he is not acting in the protection of his own rights and interests, and there is no public or private, legal or moral duty resting upon him to continue to warn these and other people. *Dillard v. Collins*, 25 Gratt. 343, 355. See also, *Johnson v. Brown*, 13 W. Va. 71, 123.

#### 5. Abuse of Privilege.

Although a communication is made bona fide, still it is not privileged, and will not be protected, if it goes beyond the occasion or exigency, and is unnecessarily defamatory of the plaintiff, or is more extensively published than the circumstances of the case require, though the plaintiff may have honestly believed that in all he did he was discharging a duty, for a man in defending himself must not overstep the line of legitimate defense, and unnecessarily become an aggressor. Whether the occasion imposes a duty upon the defendant, is to be determined by the circumstances. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

#### 6. Malice.

**In General.**—When a communication is shown to be confidential, and in the exercise of a duty, the ordinary rule with respect to libelous and slanderous words is so far changed as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or in the situation of the parties, adequate to authorize the conclusion. *Dillard v. Collins*, 25 Gratt. 343.

**Actual Malice.**—If the privilege is only qualified, the onus lies on the

plaintiff of proving actual malice. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *Farley v. Thalhimer*, 103 Va. 504, 48 S. E. 644; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

**Proof of Malice.**—If the communication be privileged, the burden is on the plaintiff to prove actual malice in order to warrant any recovery at all. The malice may be shown either by construction of the words spoken, or by facts and circumstances connected therewith, or in the situation of the parties adequate to authorize the conclusion. *Farley v. Thalhimer*, 103 Va. 504, 48 S. E. 644.

**An Honest Belief.**—In an action for defamation, the occasion being privileged, the question for the jury is, not whether the language used was true, or whether the defendant had reasonable ground to believe it true, but whether in point of fact he honestly believed it to be true, and published it without malice, in fair self-defense, or in the reasonable protection of his own interests. And if the plaintiff fails to show actual malice, then the communication is protected, and the defendant is entitled to the verdict, no matter whether the imputations contained in the publication were true or false, unless the plaintiff has availed himself of the occasion for some malicious purposes. A man is morally bound to defend his character against false aspersion, and his communication, if within the limits of the occasion, is protected, because made in the performance of a moral duty. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Johnson v. Brown*, 13 W. Va. 71, 126; *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664.

**Publications in Pleadings.**—Upon the trial of an issue as to whether certain libelous matters are pertinent, etc., if it appear, that the libelous allegations were published in the due course of a legal procedure, though it be proved that the court had no jurisdiction, or that the allegations were not pertinent

to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice, to entitle him to recover. When it appears that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, the prima facie presumption of malice is rebutted, and throws the burden of proving express malice on the plaintiff, the case being one of conditionally privileged publication. *Johnson v. Brown*, 13 W. Va. 71, 148.

**Strong and violent language, however, disproportioned to the occasion,** may overcome the weight of the privilege and raise an inference of malice. *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295, citing *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

**Inference of Malice.**—Although strong or violent language, disproportioned to the occasion, may raise up an inference of malice, and thus take away the privilege that otherwise would attach to it, still when the occasion is privileged, the tendency of the courts is not to submit the words to too strict a scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances. *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

If the defendant acts in the performance of a duty, legal or social, or in defense of his own interests, the occasion is privileged, but strong or violent language, disproportioned to the occasion, may raise an inference of malice and destroy what would otherwise be a privilege. Whether such an inference is to be drawn from the language used, or the circumstances under which it was uttered, is a question for the jury. The questions of good faith, belief in the truth of the statement, and the existence of actual malice, are

for the jury. *Farley v. Thalhimer*, 103 Va. 504, 48 S. E. 644.

"The remarks of Judge Lewis in *Strode v. Clement*, 90 Va. 553, 19 S. E. 177, are applicable in this case: 'There is no extrinsic evidence of malice, such as an antecedent grudge, or previous disputes, or anything of that sort, between the parties; but the contention is that the language used by the defendant is of itself evidence of malice. Undoubtedly strong or violent language disproportioned to the occasion may raise an inference of malice, and thus lose the privilege that otherwise would attach to it. But when the occasion is privileged, the tendency of the courts is not to submit the words to a strict scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances.' In this case there is no extrinsic evidence of malice, nor is the language complained of so violent or disproportioned to the occasion as to raise an inference of malice. In other words, there is no evidence of malice." *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664.

**Demurrer to Evidence.**—If the communication is privileged the presumption is that there was no malice in its publication, and the burden is upon the plaintiff to prove malice. Where the truth or falsity of a privileged communication is in no wise involved, but only the question of good faith in its publication, malice will not be presumed even on a demurrer to the evidence by the defendant. *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664.

**Presumptions and Burden of Proof.**—See ante, "Malice," VII; post, "Evidence," X.

Ordinarily malice may be implied from the publication of defamatory matter, but if the occasion of the pub-

lication is privileged, malice will not be implied, and the burden is on the plaintiff to prove malice in fact. *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295; *Strode v. Clement*, 90 Va. 553, 556, 19 S. E. 177; *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664; *Farley v. Thalhimer*, 103 Va. 504, 48 S. E. 644; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *Johnson v. Brown*, 13 W. Va. 71.

The communication being privileged, plaintiff in error can only prevail by showing that the defendant availed itself of the occasion, not for the purpose of protecting its interests, but to gratify its ill will. Upon this issue the burden of proof is upon the plaintiff in error. *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 624, 42 S. E. 664.

#### 7. Questions of Law and Fact.

**In General.**—"It seems too well settled in this state to admit of extended discussion that while it is within the province of the trial court to determine whether or not the occasion when alleged slanderous or insulting words were spoken or written was privileged; whether they were spoken or written with or without malice, is a question for the jury under proper instructions. *Dillard v. Collins*, 25 Gratt. 343, 353; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; S. C., 84 Va. 884, 6 S. E. 474; *Strode v. Clement*, 90 Va. 553, 557, 19 S. E. 177; *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358; *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664; *Tyree v. Harrison*, 100 Va. 540, 542, 42 S. E. 295." *Farley v. Thalhimer*, 103 Va. 504, 507, 48 S. E. 644.

#### Whether Occasion Was Privileged.

—It is a question of law whether or not the occasion, when alleged slanderous or insulting words were spoken or written, was privileged. *Dillard v. Collins*, 25 Gratt. 343, 353; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; S. C., 84 Va. 884, 6 S. E. 474; *Strode v. Clement*, 90 Va. 553, 557, 19 S. E. 177; *Reusch v. Roanoke, etc., Co.*, 91 Va.

534, 22 S. E. 358; *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664; *Tyree v. Harrison*, 100 Va. 540, 542, 42 S. E. 295; *Farley v. Thalhimer*, 103 Va. 504, 48 S. E. 644; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873.

**Good Faith and Malice.**—Whether the occasion for the publication of defamatory matter has been used bona fide and without malice, is a question of fact for the jury. *Brown v. Norfolk, etc., R. Co.*, 100 Va. 619, 42 S. E. 664, citing *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; S. C., 84 Va. 884, 6 S. E. 474.

Though the occasion is privileged, strong and violent language, disproportioned to the occasion, may raise an inference of malice, and thus obviate the privilege that would otherwise attach to it, and whether such an inference is to be drawn from the language used or the circumstances in which it is used, etc., is a question for the jury. The questions of good faith, belief in the truth of the statement, and the existence of actual malice remain also for the jury. *Tyree v. Harrison*, 100 Va. 540, 542, 42 S. E. 295; *Farley v. Thalhimer*, 103 Va. 504, 508, 48 S. E. 644.

Where the supposed libel is the publication of a privileged communication, the question of malice should be submitted to the jury. *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358.

In an action of libel it is for the court to determine what communications are privileged, but it is the province of the jury to determine whether the privilege has been used in good faith, and without malice. *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295, citing *Strode v. Clement*, 90 Va. 553, 556, 19 S. E. 177.

Whether or not the occasion when alleged slanderous words were spoken is privileged is a question for the court, but whether—there being evidence tending to prove malice—the occasion was abused and the words were

spoken with malice, is a question for the jury, which the court can not take from them. *Farley v. Thalheimer*, 103 Va. 504, 48 S. E. 644.

**Existence of Interest.**—It is settled law that a communication made by a person, in the conduct of his own affairs, where his interest is concerned, is privileged, if without malice, and whether or not such an interest exists as to make the occasion privileged is a question for the court. *Strode v. Clement*, 90 Va. 553, 19 S. E. 177, 178; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

**Absolute or Qualified Privilege.**—It seems to be well settled that the question whether the privilege was qualified or absolute, is one of law for the court to decide. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177.

The judge must decide whether the occasion is or is not privileged, and also whether the privilege is absolute or qualified. If he decides that the occasion was one of absolute privilege, judgment should be for the defendant, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the onus lies on the plaintiff of proving actual malice. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 875.

#### **Words Used in Judicial Proceedings.**

—Whether libelous matters, if they are contained in the pleadings in a cause, are, or are not, pertinent to the cause, is a question of law, which ought to be decided by the court, and not a question of fact to be submitted to the jury. But the question whether the defendants had reasonable cause for believing, and did actually believe, the alleged libelous matters to be pertinent in the chancery cause, is a question of fact to be decided by the jury. *Johnson v. Brown*, 13 W. Va. 71.

## **IX. Justification and Defenses.**

See ante, "Statute of Insulting Words," VIII, C. 3.

### **A. TRUTH.**

#### **1. In Civil Actions.**

The statutes in Virginia and West Virginia provide that in any action for defamation, the defendant may justify by alleging or proving that the words spoken or written were true. Va. Code, 1904, § 3375; W. Va. Code, 1899, ch. 130, § 3970.

#### **Good Motives and Justifiable Ends.**

—In prosecutions and civil suits for libel, the truth may be given in evidence; and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant. W. Va. Constitution, art. 3, § 8.

The purpose of this was to settle the bitter controversy, as to whether in a criminal prosecution for libel the truth shall be a bar to the proceedings, and, as will be seen, it determines that it shall be a bar only when published with good motives and justifiable ends, and it further puts upon exactly the same footing, common-law and statutory suits for libel; the truth being a bar when made with good motives and justifiable ends, and not otherwise. *Sweeney v. Baker*, 13 W. Va. 158, 205.

This section is confined strictly to actions for libel, and is not to be construed so as to include actions for defamation or verbal slander. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

#### **2. In Criminal Prosecutions.**

Upon an indictment or information for libel, it is in no case necessary or proper for the defendant to plead the truth of the libel. *Com. v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515.

But upon an indictment or information for libel of individuals, not public officers, or candidates for public of-



fice, truth, though no justification, may be given in evidence in mitigation of a fine. *Com. v. Morris*, 1 Va. Cas. 175.

### B. APOLOGY.

In any action for defamation, the defendant, after notice in writing of his intention to do so (given to the plaintiff at the time of, or for pleading to such action), may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case action shall have been commenced before there was an opportunity of making or offering such apology. Va. Code, 1904, § 3375; W. Va. Code, 1899, ch. 130, § 3970.

### C. REPETITION.

A defendant who has circulated a slander about a young girl, can not offer evidence to prove that others had heard the same slander. It is no excuse for him that others had heard the same slander after he himself had set it going. *Blackwell v. Landreth*, 90 Va. 744, 19 S. E. 791, citing *Cheatwood v. Mayo*, 5 Munf. 16; *Dillard v. Collins*, 25 Gratt. 343.

### D. WORDS SPOKEN IN HEAT OF PASSION.

It is no defense or justification for the defendant that he used the words charged, in the heat of passion, provoked by the plaintiff's quarrelsome and insulting words. *McAlexander v. Harris*, 6 Munf. 465; *Dillard v. Collins*, 25 Gratt. 343.

**Absence of Ill Will.**—On a trial in an action for slander by C. against D., the slanderous words having been proved, D. will not be allowed to prove by his own testimony what were his feelings and motives in making the charge, whether with any ill will against C., or only for the protection of his own interests. *Dillard v. Collins*, 25 Gratt. 343, citing *McAlexander v. Harris*, 6 Munf. 465.

### E. CRIMINATION AND RECRIMINATION.

It is no defense in an action of slander, even in mitigation of damages, that previous to the speaking of the slanderous words laid in the declaration, the plaintiff had used equally offensive and insulting words towards the defendant. *Bourland v. Eidson*, 8 Gratt. 27; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803.

"It is certain that mutual defamations can not be made a matter of account and set off against each other, and a balance struck in favor of the most injured or least culpable of the parties; and such would be the effect of allowing evidence of reciprocal criminations unconnected except by a general spirit of hostility and revenge. The only principle upon which defamatory words spoken by the plaintiff can be proved in mitigation of damages is that he has thereby brought upon himself, at least to some extent, the grievance of which he complains. This can not be conceded with any propriety or safety, unless where such provocation occurs, or is referred to, in the same conversation with the defamation by the defendant, or is communicated to him at the time. I need not consider whether there may not be exceptions to this restriction, there being no foundation of or any in the present case." *Bourland v. Eidson*, 8 Gratt. 27, 38.

### F. INSANITY.

It is a sufficient ground of equity for a perpetual injunction to a judgment in slander, that at the time of speaking the defamatory words, and when the judgment was obtained, the complainant in the bill (who was defendant at law) was insane, or in a state of partial mental derangement on the subject to which those words related. *Horner v. Marshall*, 5 Munf. 466. See also, *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316.

**G. BANKRUPTCY.**

In an action for slander, a plea alleging that since the action was brought the plaintiff had been adjudged a bankrupt, should be rejected. *Dillard v. Collins*, 25 Gratt. 343.

**X. Evidence.**

Consult, also, the other sections in this title.

**A. RELEVANCY.****1. In General**

In an action for libel published by letter, evidence of publication in a newspaper of matter having no connection with or relation to the letter, and for which the defendant is in no wise responsible, is not admissible. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

In an action for slander, the defendant can not inquire into the social intercourse of the plaintiff with his neighbors. And where the slander charged is for horse stealing, the defendant can not introduce evidence of rumors as to the plaintiff or his sons having stolen a hog. *Dillard v. Collins*, 25 Gratt. 343.

**Threats.**—On a trial in an action for slander by C. against D., D. can not introduce a witness to prove whether he had or had not heard of threats from the sons of C., the plaintiff, made since the commencement of this trial, against witnesses of the defendant who had testified or should testify against the character of the plaintiff and his sons. It was not pertinent or relevant, and could not, in any manner, affect the issues which the jury were sworn to try. *Dillard v. Collins*, 25 Gratt. 343.

**2. Collateral Facts and Transactions.****a. In General.**

It is a general rule in actions for slander, as in all other civil suits and proceedings, that collateral facts are inadmissible in evidence, because they do not afford any reasonable presumption or inference as to the principal

fact or matters in dispute, and tend to draw away the minds of the jury from the point in issue, excite prejudice, and mislead. *Hook v. Hancock*, 5 Munf. 546.

**b. Res Inter Alios Acta.****Prior Difficulties between Parties.**—

A defendant can not introduce evidence of a fight had between the plaintiff and defendant, prior to the uttering of the slanderous words, on the ground that the plaintiff's counsel had referred to this fight in his opening statement to the jury, for it has no connection with the utterance of the slanderous words. *Harman v. Cundiff*, 82 Va. 239, 246.

**Proof of Malice.**—See ante, "Malice," VII.

While there is conflict in the cases as to whether or not words spoken after the suit is brought can be given in evidence to show with what intent the words declared on were spoken, the rule that they can not be given in evidence for such purpose, is more consistent with the general principles of law, and better calculated to subserve the ends of justice, for the reason that they may be the ground of another action. *Swindell v. Harper*, 51 W. Va. 381, 41 S. E. 117.

**B. HEARSAY EVIDENCE AND RES GESTÆ.**

In an action for libel, a witness can not testify to a conversation he has had with the general manager of the defendant company several weeks after the writing of the defamatory letter, as it is hearsay. And the alleged admissions that the general manager made in the above-mentioned conversation, can not be considered in evidence against the defendant company, because they were made several weeks after the letter complained of was written, and hence do not form a part of the *res gestæ*. *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358.

Evidence of all that occurred at the time of speaking the words, being part

of the *res gestæ*, and tending to explain the words spoken, and the intent of the party in making the charge, would be admissible. *Bourland v. Eidson*, 8 Gratt. 27, 40.

It is inadmissible to allow proof of the general character of the plaintiff, as an insulting, provoking and quarrelsome man, and, that before the speaking of the words imputed to the defendant, the plaintiff was in the habit of vilifying, provoking and insulting the defendant and his family. Everything that happened at the time is admissible, as a part of the *res gestæ*, and nothing else. *McAlexander v. Harris*, 6 Munf. 465.

### C. BURDEN OF PROOF.

See ante, "Malice," VII; "Privileged Communications," VIII.

**Proof of Negative.**—H. swore in an affidavit that L. had engaged to pay certain taxes, L. said that the statement was false, that it was all a lie and that he would have H. indicted for perjury. H. brought an action for slander against L. and he pleaded a justification, and the court held that the *onus probandi* was on the defendant to prove that the plaintiff's affidavit was false, even though it required the difficult task of proving a negative, contrary to the general rule that he who holds the affirmative of the issue must prove it. *Hinchman v. Lawson*, 5 Leigh 695, 27 Am. Dec. 622.

### D. IMPEACHMENT OF WITNESSES.

See the title WITNESSES.

In an action for slander, the defendant may introduce evidence to prove particular facts, showing that the plaintiff's witnesses had feelings of ill will towards him, for although particular facts of hostility can not be proved to impeach the credit of witnesses, when supported by general reputation; still hostility towards one of the parties is not, in its nature, a matter of general reputation, and if proved at all, must be proved by particular facts and

circumstances. *Rixey v. Bayse*, 4 Leigh 330.

**Impeachment of Character for Veracity.**—A witness can not testify to particular facts, in order to discredit a witness, to whose general character for veracity he had before borne testimony, for the credit of a witness can be impeached by general evidence only, and not by evidence of particular facts of falsehood. *Rixey v. Bayse*, 4 Leigh 330.

## XI. Damages.

### A. SPECIAL DAMAGES.

Where words are not actionable *per se*, because they do not impute a crime to the plaintiff, or the having of a contagious disease, or do not affect him in his trade, profession or calling, etc., then there must be an averment and proof of special damage, and the present character of the special damage suffered must be specifically alleged in the declaration, such as the loss of customers, etc. 4 Min. Inst. (4th Ed.) 465; *Hansbrough v. Stinnett*, 25 Gratt. 495, 498; *Harman v. Cundiff*, 82 Va. 239, 244; *Hoyle v. Young*, 1 Wash. 150; *Moore v. Rolin*, 89 Va. 107, 111, 15 S. E. 520; *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358. See also, *Moseley v. Moss*, 6 Gratt. 534, 538; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

Where written or spoken words are actionable *per se* it is not necessary to aver or prove special damage, since in all such cases the law implies damage from the nature of the language used. When, however, the language does not import such defamation as will of course be injurious, and is therefore actionable only because it occasions special damage to the plaintiff—i. e., damage which, though the natural and immediate, is yet not the necessary result of the language used, there the damage must be both alleged and proved. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520.

**Loss of Customers as Special Damage.**—In an action for libel under § 2897 of the Virginia Code, where no special damage is claimed except from loss of customers, no proof can be received of the loss of any customers except those mentioned in the declaration. *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358.

**Names Need Not Be Alleged.**—In an action for libel for prematurely filing a mechanic's lien, the declaration should allege some special damage to the plaintiff, where the language of the lien does not necessarily import injurious defamation, but it is not necessary to give the name of any one whose custom has been lost to the plaintiff. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520.

## B. MITIGATION OF DAMAGES.

See post, "The Plea," XII, B.

**Apology.**—Under the statutes, the defendant may show in mitigation of damages that before the commencement of the action, or as soon thereafter as possible, he offered an apology to the plaintiff for his defamatory words. Va. Code, 1887, § 3375; Code of W. Va., ch. 130, § 47.

**The defendant may give retraction** in evidence by way of mitigation of damages. *McAlexander v. Harris*, 6 Munf. 465.

### Justification.

**When an Aggravation When a Mitigation of Damages.**—If a plea of justification is filed, and is entirely or very slightly sustained by the evidence, the filing of such a plea is an aggravation of the damages, the jury should find under the plea of not guilty; but if the evidence is strong to sustain the plea of justification, though it fails to establish fully this defense, yet it would tend to show a less degree of malice on the part of the plaintiff in uttering the words of publishing the libel, and should therefore be regarded as a mitigation of damages. The above rule is sustained by the weight of authority.

*Sweeney v. Baker*, 13 W. Va. 158, 206. Truth.

**Under the Statute of Insulting Words.**—As we have seen, the rule formerly was that under the statute of insulting words the truth could not be pleaded as a bar to the action, and as it was proper that it should in some manner be brought before the jury, it was allowed in mitigation of damages. *Moseley v. Moss*, 6 Gratt. 534; *Brooks v. Calloway*, 12 Leigh 466. 469.

**Improper Conduct of Plaintiff.**—In an action for slander at common law, evidence is not admissible under the general issue in mitigation of damages, which proves or tends to prove in any form or shape, the truth of the words. But, on the other hand, where defamatory words point to a specified act of the plaintiff, and the evidence offered in mitigation of damages neither proves nor tends to prove, or upon the whole negatives the truth of the words, it is admissible, where it shows the improper conduct of the plaintiff in relation to the transaction in question. *Bourland v. Eidson*, 8 Gratt. 27; *Cheatwood v. Mayo*, 5 Munf. 16; *McAlexander v. Harris*, 6 Munf. 465; *Moseley v. Moss*, 6 Gratt. 534.

In an action of slander, under the plea of not guilty, the defendant may, in mitigation of damages, prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of; but in fact relieve the plaintiff from the imputation involved in it. *Bourland v. Eidson*, 8 Gratt. 27.

**Perjury.**—In an action for slander for charging the plaintiff with perjury in a judicial proceeding, though it is improper to permit the defendant to prove the falsity of the plaintiff's words, and thus fix upon him the charge of perjury indirectly, yet he

may prove what those words were, in mitigation of damages. *Grant v. Hover*, 6 Munf. 13.

### C. AGGRAVATION OF DAMAGES.

**Repetition** of the slander, proving the defendant's ill will towards the plaintiff, may be given in evidence by way of aggravation. *Ex consequenti*, therefore, the defendant may give retraction in evidence, by way of mitigation of damages. *McAlexander v. Harris*, 6 Munf. 465.

### D. CHARACTER IN EVIDENCE.

Where the defamatory words for which an action of slander is brought import a direct attack upon the character of the plaintiff, evidence of his general bad character should be admitted in mitigation of the damages. Surely "a person of disparaged fame is entitled to the same measure of damages with one whose character is unblemished." *M'Nutt v. Young*, 8 Leigh 542; *Lincoln v. Chrisman*, 10 Leigh 338, 342; *Adams v. Lawson*, 17 Gratt. 250, 259.

As it is admissible for a plaintiff to introduce a witness to testify to his general character, when speaking on oath and when not on oath, as a man of truth, a fortiori is it admissible for the defendant to cross-examine the witness as to the plaintiff's general moral character, as the character of the prosecutor is of some importance in estimating the quantum of damages, and it is no hardship in holding that a plaintiff suing for his character must come prepared to defend it from general attacks. *Lincoln v. Chrisman*, 10 Leigh 338; *McNutt v. Young*, 8 Leigh 542; 4 Min. Inst. (4th Ed.) 469.

**Under plea of "not guilty"** the defendant may show, in mitigation of damages, the general bad character of the plaintiff for honesty. *Dillard v. Collins*, 25 Gratt. 343, 355; *McNutt v. Young*, 8 Leigh 542.

**General Bad Character of Plaintiff for Veracity.**—In an action for slander for falsely accusing the plaintiff of per-

jury, it is well settled that the defendant may offer proof of the general bad character of the plaintiff for veracity although it be not in issue, for the general character of the plaintiff is in issue in every declaration in slander, and moreover it is always to be considered by the jury in mitigation of damages, for "certainly one of disparaged fame, is not entitled to the same measure of damages, with one whose character is unblemished." This is true for actions under the statute as well as at common law. *McNutt v. Young*, 8 Leigh 542; *Moseley v. Moss*, 6 Gratt. 534.

**Evidence Must Be Relevant.**—In an action for slander it is inadmissible to ask a witness what the habits of the neighbors were with reference to social intercourse with the plaintiff, and upon a charge of horse stealing, it is inadmissible to ask a witness as to rumors in the neighborhood that the plaintiff had stolen a hog, the rule being that though the general bad character of the plaintiff is admissible in evidence, under the pleas of not guilty and justification, yet the inquiry must be limited to that specific matter with which he is charged. *Dillard v. Collins*, 25 Gratt. 343, 359.

**Particular Bad Traits.**—Particular bad traits of the plaintiff, in no way, connected with the defamatory charge, can not be shown in mitigation of damages. *McAlexander v. Harris*, 6 Munf. 465. See also, *Cheatwood v. Mayo*, 5 Munf. 16.

**Rebuttal by Plaintiff.**—Even before the defendant has introduced any evidence, in an action for libel, the plaintiff may introduce evidence to prove that prior to the publication of the libel, his general character for truth and honesty had been good, and the plaintiff is not precluded by the presumption that the law indulges in his favor, that his character is good, until the contrary appears. *Adams v. Lawson*, 17 Gratt. 250, 260; *Shroyer v. Miller*, 3 W. Va. 158, 161.

**Harmless Error.**—The fact that the presumption of law is in favor of the plaintiff's good character, and, therefore, no good could flow from permitting him thus to prove it, does not avail the defendant in the appellate court as he can not be heard to allege error here unless it appears that he is aggrieved by it. *Shroyer v. Miller*, 3 W. Va. 158.

#### **E. ANTECEDENT AND SUBSEQUENT SLANDERS.**

When the words laid in the declaration have been proved, then evidence of the speaking of like words, antecedent and subsequent to the words laid, is admissible. As the words are admitted only to effect the measure of damages, it would be contrary to both reason and authority to admit such evidence before proof of the words laid. *Hansbrough v. Stinnett*, 25 Gratt. 495, 506; *Harman v. Cundiff*, 82 Va. 239, 245.

#### **F. EXEMPLARY DAMAGES.**

See the title **EXEMPLARY DAMAGES**, vol. 5, p. 758.

#### **Wealth and Standing of Parties.**

**Wealth of Defendant.**—It is proper to instruct the jury that, if they believe from the evidence that the defendant spoke the defamatory words, and was actuated by actual malice towards the plaintiff, they may give exemplary damages, that the defendant's wealth is to be considered, only so far as it tends to show his rank and influence in society, but not to show his ability to pay. *Harman v. Cundiff*, 82 Va. 239, 246; *Womack v. Circle*, 29 Gratt. 192, 201. See also, 4 Min. Inst. (4th Ed.) 464.

**Standing of the Parties.**—In ascertaining the measure of damages, it is proper for the jury to consider the plaintiff's standing and that of the defendant. *Harman v. Cundiff*, 82 Va. 239.

In an action against a corporation to recover damages for the publication by its agent of a libel of the plain-

tiff, where it appears that the publication was not previously authorized nor subsequently ratified by the defendant, the plaintiff can only recover actual or compensatory damages, and it is error to instruct the jury that, in ascertaining the damages, they may consider the standing of the plaintiff and of the defendant. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

#### **G. RECOVERY LIMITED TO PLEADINGS.**

**Repetitions.**—After proving the words counted upon in the declaration, the plaintiff may give evidence of repetitions of them and of other similar statements made by the defendant, both before and after the time of the speaking of the words counted upon, but prior to the commencement of the action, for the purpose of showing the intent of the defendant in speaking the words complained of, but no damage can be given upon such repetitions or similar statements unless they are declared upon as causes of action. *Swindell v. Harper*, 51 W. Va. 381, 383, 41 S. E. 117.

### **XII. Pleading and Practice.**

See the title **PLEADING**.

#### **A. THE DECLARATION.**

##### **1. Alternative Allegations.**

A declaration in slander laying both counts in the alternative, that is to say, that the defendant spoke certain words, or words of the same import, is good after verdict. *Bell v. Bugg*, 4 Munf. 260.

##### **2. Definiteness and Certainty.**

**In General.**—A declaration in an action for libel which sets out the plaintiff's cause of action with sufficient fullness and clearness to apprise the defendant of the grounds of the plaintiff's claim, and to enable the defendant to plead to the action, is sufficient. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

Omitting the formal part of the dec-

laration, the wrong alleged in the first count is set out as follows: "Falsely, wickedly, and maliciously did compose, publish, by and through its agents, Foster & Bartow, who were at the time managers of the defendant's insurance business for the city of Richmond and state of Virginia, and acting within the scope and course of the business in which said agents were employed, caused to be published of and concerning the said plaintiff, a certain false, scandalous, malicious, and defamatory libel, by means of a letter dated March 7, 1901, mailed by said agents to, and received by, said plaintiff, containing the false, scandalous, malicious, defamatory, and libelous matter following." This is followed by the letter on which the action is based, and the usual allegations concluding a common-law count for libel or slander. It was held, that a demurrer to this declaration, on the ground that it does not sufficiently allege publication of the libel, is properly overruled. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 445, 44 S. E. 692.

It is an elementary rule of pleading that whatever is alleged must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo. *State v. Aler*, 39 W. Va. 549, 20 S. E. 585.

**Exact Words or Substance.**—"In Pennsylvania and Massachusetts, and probably some other states, in a charge for slander it is held unnecessary to set out the exact words, the substance being deemed sufficient, but in this state the words spoken must be set out, and not their substance. 13 Ency. Plead. & Pract. 46. This may account to some extent for the different holdings in regard to the action on the case in the nature of a conspiracy. The declaration in the present case appears to be predicated on two grounds of action, to wit, defamation and malicious prosecution or unlawful use of judicial process." *Porter v. Mack*, 50 W. Va.

581, 586, 40 S. E. 459; *Hansbrough v. Stinnett*, 25 Gratt. 495.

### 3. Declaration under Statute of Insulting Words.

If a proceeding be under the statute, which provides that all words which, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace, shall be actionable, the declaration must aver that the words from their usual construction and common acceptation are construed as insults, and tend to violence and breach of the peace, or else employ some other equivalent averment to denote that the words are actionable under the statute. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385; *Hogan v. Wilmoth*, 16 Gratt. 80; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Payne v. Tancil*, 98 Va. 262, 264, 35 S. E. 725; *Moseley v. Moss*, 6 Gratt. 534.

After the usual averment of the plaintiff's good character and reputation the declaration sets out the card published by the defendant on the twelfth of March, 1884, which it alleges to be malicious and libelous, and then, referring to the objectionable words therein, avers that they are such as, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace; by reason whereof, it concludes, the plaintiff has been greatly injured, etc. This undoubtedly is a good declaration for an insult under the statute. *Chaffin v. Lynch*, 83 Va. 106, 114, 1 S. E. 803.

**Demurrer.**—And where the declaration does not show by proper averments, that the action is under the statute, it may be demurred to as defective, unless it sets out properly, and in substantial compliance with the rules of pleading, such a charge as constitutes defamation at common law, and if the words charged do not amount to slander they can not be helped by the innuendo. *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534;

*Sweeney v. Baker*, 13 W. Va. 158, 210; *Shroyer v. Miller*, 3 W. Va. 158; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

#### 4. Libel in Course of Judicial Proceedings.

If a declaration on its face shows, that the libelous matters complained of were published in the due course of legal procedure, it will be held fatally defective on general demurrer, unless it further shows, that the libelous matters complained of are not absolutely privileged publications under the general rule, that all such publications are so privileged, by alleging facts that bring it within some exceptions to this general rule, such as, that the court had no jurisdiction, or that the libelous matters alleged were not pertinent to such judicial procedure. *Johnson v. Brown*, 13 W. Va. 71.

#### 5. Action for Prematurely Filing Mechanic's Lien.

In an action for libel in prematurely filing a mechanic's lien, the declaration need not state that the alleged lien has been ended by limitation or decree. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520, distinguishing *Young v. Gregorie*, 3 Call 446, holding that in an action for malicious prosecution in suing out an attachment without cause, the declaration must aver that the attachment has been ended.

#### 6. Imputation of Crime.

**The Crime Must Be Clearly Set Forth.**—When the ground of defamation is, that the words or writing impute to the plaintiff a criminal offense, it must be made to appear so, clearly and unequivocally, either by the words themselves, or if they do not necessarily express that meaning, any doubt that exists must be removed by proper averments in regard to the subject matter of the discourse. *Moseley v. Moss*, 6 Gratt. 534; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Johnson v. Brown*, 13 W. Va. 71.

#### Particulars of Offenses Need Not Be Set Out with Strictness Required in Indictment.

It is not indispensable in an action for slander at common law, upon a charge of perjury to set out and charge all the facts constituting the offense with the same technical strictness required in an indictment for the same offense. *Shroyer v. Miller*, 3 W. Va. 158.

#### 7. Averment That Words Were Spoken of Plaintiff by Defendant.

A declaration, in slander, containing a mere recital of slanderous words, and no direct charge that those words were spoken of the plaintiff by the defendant, is insufficient to maintain an action of this kind, and judgment will be arrested after the verdict is rendered. It is a well-settled rule of pleading that the pleader must guard against statements made under the quodcum. *Donaghe v. Rankin*, 4 Munf. 261; *Hord v. Dishman*, 2 Hen. & M. 595; *Moore v. Dawney*, 3 Hen. & M. 127, 271; *Syme v. Griffin*, 4 Hen. & M. 277.

In order that an action for libel or slander may be maintained, it must be averred and shown that defamatory or slanderous words were spoken of and concerning the plaintiff, or that they were spoken in a conversation or colloquium concerning the plaintiff, and the words charged must clearly import that they related to him. In other words the defamation must refer to some ascertained or ascertainable person, i. e., the plaintiff, and if no person appears to be slandered in particular, the averment or innuendo can not make them defamatory. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995; *Cave v. Shelor*, 2 Munf. 193.

"The defamation, however, is not sufficiently averred to justify a judgment against either of the defendants, for it nowhere shows which one of the defendants uttered or published the words charged." *Porter v. Mack*, 50 W. Va. 581, 586, 40 S. E. 459.

#### 8. Averment of Malice.

In every instance of slander, whether



verbal or written, malice is an essential ingredient and must be expressly or substantially averred. Confidential or privileged communications are an exception to this rule. *Chaffin v. Lynch*, 83 Va. 106, 116, 1 S. E. 803; *S. C.*, 84 Va. 884, 6 S. E. 474; *Dillard v. Collins*, 25 Gratt. 343, 351; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71.

#### 9. Averment of Publication.

In an action of libel based upon a letter mailed by the defendant to and received by the plaintiff, an allegation in the declaration that the defendant, through its agents, did publish and cause to be published "a certain false, scandalous, malicious and defamatory libel by means of a letter" mailed by defendant's agents to and received by the plaintiff, containing the defamatory matter, is a sufficient allegation of the publication of the libel. The publication may have been before or after mailing the letter, by dictation to a stenographer, or by otherwise making known the contents of the letter to others. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

Where the allegation is that the slander was published in the presence of three named persons, and it appears from the evidence that only two of the named persons were present together, upon the trial, after the evidence is in, the court may allow the declaration to be amended, striking out the name of the person who is not present. *Harman v. Cundiff*, 82 Va. 239, 242.

#### 10. Duplicity.

If a declaration in a libel suit sets forth, in what is drawn in the form of one count, that the defendant on a given day published a libel against the plaintiff, containing in one part certain specified libelous allegations, and also containing in another part certain other specified libelous allegations of an entirely different character, this is nevertheless but one count, it being

entirely formal, by the rules of common law, to set forth in this manner all the libelous allegations published at one time. *Sweeney v. Baker*, 13 W. Va. 158.

When it is objected that distinct libelous allegations are contained in one count, the defendant may plead separately to either or both parts of the count, but the objection can not be taken by demurrer now, as duplicity is an error of form only and can only be reached by special demurrers, which have been abolished. Code, W. Va., ch. 125, § 29; Va. Code, ch. 15, § 3272. *Sweeney v. Baker*, 13 W. Va. 158.

#### 11. Amendment of Declaration.

**Variance.** — Where a declaration charges that the slanderous words were uttered in the presence of three named persons, and proof is that one of the three was not present, the declaration may be amended at the trial as the variance is immaterial. *Harman v. Cundiff*, 82 Va. 239; *Hansbrough v. Stinnett*, 25 Gratt. 495, distinguished in above case.

#### 12. Joinder of Causes of Action.

See the title ACTIONS, vol. 1, p. 135.

It is a well-settled principle of law, that common-law and statutory causes of action for slander can not be blended in the same count. *Chaffin v. Lynch*, 83 Va. 106, 115, 1 S. E. 803; *Payne v. Tancil*, 98 Va. 262, 266, 35 S. E. 725; *Moseley v. Moss*, 6 Gratt. 534, 547; *Bourland v. Eidson*, 8 Gratt. 27, 39; *Sweeney v. Baker*, 13 W. Va. 158; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *Hogan v. Wilmoth*, 16 Gratt. 80.

Common-law libel and an action for insulting words under the statute can not be blended in one count of a declaration, but where it satisfactorily appears that a count was intended to be a count under the statute it will be upheld, because a publication containing insulting words may be declared on

under the statute, although libelous at common law. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692, citing *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

"It will be seen in this case, that the whole structure of the declaration indicates an action for defamation at common law, except that the words are charged to be insulting as well as slanderous; which word insulting would seem to have been introduced for the purpose of enabling the plaintiff to recover for an insult under the 8th section of the act to suppress dueling, Supp. Rev. Code, p. 284, if his evidence should fail on the trial to make out a case of common-law slander. This mode of declaring in one and the same count of the declaration for a common-law defamation and an insult under the statute, is not allowable. *Moseley v. Moss*, 6 Gratt. 534, and therefore open to demurrer. But the defendant having failed to avail himself of the misjoinder by demurrer, a question might occur whether the plaintiff might not recover, for an insult, though he should fail to establish a common-law defamation; and if so, whether the defendant would not be at liberty to prove any mitigating circumstances which would be allowable in an action founded upon the statute. These, however, are questions which do not require consideration in this particular case; for in regard to the evidence stated in the second bill of exceptions, the same being admissible in an action for common-law defamation, it would be at least equally so in an action founded upon the statute; and in regard to the evidence stated in the first bill of exceptions, the reasons for excluding it are equally strong, whether in an action for a slander, or in an action for an insult." *Bourland v. Eidson*, 8 Gratt. 27, 39.

### 13. The Inducement, Colloquium and Innuendo.

#### Necessity of.

**In General.**—Where words do not

ex vi termini convey an actionable imputation it is permissible and necessary to show that they were used in an actionable sense, by taking into consideration the facts and circumstances, and the intention of the person who published the defamatory language, and this is done by means of the inducement, colloquium, and innuendo. *Hansbrough v. Stinnett*, 25 Gratt. 495, 497; *Moseley v. Moss*, 6 Gratt. 534.

**Office of Inducement.**—It is the office of the inducement, or averment as it is frequently termed, to show that words, which bear upon their face a doubtful meaning, if taken in connection with the discourse that lead up to them, and the extrinsic facts and circumstances, impute a criminal offense or dishonesty in one's calling or profession. *Moseley v. Moss*, 6 Gratt. 534; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Hansbrough v. Stinnett*, 25 Gratt. 495, 497. See also, *Johnson v. Brown*, 13 W. Va. 71.

**Office of Colloquium.**—It is the office of the colloquium to show that words, not on their face actionable, when taken with reference to pre-existing or extrinsic facts, spoken with reference to them, are actionable. The conversation or discourse of the defendant, at the time the words were spoken, may have an important bearing on their meaning. Thus, in an action at common law for a charge of false swearing, it is the office of the colloquium to show the judicial proceeding in which the evidence was given, and that the charge had reference to the evidence given in that proceeding. The essentials of explanation are the averments of pre-existing facts and the colloquium concerning them. 4 Min. Inst. (4th Ed.) 462; *Hogan v. Wilmoth*, 16 Gratt. 80; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Moseley v. Moss*, 6 Gratt. 534, 550; *Shroyer v. Miller*, 3 W. Va. 158, 160; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

Words are actionable, without a colloquium, if they consist of a statement

of facts or matters which clearly and unequivocally impute to the party charged a criminal offense involving moral turpitude, or which would subject him to an infamous punishment. To say of a man that he is "keeping" a woman imports in the connection in which it is used in this case that he has criminal intercourse with her. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

**Words Not Actionable Per Se Helped by Colloquium.**—Though words are not actionable in themselves at common law, yet it may be shown by the averment of extrinsic facts and by the colloquium in the introductory part referring to them, that they have that meaning. 4 Min. Inst. (4th Ed.) 379; *Hansbrough v. Stinnett*, 25 Gratt. 493, 498; *Harman v. Cundiff*, 82 Va. 239, 244 (rascal, cheat, villian, not actionable without colloquium); *Cave v. Shelor*, 2 Munf. 193, 194 (colloquium not averred).

**Colloquium.—How Actionable Charge Made.**—Either the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable, and the precise words spoken must be set out, and it is not sufficient merely to set them out in substance. *Hansbrough v. Stinnett*, 25 Gratt. 495.

In an action for slander at common law, the words charged are, "D. killed my beef." There being no colloquium, the words not necessarily importing a felony, they can not be extended in their meaning by the innuendo. In such case, the words themselves not being actionable at common law, unless the averment of extrinsic facts and the colloquium concerning them show that the defendant in speaking the words laid, imputed the crime of felony, they are not actionable. *Hansbrough v. Stinnett*, 25 Gratt. 495.

**Must Be Understood by the Hearers.**

- An accusation of crime must be in

precise terms, or have such a plain allusion to some prior transaction that the hearers of the words must necessarily have understood that the slanderer meant to impute to the plaintiff the guilt of some punishable offense. *Harman v. Cundiff*, 82 Va. 239.

**Office of Innuendo.**

**In General.**—The office of the innuendo is to designate, not enlarge, the meaning of words; but where the words are unambiguous and actionable in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Moseley v. Moss*, 6 Gratt. 534, 549; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *Hansbrough v. Stinnett*, 25 Gratt. 495, 499; *Johnson v. Brown*, 13 W. Va. 71, 109; *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, 588; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

The office of an innuendo is to show how the words used are defamatory, and how they relate to the plaintiff when that is not clear on their face. It can not introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain. *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385.

"The law proceeds on the hypothesis that what is the ordinary meaning and nature and intrinsic force of language is a question of law. When, therefore, words are set forth as having been spoken by the defendant of the plaintiff, the first question is whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo undertaking to state the same in other words is useless and superfluous. If they do not, such an innuendo can not aid it. It therefore often happens that where innuendoes are added which do alter and vary, and even inflame and exaggerate, the sense of the words much beyond their natural force and meaning, yet such innuendoes are held not to vitiate the declaration; the reason of which I take to be this: The words themselves imputing an in-

famous offense, the innuendo may be rejected as surplusage; and, as the plaintiff is not allowed to go into evidence aliunde to show that the words were in fact used in the sense imputed by the innuendo, they can have no influence whatever. But if the words do not impute such infamous crime by their natural sense and meaning, then, as a general rule, the plaintiff is not entitled to recover; and, as he can not enlarge that meaning by an innuendo so as to let in proof of extraneous facts, his action must fail." To the same effect, see *Payne v. Tancil*, 98 Va. 262, 264, 35 S. E. 725, and *Moseley v. Moss*, 6 Gratt. 534. *Moss v. Harwood*, 102 Va. 386, 390, 46 S. E. 385.

**Averment and Colloquium Can Not Be Helped by the Innuendo.**—If the accusation is not made by the words spoken, taken in connection with the colloquium and averment, it can not be supplied by the innuendo. It is a clear rule of law, that the innuendo can not introduce a broader meaning than that which the words, taken in connection with the averment and the colloquium, would naturally bear. *Hansbrough v. Stinnett*, 25 Gratt. 495, 502; *Harman v. Cundiff*, 82 Va. 239, 244; *Johnson v. Brown*, 13 W. Va. 71, 108; *Moseley v. Moss*, 6 Gratt. 534, 550; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

The office of an innuendo is to designate, not to enlarge, the meaning of the words spoken, and in this state it is wholly immaterial whether the designation imputes to the plaintiff adultery or fornication, as each is equally punishable under § 3786 of the Code. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

**Certainty as to Person Defamed.**—An innuendo can not make the person certain who was uncertain before. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995.

**Surplusage.**—In an action of libel where the writing on its face relates

to the plaintiff and the words are libelous in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Adams v. Lawson*, 17 Gratt. 250; *Moseley v. Moss*, 6 Gratt. 534; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725.

**Under Enlargement of Meaning.**—Moreover an innuendo can not introduce new matter, nor enlarge, change, or extend the natural sense or meaning of the alleged defamatory words, and if the words charged do not amount to slander, they can not be helped by the innuendo. *Moseley v. Moss*, 6 Gratt. 534; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995; *Harman v. Cundiff*, 82 Va. 239, 244; *Hansbrough v. Stinnett*, 25 Gratt. 495, 498; *Johnson v. Brown*, 13 W. Va. 71, 107; *Hogan v. Wilmoth*, 16 Gratt. 80.

The inducement in a declaration in libel suit is that the plaintiff had been the general superintendent of a certain corporation. The libelous writing was alleged to be as follows: "The plaintiff was, through his own and his brothers' influence, placed and retained in the general management of, said corporation during the years 1871, 1872 and 1873 for their own private and individual gain, and not the corporation's; that especially during the year 1873 the plaintiff in the libel suit did use, and employ, the goods, money, means and credit of the said corporation for his own use, and his brother's private use, business and benefit; that he took the goods and money of the said corporation to pay his own employee; that he borrowed money, and used it in his own business, and gave said corporation's notes therefor; that he and his wife purchased goods, wares and merchandise of divers persons and at various times during the years 1871 and 1872, and especially during the year 1873, for their own and friends' use, and had them charged to the corporation." The allegations being set forth in the declaration, the innuendo was: "Thereby meaning that the

plaintiff had embezzled the goods and money of said corporation." The allegations without any innuendo would not be libelous in themselves; and the innuendo improperly extended the meaning of these words. And if the publication of these words had been all that was complained of in the declaration, a general demurrer to the declaration ought to have been sustained. *Johnson v. Brown*, 13 W. Va. 71.

But if such a declaration alleged the publication of a writing in these words: "The said plaintiff in the slander suit, and others, have been, and are, conspiring to defraud the other stockholders in said corporation, to divert the means, money and credit of the corporation to their own individual use and ends, and against the interest and welfare of the other stockholders in the said corporation;" and the innuendo is, "thereby meaning, that the plaintiff, while acting as the general superintendent and agent of said corporation, defrauded the said corporation, and conspired with other persons to defraud and cheat said corporation." this language without any innuendo was libelous; and the innuendo did not extend the meaning of the words. And as this allegation is in its nature distinct and divisible from the others, the defendant could not properly demur to the whole declaration; and such a demurrer ought to be overruled. *Johnson v. Brown*, 13 W. Va. 71.

**Not Capable of Proof.**—As an innuendo is merely explanatory of that which is already expressed, it is not capable of proof. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. 995; *Hogan v. Wilmoth*, 16 Gratt. 80.

**Explanation.**—An innuendo may serve for an explanation to point out a meaning, where there is precedent matter expressed, and necessarily understood or known, but never to establish a new charge. *State v. Aler*, 39 W. Va. 549, 20 S. E. 585; *Argabright v. Jones*, 46 W. Va. 144, 32 S.

E. 995, 997. See *Moseley v. Moss*, 6 Gratt. 534, 550.

**Undue Enlargement Not Ground for a Demurrer.**—Still if words spoken are per se actionable, the fact that the innuendo enlarges their meaning, and attributes to them a signification they do not bear, does not render them demurrable, because the words themselves being actionable, the innuendo is a surplusage and may be rejected, without vitiating the count or declaration. If the words in the declaration or count are sufficient in themselves, the innuendo, as we have seen, is useless; but if they are not sufficient in themselves, they can not be aided by the innuendo. *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725. See also, *Johnson v. Brown*, 13 W. Va. 71, 107, 108.

**Innuendo Insures Certainty.**—It is an elementary rule of pleading that whatever is alleged, must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo. *Townshend on Slander and Libel*, § 335; *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, 588.

But an innuendo can not give a meaning to words which they do not necessarily import, either of themselves independently of any other circumstances, or with necessary reference to some other circumstances occurring at the time of the accusation; an innuendo being explanatory of subject matter sufficiently expressed before, and that only. *Hansbrough v. Stinnett*, 25 Gratt. 495, 499; *Johnson v. Brown*, 13 W. Va. 71, 108; *Moseley v. Moss*, 6 Gratt. 534, 550.

**Surplusage.**—Where the words are unambiguous and actionable in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Moseley v. Moss*, 6 Gratt. 534, 549; *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725; *Hansbrough v. Stinnett*, 25 Gratt. 495, 499; *Johnson v. Brown*, 13 W. Va. 71, 109; *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, 588.

When the writing on its face, in an action of libel, relates to the plaintiff and the words are libelous in themselves, the innuendo is unnecessary, and may be rejected as surplusage. *Adams v. Lawson*, 17 Gratt. 250.

**Province of Court.**—It is the duty of the court to determine, whether a publication is capable of the meaning ascribed to it by the innuendo. *Johnson v. Brown*, 13 W. Va. 71, 107.

## B. THE PLEA.

### 1. Justification.

#### **Necessity of Pleading Justification.**—

If the defendant intends to justify the speaking of the words, he must file a plea of justification in order that the plaintiff may know what defense he is to meet. *Cheatwood v. Mayo*, 5 Munf. 16; *McAlexander v. Harris*, 6 Munf. 465; *Bourland v. Eidson*, 8 Gratt. 27.

If a defendant has a special justification, he must plead it. *Kerr v. Dixon*, 2 Call 379.

#### **"Good Motives and Justifiable Ends."**

—But it is not necessary for a plea, in an action for verbal slander to show that the charges were made "with good motives and justifiable ends," as this requirement, contained in art. 3, § 8, of the West Virginia constitution, applies strictly to actions for libel, and does not include actions for defamation or verbal slander. Section 47, ch. 130 of the Code of West Virginia applies to actions for defamation, and only requires allegations and proof that words written or spoken are true. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

**Evidence Admissible under Plea of Justification.**—The general bad character of the plaintiff may be given in evidence under the plea of justification. *M'Nutt v. Young*, 8 Leigh 542.

#### **Truth of Defamation.**

**Necessity of Pleading.**—It seems to be settled that if the defendant does not put in issue, as provided by statute, the truth of the words imputing

crime, he has no right to adduce in any way, evidence tending to prove the truth of the same. *Swindell v. Harper*, 51 W. Va. 381, 41 S. E. 117.

**Manner of Pleading.**—It seems to be well settled by the authorities that the truth of the defamatory matter, if intended to be relied on as a defense, must be pleaded specially; that it can not be given in evidence under the general issue. *Hogg*, Pl. & Forms, § 244. And such special plea, to be good, must specify the particular facts which show the general charge to be true. *Sweeney v. Baker*, 13 W. Va. 158; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Folk v. Starkie*, Sland. & L. p. 523, note 16; *Warner v. Clark* (La.), 13 South. 203, 21 L. R. A. 502. "Where a defamatory charge is made in general terms, it can only be justified by a specification of the facts which are relied on to establish its truth." *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821, 825.

**Truth Must Be Specially Plead.**—In an action for defamation, if the defendant would rely on the truth of the matter declared on, he must plead it specially, or he can not give it in evidence at the trial. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821.

#### **Plea Justifying Charge of Perjury.**—

A plea justifying a charge of perjury must allege that the matter or thing about which the false words were spoken, was material to the issue; otherwise it is bad. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

#### **Privilege.**

#### **Plea Need Not Deny Express Malice.**—

If the declaration alleges facts showing that the libelous allegations come within some exceptions to the general rule, a plea denying that they come within some exception to the declaration, by alleging that the court had jurisdiction, or that the libelous allegations were pertinent to the cause, as the case may be, is a good plea in bar, though it does not deny

express malice. *Johnson v. Brown*, 13 W. Va. 71.

**Judicial Proceedings — Pertinent—Honest Belief.**—Moreover, a plea, that the libelous matters complained of were only published in the pleadings in a cause, instituted according to the regular course of judicial procedure, and that the defendant had reasonable cause to believe and did actually believe, that they were pertinent to the cause, is a good plea in bar; and such a plea need not deny express malice. *Johnson v. Brown*, 13 W. Va. 71.

**When Plea Must Deny Malice.**—But if there is no allegation in the plea, that the libelous allegations were pertinent, or that the defendants had reasonable cause for believing, and did actually believe them to be pertinent to the cause, it must then deny malice in the publication, or the plea will not be a good plea in bar. *Johnson v. Brown*, 13 W. Va. 71.

## 2. Matters Provable under General Issue.

**In General.**—It is a well-settled rule that where a party can not take advantage of special matter bearing upon the measure of damages, by pleading, he may give it in evidence under the general issue. *Lincoln v. Chrisman*, 10 Leigh 338, 343, citing *McNutt v. Young*, 8 Leigh 542, as authority.

**Privilege.**—It is well settled that the defense of privilege may be shown under the general issue. *Dillard v. Collins*, 25 Gratt. 343, 352; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177; *Johnson v. Brown*, 13 W. Va. 71; *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 875.

"The defendant may, under the general issue, show that the alleged defamation consisted in a communication on matters of business made by or to persons interested in the subject matter of the communications, although they affect the character or credit of the plaintiff. *Id.*, p. 788. *Greenleaf on Evidence* (vol. 2, § 421), under 'Defense under the General Issue,'

says: 'So, if a person having information materially affecting the interests of another honestly communicates it privately to such other party in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the matter, and though no inquiry has been made of him, and though the danger to the other party is not imminent.'" *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 876.

**Character.**—In an action for slander the general bad character of the plaintiff is admissible in evidence under the pleas of not guilty and justification. *Dillard v. Collins*, 25 Gratt. 343, 359.

**General Bad Character for Veracity.**—Under the plea of not guilty, the defendant may show, in mitigation of damages, the general bad character of the plaintiff for veracity when on oath. *McNutt v. Young*, 8 Leigh 542.

**Libels in Pleadings.**—If a declaration on its face shows that the libelous matters complained of were published in the due course of legal procedures, a plea denying that they come within such exception, named in the declaration, by alleging, that the court had jurisdiction, or that the libelous allegations were pertinent to the cause, may be proved under the general issue. And upon the trial on such issue if it appear, that the libelous allegations were published in the due course of legal procedure, though it be proved, that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice, to entitle him to recover. The simple fact that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, rebuts the prima facie presumption of malice, and makes it incumbent on the plaintiff to prove express malice, the

case being what is called a conditionally privileged publication. *Johnson v. Brown*, 13 W. Va. 71.

A plea that the libelous matters complained of were only published in the pleadings in a cause, instituted according to the regular course of judicial procedure, and that the defendant had reasonable cause for believing, and did actually believe, that they were pertinent to the cause, may be proved under the general issue. *Johnson v. Brown*, 13 W. Va. 71.

If a declaration on its face shows that the libelous matters complained of were published in the due course of legal procedures, if there is no allegation in the plea, that the libelous allegations were pertinent, or that the defendants had reasonable cause for believing, and did actually believe, them to be pertinent to the cause, these may be proved under the general issue. *Johnson v. Brown*, 13 W. Va. 71.

#### **Justification of Charge of Perjury.—**

In an action of slander for charging the plaintiff with perjury in a judicial proceeding, the defendant on the plea of not guilty (though not permitted to show the falsity of the words sworn to by the plaintiff) may prove what those words were, in mitigation of damages. *Grant v. Hover*, 6 Munf. 13. See also, *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. 415; *Brooks v. Calloway*, 12 Leigh 466.

**Truth, Good Motives.**—The truth, and that the publication was made with good motives and for justifiable ends, can not be given in evidence under the general issue. *Sweeney v. Baker*, 13 W. Va. 158; *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821.

#### **Matters in Mitigation of Damages.**

**In General.**—The authorities in regard to the evidence proper under the general issue in mitigation of damages, are numerous, and a good deal conflicting; and the difficulties which have embarrassed the courts seem to have arisen out of opposing considerations

entirely proper in themselves, but often hard to be reconciled; the propriety and justice, on the one hand, of submitting to the jury the ungarbled merits of the controversy, so as to enable them to give to the plaintiff the full damages he ought to recover, and no more; and on the other hand, the policy and necessity of excluding evidence irrelevant to the substance of the grievance, or to the issue joined between the parties. *Bourland v. Eidson*, 8 Gratt. 27, 31.

In such cases, it is often important that the jury should have some information of the transaction to which the words refer, in order to understand correctly their true import and meaning, and the design with which they were spoken. The defendant may, through ignorance or excitement, misapprehend the plaintiff's conduct, or use inappropriate language and epithets in the expression of his indignation or resentment; and yet that conduct may have been wholly unwarranted, or extremely injurious or provoking. The aggravation of a fraud or a trespass into a felony, whether from ignorance or exasperation, surely stands upon a different footing in regard to the quantum of damages, from a sheer fabrication. Thus if a party should obtain the money of another by a fraudulent contrivance, or dishonest breach of trust, or his property by open violence under a false claim of title, and the party injured in speaking of the transaction should designate it, in the former case as a theft, or in the latter as a robbery, a recovery of heavy damages in an action of slander would not be so much for actual defamation, as of inaccurate phraseology. And if a plaintiff, without moral guilt, but to disport himself with the fears or feelings of the defendant, has misled or provoked him to the use of defamatory words, this should be made known to the jury, otherwise the plaintiff, to a greater or less extent, would recover damages for his own misbehavior. In the cases



mentioned, the defendant could not protect himself from heavy damages under the plea of justification, inasmuch as the evidence would not prove or tend to prove the truth of the words; and yet, for that very reason, and because they were begotten, as it were, by the plaintiff's own misconduct, the evidence is proper under the general issue in mitigation of damages. Of this the plaintiff has no right to complain, for he suffers no injustice, nor is he taken by surprise, the particular transaction being pointed to by the words themselves, and the defendant not having declined any privilege of pleading the matter specially, inasmuch as such pleading was beyond his competency. The admissibility of evidence such as above mentioned in mitigation of damages is warranted by the spirit of familiar doctrines. *Bourland v. Eidson*, 8 Gratt. 27, 35.

In an action for slander under the plea of not guilty, the defendant may in mitigation of damages prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but in fact relieve the plaintiff from the imputation involved in it. *Bourland v. Eidson*, 8 Gratt. 27.

Evidence is not admissible under the general issue, in mitigation of damages, which proves, or tends in any form or shape to prove, the truth of the words. *Bourland v. Eidson*, 8 Gratt. 27, 34.

In *Grant v. Hover*, 6 Munf. 13, in an action for charging the plaintiff with perjury, the defendant was permitted to prove under the general issue what the plaintiff did swear to, though not its falsity.

The defendant may prove, as a complete defense under the general issue, that the publication of the defamatory

words was procured by the contrivance of the plaintiff for the purposes of the action. *Bourland v. Eidson*, 8 Gratt. 27, 36.

**Circumstances of Suspicion.**—In order to justify a slanderous charge, proof of circumstances of suspicion, not amounting to full justification, are not admissible, under the general issue, in mitigation of damages. Such a proceeding is altogether inadmissible, being not only contrary to justice and policy, but also injurious to the plaintiff, as tending to entrap and surprise him at the trial. *McAlexander v. Harris*, 6 Munf. 465; *Cheatwood v. Mayo*, 5 Munf. 16; *Sweeney v. Baker*, 13 W. Va. 158, 203. But see Va. Code, ch. 176, § 44 (also in force in W. Va.), for the change it wrought in the above rule.

### 3. Definiteness and Certainty.

**Pleas Must Not Be General.**—A general plea, that the libelous matter charged is true and was published with good motives and for justifiable ends, is not a good plea, where the libelous matter is a general charge. In such case the plea to be good, must specify the particular facts which show the general charge to be true, and must, unless the declaration shows it on its face, further allege the particular facts which show, that the end, for which the publication was made, was justifiable, and it would be insufficient, without so doing, to allege generally, that the motives were good and the ends justifiable. This applies equally to suits for common-law defamation, to libels, and to statutory suits for the publication of insulting words. *Sweeney v. Baker*, 13 W. Va. 158.

**Specification of Facts as Justification.**—When a defamatory charge is made in general terms, it can only be justified by specification of the facts which are relied on to establish its truth. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821.

#### 4. Surplusage.

A plea ought to be rejected, which is an allegation of the truth of a distinct portion of the libelous charges, contained in a count for a common law libel, and that it was published with good motives and justifiable ends, when the portion of this charge was not at common law libelous, as such a portion of a charge inserted in the declaration must be regarded as a surplusage. But such plea ought to be received, if pleaded to such a portion of the charges in a count in a suit brought under the statute for insulting words, as no distinct portion of such charges can be treated by the court as surplusage. *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

#### 5. Separate Pleas.

If a declaration in a libel suit set forth, in what is drawn in the form of one count, that the defendant on a given day published a libel against the plaintiff, containing in one part certain specified libelous allegations, and also containing in another part certain other specified libelous allegations of an entirely different character, to the two distinct libelous allegations contained in such a count, distinct pleas could be filed. *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

#### 6. Conclusion of Pleas.

A plea in bar, that the libelous matter was published only in a pleading in the regular course of judicial procedure, and was pertinent thereto, should conclude with a verification by the record, as it proposes for decision a question of law, and not one of fact. *Johnson v. Brown*, 13 W. Va. 71.

#### 7. Appellate Practice.

In an action for defamation, where a special plea of justification is permitted to be filed, which undertakes to justify all the charges in the declaration, but is insufficient in its specifications as to any one of them, and other special pleas are filed, justifying, by proper specifications, certain of the

charges, and on the trial it appeared that the defendant offered no evidence to the jury to prove the truth of any of the charges not specifically justified in such other pleas, the appellate court will regard the filing of this insufficient plea, a harmless error. *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821.

#### C. REPLICATION OR REPLY.

In case, for slander, if the defendant plead the word "justification" only, and the plaintiff reply generally, a verdict for the defendant should be set aside, and a repleader awarded. *Kirtley v. Deck*, 3 Hen. & M. 388, 391, citing and approving *Kerr v. Dixon*, 2 Call 379. In this connection, *Kerr v. Dixon*, 2 Call 379, is further cited in *Rice v. White*, 4 Leigh 474, 481.

But a verdict for the plaintiff ought not to be set aside, it being a rule, that a repleader is not grantable in favor of the person who made the first fault in pleading. *Kirtley v. Deck*, 3 Hen. & M. 388.

#### D. DEMURRER.

See ante, "The Statute of Insulting Words," II, G; "The Declaration," XII, A.

#### E. JURISDICTION AND VENUE.

See the titles JURISDICTION, vol. 8, p. 842; VENUE.

In West Virginia, a justice shall not have cognizance of any action of slander, verbal or written. W. Va. Code, 1899, ch. 50, § 1963.

In an action of slander brought by the plaintiff in the court of hustings for the city of Richmond, declaration began thus: "City of Richmond, to wit." It then proceeded to lay the words to have been spoken "In the city aforesaid." It was held, that the declaration was insufficient because it did not lay the cause of action to have arisen within the jurisdiction of the court. *Thornton v. Smith*, 1 Wash. 81.

#### F. LIMITATION OF ACTIONS.

See the title LIMITATION OF ACTIONS.

An action for slander is a mere personal action, and therefore is barred in West Virginia in one year from the time the action accrued. And neither conspiracy nor consequential or special damages to business or property can change the nature of a personal action so as to prevent the bar of the statute of limitations. *Porter v. Mack*, 50 W. Va. 581, 592, 40 S. E. 459.

### G. INSTRUCTIONS.

See the title INSTRUCTIONS, vol. 7, p. 701.

#### 1. In General.

Where the court undertakes to state a case upon which the plaintiff should recover, it must state a complete case, and embrace all the elements necessary to support a verdict, but an incomplete statement of the law in one instruction may be cured by a complete statement in another, if when the two are read together the court can see that the jury could not have been misled by the incomplete instruction. Thus an instruction must not make malice alone the criterion of the right of the plaintiff to recover in libel, and wholly leave out of view the question of publication which is an essential element of libel. *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692.

#### 2. Singling Out and Giving Undue Prominence to Particular Facts.

Where an instruction singles out certain facts which the evidence may have a tendency to prove, but omits the facts so prominently shown that the words uttered, from the circumstances immediately attending their utterance, might well be considered and believed by the court and jury to be privileged communications, such instruction is erroneous. And if excepted to, and not cured, is ground for reversal. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873.

#### 3. Must Be Based on Evidence.

It was held, in *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358, that the court may properly refuse an in-

struction submitting the question of malice to the jury where "there is no legal evidence in the record to suggest malice," but where there is evidence tending to show malice in the utterance of the words spoken, or in the published communication, that question can not be properly taken from the jury.

"We do not mean to question at all the soundness of the ruling in *Reusch v. Roanoke, etc., Co.*, 91 Va. 534, 22 S. E. 358, and other authorities cited and relied on by defendant in error, that the trial court may properly refuse an instruction submitting the question of malice to the jury 'when there is no legal evidence in the record to suggest malice,' etc., or may not instruct the jury in such a case that there is not such evidence in the record, but we do mean to say that when there is any legal evidence in the case tending to prove that the language spoken or written was disproportional in strength and violence to the occasion when spoken or written, though the occasion was privileged, which may raise an inference of malice, thereby destroying the privilege that would otherwise attach to it, the question of malice in the use of the words spoken or written can not be properly taken from the jury." *Farley v. Thalheimer*, 103 Va. 504, 509, 48 S. E. 644.

#### 4. Privileged Communications and Malice.

"The occasion of the publication was clearly privileged, and the jury ought to have been instructed to find for the defendant, if they believed from the evidence that it had not been abused; that is to say, that the defendant had not laid hold of the occasion as a mere color or excuse for gratifying his private malice with impunity, but had honestly and reasonably acted in the performance of a duty, or in the protection of his own interest." *Chaffin v. Lynch*, 83 Va. 106, 122, 1 S. E. 803.

"The onus lies on the plaintiff of

proving actual malice, and the court erred in telling the jury, in instruction No. 2, that 'if they believed, from the evidence, that the slanderous words, or any of them, charged in plaintiff's declaration, were uttered by the defendant against or about the plaintiff, the law will presume that the said words were uttered maliciously, and with intent to injure the plaintiff,' without at the same time telling them that said presumption would be overthrown if the circumstances showed that the utterances were privileged, and in such case the onus of proving malice would be upon the plaintiff." *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 876.

"Instruction No. 6 is erroneous in that it fails to inform the jury as to the result of the words charged in the declaration to have been uttered were privileged. Whenever, in answering an inquiry, the defendant is acting bona fide in the discharge of any legal, moral, or social duty, his answer will be privileged." *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873, 876.

It is erroneous to instruct the jury that "if they believe, from the evidence, that the defendant has failed to show that said words were privileged, then they should find for the plaintiff," because the question as to whether the words uttered were privileged was not a question for the jury, but was one of law for the court upon the facts proven. *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873.

##### 5. Damages.

The sixth assignment is as to the instruction given by the court to the jury as follows: "The jury are instructed that if they believe from the evidence that the defendant, within twelve months before October, 1884, spoke of and about the plaintiff the defamatory words charged in either count of the declaration, and that he was actuated by actual malice towards the plaintiff, they may give exemplary damages, and in ascertaining the dam-

ages they shall consider the plaintiff's standing and that of the defendant, and the wealth of the defendant is only to be considered so far as it tends to show the defendant's rank and influence in society, but not as showing his ability to pay." This instruction correctly expounded the law, and there was no error in giving it to the jury. *Womack v. Circle*, 29 Gratt. 192; *Wait's Act. & Def.* 5, p. 753. *Harman v. Cundiff*, 82 Va. 239, 246.

##### H. VERDICT AND JUDGMENT.

See the titles JUDGMENTS AND DECREES, vol. 8, p. 161; VERDICT.

In an action for defamation the trial court had no power to enter judgment for five dollars only, where the verdict was for that sum and costs, but if the verdict was irregular, it should have been set aside and a new trial awarded. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791.

##### I. NEW TRIALS.

See the titles DAMAGES, vol. 4, p. 202; NEW TRIALS.

**Inadequate Damages.**—It is rare that the court will disturb a verdict on the ground that the damages are too small. *Ward v. White*, 86 Va. 217, 9 S. E. 1012. But where a candidate for office circulates a false and slanderous report about a young girl living in the family of his opponent, and of hitherto unblemished name and fame, stating that she had been delivered of a bastard child, and that he believed it was his opponent's, a verdict, upon such a charge, for five dollars will be set aside as being so palpably and grossly inadequate as to shock the moral sense of every just man. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791.

The act of the assembly (1 Rev. Va. Code 510, § 96), authorizes the granting of a new trial, in an action for slander, when the damages found by the jury are manifestly too small. *Rixey v. Ward*, 3 Rand. 52, 55.

**Damages Excessive.**—In an action

for libel, the court will not grant a new trial on the ground that the damages are excessive, unless they are so enormous as to furnish evidence of prejudice, partiality, passion or corruption on the part of the jury. \$8,000 was not considered excessive in the case cited below. *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

**Illustrative Verdicts.**—It has been held, that \$800 damages is not excessive in an action of slander to recover for calling the plaintiff a thief, which words were false and malicious. *Harman v. Cundiff*, 82 Va. 239.

A verdict for \$8,000 in an action for slander by a candidate for office against a newspaper, for false and malicious charges contained therein, will not be set aside as excessive. *Sweeney v. Baker*, 13 W. Va. 158.

A verdict for five dollars and costs will be set aside as inadequate in action of slander of a girl of unblemished reputation by false imputations upon her chastity for the purpose of injuring an opposing candidate for office. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791.

**Misconduct of Jurors.**—In an action for slander, the judgment was enjoined, and new trial awarded by the county court, on the ground that four of the jurors would not have found any damages but for the impression produced on them by the other jurors that they were bound to yield to the majority. The jurors were allowed to testify as to the facts. The H. C. C. refused new trial, and dismissed the bill. Reversal by the court of appeals; on the ground that the verdict was found under a mistake. See this case reported in 1 Wash. 79. *Cochran v. Street*, Wythe 133; S. C., 1 Wash. 80.

### XIII. Criminal Law.

Upon an indictment or information for libel, it is in no case necessary or proper for the defendant to plead the

truth of the libel. *Com. v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515.

Upon an indictment or information for libel against public officers, or candidates for public office, truth is a justification, and may be given in evidence. *Com. v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515.

Upon an indictment or information for libel of individuals, not public officers, or candidates for public office, truth is no justification, but may be given in evidence in mitigation of a fine. *Com. v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515.

### XIV. Constitutional Law.

#### Freedom of Speech and of the Press.

—No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation. W. Va. Constitution, art. 3, § 7.

The terms "freedom of the press" and "liberty of the press" have misled some to suppose that the proprietors of a newspaper had a right to publish that with impunity for the publication of which others would have been held responsible. But the proper signification of these phrases is, if so understood, misapprehended. The "liberty of the press" consists in a right, in the conductor of a newspaper, to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent, that any one else would be responsible for the publication. *Sweeney v. Baker*, 13 W. Va. 158, 182.

### XV. Slander of Title.

Action against P. v. R. for slandering his title to slaves exposed to public sale, by which their sale was injured. On

second trial, on demurrer to evidence, the jury found £1,000 conditionally against R. The district court adjourned the case to the H. C. C. with a certificate that they thought the weight of evidence in favor of R. and the verdict was not satisfactory. But H. C. C. and court of appeals sustained the verdict and refused a new trial. *Ross v. Pynes*, Wythe 69.

## Libel in Admiralty.

See the title ADMIRALTY, vol. 1, p. 182.

**LIBERTY.**—See the title CONSTITUTIONAL LAW, vol. 3, p. 199.

In *Peel v. Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1018, it is said: "No person shall be deprived of life, liberty, or property without due process of law." "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," nor "abridge the privileges or immunities of citizens of the United States." The word 'liberty,' as here used, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, and to make lawful contracts therein, to the ends of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness." See also, the title CONSTITUTIONAL LAW, vol. 3, pp. 202, 207.

**LIBERTY OF THE PRESS.**—See the titles CONSTITUTIONAL LAW, vol. 3, p. 207; LIBEL AND SLANDER, ante, p. 248.

In *Sweeney v. Baker*, 13 W. Va. 158, 182, it is said: "The 'liberty of the press' consists in a right, in the conductor of a newspaper, to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent, that any one else would be responsible for the publication."

**LIBERUM TENEMENTUM.**—See FREEHOLD—FREEHOLDER, vol. 6, p. 682.

## LICENSE (REAL PROPERTY).

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**VI. Assignability, 304.****VII. Rights of Licensee, 304.****VIII. Pleading and Practice, 304.****CROSS REFERENCES.**

See the titles ADVERSE POSSESSION, vol. 1, p. 199; DEDICATION, vol. 4, p. 350; DRAINS AND SEWERS, vol. 4, p. 824; EASEMENTS, vol. 4, p. 851; FRAUDS, STATUTE OF, vol. 6, p. 516; MINES AND MINERALS; OYSTERS; PRESCRIPTION; STREETS AND HIGHWAYS; RAILROADS; TREES AND TIMBER; WATERS AND WATERCOURSES.

As to injury to licensees on a railroad track by the railroad, see the title RAILROADS. As to licenses for the engaging in a particular business, occupation, etc., see the title LICENSES. As to whether a conveyance of mining property is a lease or license, see the title MINES AND MINERALS. As to whether a conveyance of trees and timber is a lease or license, see the title TREES AND TIMBER.

**I. Definition and Nature.**

**Definition.**—A permission. A right, given by some competent authority to do an act, which without such authority would be illegal, or a tort or trespass. Bouv. Law Dict. See *Power v. Tazewells*, 25 Gratt. 786.

The court, in *Power v. Tazewells*, 25 Gratt. 786, 788, in determining whether a grant of certain oyster land under the act of 1873 passed an interest in the soil, said: "That the statute does not authorize a grant of the soil, or an estate or interest in the soil; but only a license, which is an authority to do a particular act, or series of acts, upon the land of which the commonwealth is proprietor without passing an estate therein; and which license is revocable."

A bare licensee is one who is permitted by the passive acquiescence of a railroad company to come upon the depot platform for his own purposes in no way connected with the railroad. *Norfolk, etc., R. Co. v. Wood*, 99 Va. 156, 37 S. E. 846. See *Norfolk, etc., R. Co. v. Johnson*, 103 Va. 787, 50 S. E. 268.

**Nature.**—The distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. *Pifer v. Brown*, 43 W.

Va. 412, 27 S. E. 399, 404. See the title EASEMENTS, vol. 4, p. 854.

**Passes No Interest in Land.**—A parol license to enjoy a beneficial privilege is not an interest in land, within the statute of frauds. *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 402; *Power v. Tazewells*, 25 Gratt. 786.

**II. What Constitutes a License.**

See post, "Creation," III.

**A. LENGTH OF USER.**

Where no public or private interests have been acquired upon the faith of a dedication, the mere user, by the public, of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner; unless there be evidence of an express dedication; or unless, in connection with such long-continued user, the way has been, by the proper town authority, recognized as a street, so as to give notice that a claim to it as an easement was asserted. *Harris v. Com.*, 20 Gratt. 833. See the title DEDICATION, vol. 4, p. 359.

One who, either alone or in common with the public, has for a long time used a footpath over the lands of another, with his knowledge and without objection, is a licensee. *Norfolk, etc.,*

R. Co. v. DeBoard, 91 Va. 700, 22 S. E. 514.

Where the public has been in the habit of crossing the railroad track on foot at a certain place for years without objection from the company, held: Such acquiescence amounts to a license and imposes on the company the duty of taking reasonable care to avoidinjuring pedestrians. Norfolk, etc., R. Co. v. Wilson, 90 Va. 263, 18 S. E. 35. See also, *Savage v. Southern R. Co.*, 103 Va. 422, 49 S. E. 484; *Virginia Midland R. Co. v. White*, 84 Va. 498, 5 S. E. 573; Norfolk, etc., R. Co. v. Carper, 88 Va. 556, 14 S. E. 328.

Where there is an eight-foot space between two tracks of a railroad, which for a number of years has been used by foot passengers as a path, and acquiesced in by the railroad company, this is sufficient to constitute a license, though only a bare license. Norfolk, etc., R. Co. v. Johnson, 103 Va. 787, 50 S. E. 268. See Norfolk, etc., R. Co. v. Wood, 99 Va. 156, 37 S. E. 846.

Where a trestle or bridge has been in constant and daily use as a walkway for a number of years by a large number of persons in that vicinity it seems that it is sufficient to constitute a license for the public to pass over the bridge or trestle and hence throws upon the railroad the duty to look out for them in order to avoid injury. *Blankenship v. Chesapeake, etc., R. Co.*, 94 Va. 449, 27 S. E. 20. See also, *Chesapeake, etc., R. Co. v. Rodgers*, 100 Va. 324, 41 S. E. 732.

#### B. PERMISSION OF OWNER.

"A permission to pass over land may prove an intention to dedicate or a mere license revocable at the will of the owner; and we think that the mere permission to pass over land ought in this state to be regarded as a license. For why shall we infer that an individual makes a gift of his property to the public from an equivocal act, which equally proves an intention to grant a mere revocable license? The

public is not injured by this view of the subject. It has the accommodation of the road as long as the license continues, and after the license is revoked, the road may be made public if the public convenience requires it, by making compensation to the owner." *Com. v. Kelly*, 8 Gratt. 632, 636. See the title DEDICATION, vol. 4, p. 357.

One who is permitted by the passive acquiescence of a railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad company, is a bare licensee. Norfolk, etc., R. Co. v. Wood, 99 Va. 156, 37 S. E. 846; Norfolk, etc., R. Co. v. Johnson, 103 Va. 787, 50 S. E. 268.

The mere use of a road by the public, for however long a time, will not make it a public road. On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded as a license, revocable at pleasure. *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Com. v. Kelly*, 8 Gratt. 632; *Dicken v. Liverpool Salt, etc., Co.*, 41 W. Va. 511, 23 S. E. 582; *Harris v. Com.*, 20 Gratt. 833.

**Oyster Rights.**—An exclusive right to use and occupy land under the navigable waters of the state as an oyster bed, for one year, for the licensee's benefit; for a consideration payable to the state as the proprietor, confers on the licensee an exclusive right to take the profits, or use or occupy the land by planting or sowing oysters upon the soil. Such a permission may be sometimes called a license. It is more in the nature of a lease. *Power v. Tazewells*, 25 Gratt. 788, 790. See the title OYSTERS.

### III. Creation.

See ante, "Length of User," II, A; "Permission of Owner," II, B.

#### A. WHO MAY GIVE A LICENSE.

**Married Woman.**—A married woman who is the owner of a tract of land



may grant a license, without the joinder of her husband. *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793. See the titles EASEMENTS, vol. 4, p. 851; SEPARATE ESTATE OF MARRIED WOMEN.

### B. MODE OF CREATION.

See ante, "Length of User," II, A; "Permission of Owner," II, B.

"A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant or not." "In addition to these modes of acquiring licenses, they may frequently be implied from the passive acquiescence of the grantor in the act of the licensee; but in many instances, when the acquiescence is not sufficient, or of such a character as to support a defense of leave and license in an action, it is sufficient to entitle the quasi licensee to the equitable assistance of the court to restrain interference with the enjoyment of the privilege." *Goddard on Easements*, 90, 91, cited with approval in *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793. See *Trueheart v. Price*, 2 Munf. 468.

Licenses which in their nature amount to the granting of an estate for ever so short a time, are not good without a deed (a lease for one year without writing is good by our statute), and are not considered as leases, and must always be pleaded as such. *Power v. Tazewells*, 25 Gratt. 786, 790.

To entitle a party wishing to drain his lot under the surface of his neighbor's lot by a right not subject to revocation at the will of such neighbor, the privilege of so doing must be acquired by deed. *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399. See the title DRAINS AND SEWERS, vol. 4, p. 828.

### IV. Compliance with Terms of License.

"Acts done pursuant to a license are sheltered under it; but if they depart

from its obligation to an extent to be contrary to the law, they are not sheltered, and are as if the license had not been granted. That license can not be appealed to for justification when it has been violated in letter and spirit. It could only be justified by performance of the condition. Authorities to sustain this proposition are many." *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, 518.

"Where one has a license to interfere with a highway—as where a railroad company has authority to lay its track along, under, or over a highway—the terms of the license, so far as it directs the manner of such interference must be complied with. Interference in any other mode is a public nuisance." *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, 518.

**Illustrations.**—If a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways upon the express condition that it shall restore such highways to their former state, or to such state as not unnecessarily to have impaired their usefulness, takes possession of a part of a public highway, and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under § 45, ch. 43, of the Code, notwithstanding it has such authority from the county court. *State v. Monongahela R. Co.*, 37 W. Va. 108, 16 S. E. 519. See the title NUISANCES.

License from a city council to a railroad company to build its road across, along, or upon a public street gives it no power to destroy the street, and the company is bound to restore the street to its former state, or to such state as not unnecessarily to have impaired its usefulness for the public, and also to build proper crossings over the railroad, and keep them in good repair. If it fail to do so, the company may be compelled to do so by

mandamus; and, as the company is guilty of maintaining a nuisance, equity may entertain a bill to abate such nuisance, and may compel the company to perform its duty. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514. See the title MANDAMUS.

## V. Revocation.

See ante, "What Constitutes a License," II; "Creation," III.

### A. IN GENERAL.

The general rule is that if the license is not coupled with an interest in the land, it may be revoked at any time. *Barksdale v. Hairston*, 81 Va. 764; *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399; *Power v. Tazewells*, 25 Gratt. 786.

But a license coupled with an interest can not be countermanded. *Power v. Tazewells*, 25 Gratt. 786.

A license which not only gives an interest—a right to its exclusive use and occupancy—but gives it for a certain period, for one year, and for a valuable consideration which is paid; if a certain time is limited, is not revocable though the thing is not done. *Power v. Tazewells*, 25 Gratt. 786, 790.

A mere permission to the public, by the owner of land, to pass over a road upon it, is, without more, to be regarded as a license; and revocable at the pleasure of the owner. *Com. v. Kelly*, 8 Gratt. 632; *Harris v. Com.*, 20 Gratt. 833; *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020; *Dicken v. Liverpool Salt, etc., Co.*, 41 W. Va. 511, 23 S. E. 582. See the title STREETS AND HIGHWAYS.

### B. LICENSE EXECUTED—EXPENDITURE.

"The rule is, as stated, that a parol license is revocable; but it has some exceptions. If the enjoyment of it must be preceded necessarily by the expenditure of money, and the grantee has made improvements or invested capital in consequence of it, it be-

comes an agreement for a valuable consideration, and he is a purchaser for value." *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 403. See also, *Hodgson v. Perkins*, 84 W. Va. 706, 5 S. E. 710; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793, 796.

"In such cases, equity holds that, for remedial purposes, the license shall be deemed an executed contract." *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 403; *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793, 796.

**Construction of Drain.**—But a parol license from one lot owner in a town to another to pass a tile drain under the former's lot for the purpose of draining the lot of the latter is revocable at the pleasure of such licensor. *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399. See the title DRAINS AND SEWERS, vol. 4, p. 824.

**Construction of Tramroad.**—Where a married woman, who is the owner of a tract of land lying on a creek, for a valuable consideration gives her verbal assent that a party may build a tramroad along said creek, through her said lands, for the purpose of transporting timber from lands lying above hers to market, and in pursuance of said verbal assent said party, at considerable expense, under her immediate observation, constructs such road, and operates the same for some time, a court of equity will restrain her, by injunction, from obstructing said road, and thereby defeating its use as aforesaid. *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793.

### C. REVOCATION OPERATING AS A FRAUD.

"Where a license has been so far executed that its revocation would work a fraud, actual or constructive, upon the licensee, equity will restrain such revocation, although its continuation results in an easement upon the lands of the licensor in favor of the lands of the licensee." *Tufts v. Copen*, 37 W. Va. 623, 16 S. E. 793, 796. See

also, *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399.

#### D. HOW MADE.

**Express or Implied.**—A licensor may revoke a license expressly or impliedly. *Barksdale v. Hairston*, 81 Va. 764.

**Death or Transfer.**—A mere license is so much of a personal trust and confidence that it does not extend to anyone, but the licensee, and the death of either the licensor or the licensee, or the transfer by either party will revoke it. 1 Wash. on Real Property, quoted in *Power v. Tazewells*, 25 Gratt. 786, 790.

**Dissolution of Partnership.**—Where a license to dig and carry off ore on a piece of property is given to a partnership, it may be revoked by the dissolution of the partnership. *Barksdale v. Hairston*, 81 Va. 764.

#### VI. Assignability.

A license can not be assigned. *Barksdale v. Hairston*, 81 Va. 764; *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. 710; *Power v. Tazewells*, 25 Gratt. 786.

#### VII. Rights of Licensee.

See ante, "License Executed—Expenditure," V, B.

**Duty of Licensor to Repair Premises.**—The owner of land over which is a footpath owes no duty to a licensee to keep said footpath in good order or repair; but, if such owner carelessly and negligently makes an excavation beneath said footpath, not open to common observation of persons passing along the same, and not apparent to one exercising ordinary care, and knowing the said footpath to be in a dangerous condition, fails to repair the same, or to give notice or warning thereof to such licensee, and personal injury results therefrom to the licensee, without negligence on his part, the owner is liable in damages for such injury. *Norfolk, etc., R. Co. v. DeBoard*, 91 Va. 700, 22 S. E. 514.

An owner is under no duty to keep his premises in a safe and suitable condition for licensees, and is only liable for willful or wanton injury that may be done the licensee by the gross negligence of himself, his agents or employees. *Woolwine v. Chesapeake, etc., R. Co.*, 35 W. Va. 329, 15 S. E. 81. See *Ritz v. Wheeling*, 45 W. Va. 212, 31 S. E. 993.

**Injunction.**—If the vendor of land, in a town, assure the vendee (though not in writing), that a piece of ground, adjoining thereto, is always to be kept open as an alley; by which assurance the vendee is induced to make the purchase, or to give a higher price for the property, a court of equity will perpetually enjoin the vendor from shutting up such alley. *Trueheart v. Price*, 2 Munf. 468.

Quære, in such case, whether the vendee, who has afterwards conveyed the premises (with their appurtenances, but without warranty) to a third person, be a competent witness to prove that such verbal assurance was given to himself by the original vendor. *Trueheart v. Price*, 2 Munf. 468.

**Duty of Railroads to Licensee.**—See the title RAILROADS. See also, ante, "Length of User," II, A.

#### VIII. Pleading and Practice.

**Necessity of Pleading License.**—"If a man license me to enter into his land and to occupy it for a year, half a year or such like, this is a lease, and so shall be pleaded. If it is a lease and pleaded as a license, the plea is bad." *Power v. Tazewells*, 25 Gratt. 786, 790.

**Pleading License without a Deed.**—Licenses to do a certain act, but passing no estate in the land, may be pleaded without a deed. And this doctrine does not trench upon the policy of the law which requires that contracts for the sale of real estate, or a lease thereof for more than one year, shall be in writing. And the reason is because licenses amount to nothing more than an excuse for the act which

would otherwise be a trespass, and render the party liable in damages. *Power v. Tazewell*, 25 Gratt. 786, 790.

**Sufficiency of Plea.**—The defendant was presented by the grand jury for erecting gates on the king's highway. He pleaded a license from the county court. Held, the plea was good. *King v. Harrison*, Jeff. 50.

**Question of Fact for Jury.**—Whether a designated person is a licensee or not is a question of fact for the jury. *Norfolk, etc., R. Co. v. DeBoard*, 91 Va. 700, 22 S. E. 514.

**Measure of Damages.**—In an action by the personal representative of a licensee of a footpath, against the owner of the lands, for causing the death of such licensee, by carelessly and negligently undermining said footpath, the measure of damages is such sum as to the jury may seem fair and just under all the circumstances of the case, not exceeding the amount claimed in the declaration. *Norfolk, etc., R. Co. v. DeBoard*, 91 Va. 700, 22 S. E. 514. See the title DAMAGES, vol. 4, p. 162.

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As to effect of license of tavern keepers upon conviction for permitting gaming, see the title GAMING, vol. 6, p. 692. As to marriage license, see the title MARRIAGE. As to license to keep houses of entertainment, taverns, etc., see the title INTOXICATING LIQUORS, vol. 8, p. 1. As to license to go upon premises of another, see the title LICENSE (REAL PROPERTY), ante, p. 299.

### I. Definitions and Legality.

A license is an "authority to do some act or carry on some trade or business, in its nature lawful but prohibited by statute, except with the permission of the civil authority or which would otherwise be unlawful." Bouv. L. Dict., vol. 2, p. 224.

"A license upon trade or business can only be justified upon one of two

grounds—either it is a tax upon the occupation, or else it is a police regulation. In the former case the legality of the exaction depends upon its compliance with constitutional limitations upon the power of taxation; while in the latter, its warrant rests upon the prevention of threatened evil." *Gordon v. Newport News*, 102 Va. 649, 47 S. E. 828.

## II. What Constitutes.

**Taxation of Tongmen.**—The tax given under the statute which requires each tongman to make a return of the sales of oysters by him during the week preceding and which imposes a tax on such sales equal to the amount of tax levied by the state on any other species of property, and which prescribes penalties for failure to make such returns, but which allows such tongman, if he prefers, to pay a sum certain fixed by the statute in lieu of such tax, does not constitute a license. *Com. v. Brown*, 91 Va. 762, 21 S. E. 257.

## III. Constitutionality and Construction.

### A. CONSTITUTIONALITY.

See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; TAXATION. And see post, "Power of State," IV; "Power of Municipalities," V.

#### 1. Tax on Licenses—Uniformity.

Taxes on licenses are not required by the constitution of Virginia to be equal and uniform. *Slaughter v. Com.*, 13 Gratt. 767; *Ould v. Richmond*, 23 Gratt. 464, 673; *Com. v. Moore*, 25 Gratt. 951, 958; *Danville v. Shelton*, 76 Va. 325, 329; *Eyre v. Jacob*, 14 Gratt. 422. See also, *Gilkeson v. Frederick*, 13 Gratt. 577; *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1.

In *Newport News, etc., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645, it was held, that the only uniformity required in imposing license taxes is that the tax shall be the same on all those engaged in the same business.

The provision of § 4, art. 10, of the constitution (1869) that "the capital invested in all business operations shall be assessed and taxed as other property" is mandatory upon the legislature and can not be avoided, whereas the provision of the same section for levying a license tax, in certain enu-

merated cases and on "all other business which can not be reached by the ad valorem system," is permissive only, and in the latter case it is no invasion of the requirement that taxation shall be uniform, if no license tax is imposed. *Norfolk v. Griffith Powell Co.*, 102 Va. 115, 45 S. E. 889.

#### 2. License to Sell Tax Receivable Coupons.

Section 65, ch. 450, acts of assembly, 1883-84, p. 590, prohibiting sale without a special license, of tax receivable coupons cut from the bonds of the state of Virginia, is constitutional. *Com. v. Maury*, 82 Va. 883, 1 S. E. 185; *Com. v. Larkin*, 84 Va. 517, 5 S. E. 526; *Com. v. Plunkett*, 84 Va. 519, 9 S. E. 1120.

Acts, 1883-84, ch. 450, § 65, imposing a tax on the business of selling coupons cut from the bonds of the state is not repugnant to the constitution of the United States. *Com. v. Maury*, 82 Va. 883, 1 S. E. 185. See also, *Com. v. Adams*, 85 Va. 921, 9 S. E. 148; *Cuthbut v. Com.*, 85 Va. 899, 9 S. E. 16.

Act of March 15th, 1884, requiring payment of special license tax of \$1,000, for privilege of selling coupons cut from the state bonds and imposing tax of twenty per cent. on the face value of such coupons when sold, is not repugnant to the United States and the state constitutions, wherein they forbid the passage of laws impairing the obligation of contracts. *Com. v. Maury*, 82 Va. 883, 1 S. E. 185.

Acts of January 21, 1886, January 26, 1886, and of May 12, 1887, providing for the recovery, by motion, of taxes and certain debts due the commonwealth, for the payment of which papers purporting to be genuine coupons of the commonwealth have been tendered; held, not to be repugnant to § 10, art. 1, United States constitution. *Cooper v. Com.*, 85 Va. 528, 8 S. E. 247.

Act of March 4th, 1886, prescribing how license may be obtained, and if

coupons be tendered therefor, the officer shall receive same for verification under act of January 14, 1882, and that unless said taxes be paid in money no license shall issue, nor applicant do business, until the coupons be so verified, is not repugnant to the United States Constitution, art. 1, § 10. *Com. v. Jones*, 82 Va. 789, 1 S. E. 84.

"Such unconstitutionality of the act of March 4, 1886, would nullify the antecedent legislation which does not allow any person to act as a sample merchant without first having obtained a license therefor; although, in the absence of such unconstitutionality, such a requirement is admitted to be within the power of the state." *Com. v. Jones*, 82 Va. 789, 1 S. E. 84.

### 3. License Tax on Merchants.

See post, "Merchants," VI, B.

The 104th section of chapter 240, sess. acts, 1874, was held to be constitutional in *Com. v. Moore*, 25 Gratt. 951.

Section 101, ch. 193, sess. acts, 1870-71, prohibits the sale of goods by sample, etc., by any person not a resident merchant, mechanic or manufacturer, and applies to citizens of the state, who are not merchants, etc., as well as to citizens of other states; and the charge in the information that the party is not a resident merchant, etc., is not equivalent to the charge that he is not a resident citizen. The question therefore does not arise whether the statute is in violation of the constitution of the United States. *Speer v. Com.*, 23 Gratt. 935.

The word resident in the statute, in connection with the words merchants, etc., does not import a personal residence; but refers to the place of business; and any person, though a citizen of and living in another state, may take out a license to transact business as a merchant, etc., in the state, and the statute, therefore, is not unconstitutional. The statute is not a regulation of commerce, but is simply a revenue law. *Speer v. Com.*, 23 Gratt. 935.

### 4. Constitutionality of City Ordinance.

A city ordinance which imposes a tax on the business of publishing a newspaper does not infringe upon the constitutional guaranty of the freedom of the press. Such guaranty was never intended to restrict the right of taxation for the support of the government. Nor is such ordinance in conflict with § 1, art. 10, of the constitution, which requires all taxation to be equal and uniform, nor with § 4, art. 10, which provides for a tax on licenses upon business which can not be reached upon the ad valorem system. *Norfolk v. Norfolk Landmark Pub. Co.*, 95 Va. 564, 28 S. E. 959.

A city ordinance imposing a privilege tax on a telegraph company is not in conflict with § 4, art. 10, of the constitution of this state permitting the legislature to impose a license tax on any business which can not be reached by the ad valorem system. The tax imposed by the ordinance is a tax upon the privilege of doing business in the city, and is wholly different from a property tax. It is immaterial that the state taxes the property of the company on the ad valorem system. The two subjects of taxation are wholly different, and both may be taxed without being obnoxious to the objection that it is double taxation. *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207. See also, *Norfolk, etc., R. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658.

A city ordinance imposing a privilege tax on the business of a telegraph company, done wholly between that city and other points within the state, and expressly excepting all foreign and interstate business, and telegrams sent to or received by the United States or this state, or their agents or officers, is not in contravention of the commerce clause of the constitution of the United States. *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207.

### 5. Foreign Corporations.

See post, "Foreign Corporations," VI, C.

Sections 86 and 87 of chapter 35 of the acts of the West Virginia legislature of 1901, classifying corporations chartered under the laws of this state, and designating those having their principal place of business or chief works outside of the state as nonresident corporations, and imposing upon them a greater license tax than upon those having their principal places of business and chief works within the state, does not, in so classifying them and discriminating, violate § 1, art. 10, of the constitution of this state, nor clause 1, § 10, art. 1, of the constitution of the United States, nor the fourteenth amendment to the constitution of the United States, and is, therefore, valid and the charge of such greater tax upon such nonresident corporation legal. *Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 534, 40 S. E. 514.

### 3. Discrimination in Favor of Book Publishers.

Sections 39, 40, ch. 1, of the revenue laws of Virginia (acts, 1883-84, p. 582), which are as follows: "39. Any person, other than a licensed merchant, who shall receive subscriptions for, or shall in any manner furnish newspapers, books, maps, prints, pamphlets, or periodicals, printed or published beyond the limits of this state, shall be deemed a book agent. \* \* \* Any person violating the provisions of this section shall pay a fine of not less than fifty dollars, nor more than one hundred dollars for each offense." "40. A book agent shall pay for the privilege of acting as such, the sum of ten dollars, \* \* \*" are unconstitutional, because discriminating in favor of publishers of books, etc., in this state, and against such publishers in other states, thus contravening clause 3, § 8, art. 1, of the federal constitution, which gives congress the right to regulate commerce between the several states. *Webber v. Virginia*, 103 U. S. 344. *Ex parte Rollins*, 80 Va. 314.

### 7. Fishing in Public Waters.

The title of act, March 3, 1898 (acts, 1897-98, p. 864), entitled "An act to amend and re-enact § 2086 of the Code of Virginia, as amended and re-enacted by act, February 18, 1890, in relation to fishing in the waters of the commonwealth of Virginia, to provide for levying a tax on fishing devices, and to provide for collecting the same," embraces all provisions of such act imposing a license tax, and providing penalties for failure to pay the same, and hence such act is not repugnant to const., art. 5, § 15, declaring that no law shall embrace more than one object, which shall be expressed in its title. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

Act, March 3, 1898 (laws, 1897-98, p. 864), imposing a license tax on fishermen within the state, does not contravene const., art. 10, § 4, declaring that license taxes may be imposed only on occupations which can not be reached by the ad valorem system. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

Act, March 3, 1898 (acts 1897-98, p. 864), imposing a license tax on fishermen within the state, and dividing fisherman into three classes, according to the depth of the water in which they fish, and grading the tax accordingly, imposes the same tax upon all persons in the same class, and hence such tax is not objectionable for inequality and nonuniformity. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

The license tax imposed by act, March 3, 1898 (acts, 1897-98, p. 834), on residents of the state for the privilege of fishing in the waters belonging to the state, does not encroach on the authority of the United States to regulate commerce and navigation. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

Acts, March 3, 1898 (acts, 1897-98, p. 864), requiring persons catching and taking fish to procure a license and pay a tax, and providing a penalty for vio-



lations thereof, was not *ex post facto* as to an indictment charging an offense thereunder both before and after its enactment. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

### B. CONSTRUCTION.

"Laws imposing a license or a tax are strictly construed, and whenever there is doubt as to the meaning or scope of such laws they are construed more strongly against the government and in favor of the citizen. *Supervisors v. Tallant*, 96 Va. 723, 32 S. E. 479." *Brown v. Com.*, 98 Va. 366, 370, 36 S. E. 485.

## IV. Power of State.

See ante, "Constitutionality," III, A; post, "Exercise in Particular Instances," VI.

**Source of Power.**—The only authority which a state has to prohibit, regulate or control the private business of a citizen grows out of its "police power," or power to enact laws pertaining to the public health, the public safety or the public morals. A statute regulating such private business in a manner which in no wise pertains to public health, safety or morals is not a valid exercise of the police power. *Young v. Com.*, 101 Va. 853, 45 S. E. 327.

**Laws Relating to Ad Valorem System.**—The legislature has no power, under the constitution, to impose a license tax, or to authorize a municipal corporation to do so, upon any business other than those specifically mentioned in § 4, art. 10, of the constitution, except where it can not be reached by the ad valorem system. *Thomas v. Snead*, 99 Va. 613, 39 S. E. 586. See *Levellen v. Lockhart*, 21 Gratt. 570.

Whether a business can or can not be reached by the ad valorem system is a question primarily for the legislature, and its determination of that question can not be held to be erroneous unless it is manifestly so. *Thomas v. Snead*, 99 Va. 613, 39 S. E. 586; *Com. v. Moore*, 25 Gratt. 931.

And the fact that the legislature imposes an ad valorem tax on a business is a conclusive determination that the business can be reached by the ad valorem system, and it must be so reached when taxed by municipal corporations. *Thomas v. Snead*, 99 Va. 613, 39 S. E. 586.

"Article 4, § 10, of the constitution of 1869 (art. 13, § 170, of the present constitution) provides, that the general assembly may levy a license tax upon any business which can not be reached by the ad valorem system. The legislature, or a municipality possessing full powers of taxation under its charter, must decide primarily whether a particular business can or can not be reached by the ad valorem system; and, with the exercise of their discretion, the courts may not interfere, except in case of a plain departure from the constitutional requirement. The question is one of power and not of policy, so far as the courts are concerned; and they are without authority to control legislative discretion, even if in their opinion it is violative of sound principles of political economy, unless in its exercise it contravenes some provision of the constitution of the state, or of the United States." *Gordon v. Newport News*, 102 Va. 649, 47 S. E. 828.

## V. Power of Municipalities.

See post, "Exercises in Particular Instances," VI. See the title MUNICIPAL CORPORATIONS.

### A. NATURE AND EXTENT OF POWER.

The powers of municipal corporations are such only as the legislature confers in their charters. Taxes imposed by them must be equal and uniform and ad valorem. If so authorized, they may levy a tax on all business which can not be reached by the ad valorem system. But under color of a license tax they can not impose an unequal and uniform tax on property. *Danville v. Shelton*, 76 Va. 325.

A power conferred on a municipal corporation to require a license tax for "any business, trade, occupation, calling or any other thing," for which the state does or may require a license, is a general power of taxation, subject only to such limitations as are imposed by the constitution of the state or of the United States. *Norfolk, etc., R. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658.

A municipal corporation, with a general power of taxation, must decide primarily whether a particular business can or can not be reached by the ad valorem system, and its decisions will not be disturbed by the courts, except in case of plain departure from the constitutional requirement. The fact that the state taxed the property of a company on the ad valorem basis, did not, under the constitution of 1869, debar a municipal corporation, having a general power of taxation, from imposing a license tax on the same company for the privilege of doing business within its limits. *Norfolk, etc., R. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658.

Where a municipality has been invested with complete power of taxation, the mere fact that the state imposes an ad valorem tax on the capital invested in a particular business does not debar the municipality from imposing a license tax on such business, although no license is imposed by the state. *Thomas v. Snead*, 102 Va. 115, 45 S. E. 889.

**Statutory Provisions.**—The provisions of § 1, ch. 141, acts, 1872-73, authorizing municipal corporations to impose a license tax for the exercise of certain privileges outside and within one mile of their corporate limits, does not authorize the imposition of such tax for general municipal purposes, but only for the liquidation of bonds issued under the authority of said act. *Kaufle v. Delaney*, 25 W. Va. 410.

Code, Va., 1887, § 1042, giving the council of a city or town power to im-

pose a license tax, gives them the power to fix the duration of the license, as § 550, prescribing that the license year shall expire on the 30th of April of each year, applies only to state licenses. *Roche v. Jones*, 87 Va. 484, 12 S. E. 965.

## B. APPLICATION TO PARTICULAR CASES.

### 1. Foreign Telegraph Companies.

See the title TELEGRAPHS AND TELEPHONES.

The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States which forbids such a tax, if it is equal and just in its provisions. *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1.

### 2. Persons Engaged in Purchase of Tobacco.

The ordinance imposed on "every one engaged in purchasing leaf tobacco in D. a tax of ten dollars, and one per cent., on capital employed, and in addition fifteen cents per thousand pounds purchased monthly." Held, this feature is illegal. As a tax, fifteen cents on the thousand pounds, without regard to value, is unequal. As a license, it is not warrantable, because the business could have been reached on the ad valorem principle. *Danville v. Shelton*, 76 Va. 325.

### 3. Railroads.

See the title RAILROADS.

Section 5, of charter of city of Lynchburg, which grants authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment, which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to impose such tax upon a railroad corporation, which is neither a person nor an em-

ployment, within the ordinary acceptance of those words. *Lynchburg v. Norfolk, etc., R. Co.*, 80 Va. 237.

But a power conferred on a municipal corporation to require a license tax for "any business, trade, occupation, calling or any other thing," for which the state does or may require a license, is a general power of taxation, subject only to such limitations as are imposed by the constitution of the state or of the United States, and under it a municipal corporation could, under the constitution of 1869, impose a license tax on a railroad company doing business in said corporation. It was immaterial that the railroad company was obliged to operate its road through the corporation in order to discharge its duties, since the ordinance imposing the tax does not make its payment a condition precedent to the right of the company to carry on its business. *Norfolk, etc., R. Co. v. Suffolk*, 103 Va. 198, 49 S. E. 658.

#### 4. Foreign Insurance Companies.

The city of Norfolk has authority under its charter, to impose a license tax upon foreign insurance companies, having an agency in the city, and such companies are not exempted from this tax by the act of 1871-72, ch. 385, § 57, p. 484. *Humphreys v. Norfolk*, 25 Gratt. 97.

#### 5. Sale of One's Own Products.

The city of Norfolk has no power to impose any tax, fine, or penalty on persons selling their own farm and domestic products in controvention of the act of assembly of March, 1896, which is as follows: "It shall be unlawful for any city or town of this state, or of any agent or officer of any such city or town to impose or collect any tax, fine or other penalty upon any person selling their farm and domestic products within the limits of any such town, or city outside of and not within the regular market houses and sheds of such cities and towns." *Norfolk v. Flynn*, 101 Va. 473, 477, 44 S. E. 717.

## VI. Exercise in Particular Instances.

### A. GENERAL REGULATIONS.

The sections of our Code which require every corporation chartered under the laws of this state to take out a state license before doing or attempting any business in this state, require the same of circuses, menageries, theaters, operas, peddlers, auctioneers, stockbrokers, money brokers, pawnbrokers, bankers, hotels, restaurants, vendors of spirituous liquors, distillers, brewers, bowling alleys, skating rinks, and shooting galleries. See Code, 1891, ch. 32, §§ 1, 2. Licenses are of two characters—one a license for revenue, and the second conferring authority to engage in "vocations which need special surveillance." Cooley, Const. Lim., 586, 587. From the class of subjects with which the requirement of a license from a corporation is associated, as will be seen by the two sections of Code just referred to, it is evident that the corporate license belongs to the latter character, and is granted and required as a police regulation. Such a license is defined to be "essentially the granting of a special privilege to one or more persons not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the license belongs." And Law Dict., p. 622, subject "Licensee." The same author says: "A license is issued under the police power." It may be well here to observe that while our Code is liberal, and, as many think, extravagant, in conferring extraordinary powers upon corporations, it has yet reserved to the legislature the power of altering and amending all charters of incorporation. In chapter 53, § 8, we find the following sentence: "And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company." Section

10 of the same chapter is as follows: "Every joint stock company which shall be hereafter organized or commence its corporate business, or which shall accept the provision of this chapter, or be declared subject thereto by act of the legislature, shall, so far as it is not otherwise expressly provided, have the rights, powers, and privileges, and be subject to the regulations, restrictions and liabilities, specified in this and the preceding chapter." *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1003.

"The general assembly may levy a tax on incomes in excess of six hundred dollars per annum, and upon the following licenses, viz.; the sale of ardent spirits, theatrical and circus companies, menageries, jugglers, itinerant peddlers, and all other shows and exhibitions for which an entrance fee is required, commission merchants, persons selling by sample, brokers and pawnbrokers, and all other business which can not be reached by the ad valorem system." *Lewellen v. Lockhart*, 21 Gratt. 570.

## B. MERCHANTS.

### 1. General Provision and Construction.

"Section 549 of the Code requires that a merchant's license shall designate some definite place for the transaction of such business within the district of the commissioner granting the license. The statute, imposing a license tax upon merchants, provides that the tax shall be graduated according to the amount of their purchases during the period for which the license is granted, and the section which fixes the amount of the tax declares that merchant tailors, lumber merchants, furniture merchants, butchers, green grocers, hucksters, dealers in coal, ice, or wood, shall be embraced in that section; but, it further provides that nothing contained in the section shall be so construed as to require a license of any person who may canvass any county or corporation to buy lambs,

pigs, calves, fowls, eggs, butter, and such small matters of subsistence designed as food for man, unless such person shall keep a place of business for the purpose of selling such articles in or within half a mile of a city or town in the state. (Sections 27, 28, ch. 244, acts, 1889-90.)" *Brown v. Com.*, 98 Va. 366, 36 S. E. 485.

"The act providing for the assessment of taxes—acts, 1889-90, p. 197, § 27—says: 'Every merchant shall pay a license tax for the privilege of transacting business in this state, to be graduated by the amount of purchases made by him during the period for which his license is granted.' Section 28 says: 'For every license to a merchant or mercantile firm the amount to be paid shall be graduated as follows:' \* \* \* and then provides that 'the sum imposed under and by virtue of this section shall be in lieu of all taxes, for state purposes, on the capital actually employed by said merchant or mercantile firm in said business;' and further provides that 'the sums required by this section to be paid, when the license is taken out, shall be collected in the same manner that the amounts required to be paid for other licenses are collected.'" *Supervisors v. Tallant*, 96 Va. 723, 32 S. E. 479.

"By the 30th section of the act of 1852-53, concerning the assessment and collection of the public revenues, it is declared that no person shall, without obtaining a license as a merchant, sell at any store or place in this state any goods, wares, merchandise, or other articles, except such as may have been manufactured by the seller in this state, or been produced or raised by him, etc." *Com. v. Nax*, 13 Gratt. 789.

### What Constitutes "Goods, Wares and Merchandise" within the Statute.—

"The words 'goods, wares and merchandise,' as used in the revenue laws, were never intended to embrace the agricultural productions of the state. Thus, the annual act imposing taxes, etc., exempts from this tax, farmers,

etc., who purchase and sell sugar, salt, iron, etc., 'as a return load for their produce and other property, taken to market.' The law defining wholesale and retail merchants, declares the former to be those, of whose annual sales, one-half or more, shall be made by the bale, piece, package or dozen; terms wholly inapplicable to corn, wheat, tobacco, etc. And we know that these, and many other articles of produce and property, are not, in this state, ordinarily termed 'goods, wares and merchandises;' and have never been regarded as such, within the meaning of the revenue laws. To give this comprehensive signification to them, would make them embrace almost every subject of ordinary traffic and sale in the country; and would require a large portion of several classes of our citizens to obtain licenses as merchants." *Mitchell v. Com.*, 1 Leigh 572.

An indictment which charges that the defendant "unlawfully did sell music not manufactured by the seller within the state without having license therefor according to law," is good, it sufficiently appearing that music is a species of goods, wares and merchandise. *Com. v. Nax*, 13 Gratt. 789.

**"Place of Business."**—A merchant who has paid his license tax to the state for doing business at one point in the state is not required to take out an additional license for selling county produce acquired in his business at the market house of a city in another portion of the state. The place occupied by him at the curb of the city market house is not a place of business within the meaning of the statute. The statute contemplates a fixed place of business as a shop or store. Neither is such a sale "doing business in said city" within the meaning of the charter of the city of Roanoke, permitting the city to impose a license tax therefor. *Brown v. Com.*, 98 Va. 366, 36 S. E. 485.

## 2. Duties of Commissioners of Revenue.

By the 2d section of an act passed February 29, 1828, amended by the first section of an act passed February 28, 1829 (Supplem. to Rev. Code, ch. 274, § 2, ch. 275, § 1, pp. 332, 333), it is declared that it shall be the duty of the commissioners of the revenue, annually at some quarterly term of the court holden for each county and corporation, "to render to the court a list of all such merchants, within their respective precincts, whom they shall have just cause to believe have failed to take out license as required by law; and also a list of such witnesses as, in their opinion, may give information of any such failure. And the court shall thereupon order process to bring such witnesses in, who shall be sworn, and forthwith sent to the grand jury, to give evidence touching any of said offenses. And upon any presentment being made by such grand jury, it shall be the duty of the attorney for the commonwealth to file an information or indictment against such person or persons presented, and the court shall give judgment, upon conviction, for the penalty or penalties now imposed by law upon any such offenders." This act, it will be observed, applies in terms to the county and corporation courts only. *Com. v. Collins*, 9 Leigh 666.

## 3. Sale by Agent—Sample Merchant.

The act approved April 30th, 1874, in relation to sample merchants' licenses, authorized a party who has obtained a license, to employ an agent to sell for the principal under the license. *Myerdock v. Com.*, 26 Gratt. 988.

When the statute declares that such license "shall be a personal privilege," it does not mean, that the party obtaining such license shall be required to sell in person and not by another; it only means to declare, that such license "shall be a personal privilege," it does not mean, that the party obtaining such license shall be required to

sell in person and not by another; it only means to declare, that such license shall be used for the benefit of the party to whom it is issued. He can not transfer it to another; nor can any other person sell under it; but certainly there is no inhibition in the statute against sample merchants operating through agents. A sale by an agent is a sale by himself. If he has a license as a sample merchant, he may sell either by himself or by his agent, like any other merchant. This construction is made the plainer by the words which follow the clause—"shall be a personal privilege." "Such license thus obtained, shall be a personal privilege, and shall not be transferable, nor any abatement in the tax allowed;" that is to say, such license shall be used for the benefit of the person to whom it is issued, and shall not be transferred to another. *Myerdock v. Com.*, 26 Gratt. 988.

A sample merchant's license authorizes sale by himself, or by his agent only, of his goods. Acts, 1881-82, pp. 211, 212, 213. *White v. Com.*, 78 Va. 484.

At the trial of *W.*, the agent of a duly authorized sample merchant, for selling goods not the property of his principal, the defendant asked the court to instruct the jury that even if they believed the principal had violated the law, yet they must acquit the defendant unless they also believed that he had participated in the violation with an unlawful intent. Held, the intent of the defendant is not by the statute an ingredient of the offense, and need not be alleged or proved. Hence the instruction was properly refused. *White v. Com.*, 78 Va. 484.

"A merchant, in the sense of the act, is a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery. He is taxed according to the amount of his purchases, to be ascertained in the manner prescribed, and is licensed to

sell his own goods." *White v. Com.*, 78 Va. 484.

License issued under acts, 1881, pp. 211, 212, 213, to one to do a sample merchant's business does not authorize him to do business as a commercial broker, which is authorized by license issued under acts, 1881-82, pp. 523, 524. *Henderson v. Com.*, 78 Va. 488.

**Taking Goods into Another County.**—Whilst the statute, § 35 of the revenue law of 1877, allows a resident merchant or manufacturer, who has paid a tax on his business of \$100 to sell his goods by sample, card, etc., in any other county, without paying an additional tax, he is not authorized to take his goods or wares to another county and there sell them, without paying the tax prescribed by the said revenue laws. *Webber v. Com.*, 33 Gratt. 898.

#### 4. Dealer in Second-Hand Goods.

Under the act of June 29, 1870, sess. acts, 1869-70, ch. 174, § 6, p. 232, a regular merchant paying the tax assessed upon him as such, must take out the license required by the act, to authorize him to deal in second-hand articles at his store, and the act is not in violation of § 4, art. 10, of the constitution of the state. *Hirsh v. Com.*, 21 Gratt. 785.

#### C. FOREIGN CORPORATIONS.

See the title FOREIGN CORPORATIONS, vol. 6, p. 190.

The fact that the Singer manufacturing company is making its machines under a patent of which it is the assignee, does not entitle the company to bring its machines into the state, and sell them here without complying with the requirements of the state revenue laws. There is nothing in these provisions of the state revenue laws in conflict with the constitution of the United States. *Webber v. Com.*, 33 Gratt. 898.

The Singer manufacturing company, a foreign corporation, has a place of business in Richmond, where it sells.

its machines, made out of the state, and has paid a tax to the state of \$322. The company is a resident merchant in the sense of the revenue laws of Virginia, and may appoint an agent to conduct its business. But this does not authorize the agent to take its machine to another county and there sell and deliver them to the purchasers, without paying in that county the tax prescribed by the statute. *Webber v. Com.*, 33 Gratt. 898, reversed in *Webber v. State*, 103 U. S. 344.

#### D. TAILORS.

The city of Newport News has the power under its charter to impose a license tax on tailors and merchant tailors. The power of the legislature to impose a license tax is only limited by the constitutional provision declaring that it "may levy a license tax upon any business which can not be reached by the ad valorem system," and whether it can or can not be so reached is primarily a question for the legislature to determine, and its decision will not be disturbed by the courts except in case of a plain deviation from the constitutional requirement. This power the legislature may confer in whole or in part upon a municipal corporation. It has been conferred to its full extent upon the city of Newport News. *Gordon v. Newport News*, 102 Va. 649, 47 S. E. 828.

The license tax imposed by the city of Newport News on tailors and merchant tailors is not a poll tax. The amount is unaffected by the number of the firm or company by which the business is conducted. *Gordon v. Newport News*, 102 Va. 649, 47 S. E. 828.

#### E. DRUGGISTS.

See the title DRUGGISTS, vol. 4, p. 830.

No druggist is authorized to carry on his business in this state without a state license therefor. *State v. Enoch*, 26 W. Va. 253. See post, "Prosecutions and Punishment," VIII.

The pharmacy act does not repeal

the statute requiring a state license to carry on the business of a druggist. *State v. Enoch*, 26 W. Va. 253.

**Agent of Wholesale Druggist.**—An agent and commercial traveler for a wholesale druggist, who is doing business in the city of Parkersburg, Wood county, W. Va., who receives an order in Roane county, W. Va., on the firm he represents, for two gallons of alcohol, is liable to indictment and conviction under § 1, ch. 32, W. Va. Code, in the county where the order was received, unless he shows, by way of defense, that he was acting under a state license at the time and place of receiving said order. *State v. Swift*, 35 W. Va. 542, 14 S. E. 135.

#### F. ARTICLES BOUGHT WITHOUT AND SOLD WITHIN LIMITS OF STATE.

Coffee, sugar, and molasses purchased out of the commonwealth, with proceeds of cord wood, cut by the purchaser, and brought into the state, can not be sold without a license. *Com. v. Fugate*, 6 Gratt. 693.

#### G. OYSTER TRADING.

A statute requires the captain or other officer of a vessel engaged in the oyster trade to take out a license. A number of such captains or officers may unite in one bill to enjoin the sale of their vessels, and test the constitutionality of the act. *Johnson v. Drummond*, 20 Gratt. 419.

#### H. INTOXICATING LIQUORS.

See the title INTOXICATING LIQUORS, vol. 8, p. 1.

#### I. PHYSICIANS AND SURGEONS.

See post, "Prosecution and Punishment," VIII. See the title PHYSICIANS AND SURGEONS.

Section 14 of chapter 150 of the amended Code prohibits an itinerant physician from practicing medicine, an itinerant vendor of drugs from selling such drugs, etc., or any one, by any drug, nostrum, etc., from treating diseases, without first paying the special

tax required by the section. *State v. Ragland*, 31 W. Va. 433, 7 S. E. 424.

#### J. DAIRIES.

The ordinance of the city of Norfolk which provides for the inspection of milk sold in the city and which requires vendors of milk in the city, whether their dairies are located inside or outside of the city, to register for that purpose, and to pay a registration fee of fifty cents per cow, to cover expenses of the inspection required by the ordinance, is not extraterritorial in its effects. It only touches those who come within the city limits to dispose of their milk. Nor do the provisions of the ordinance violate the act of assembly approved March 3, 1896, forbidding any city or town to impose or collect any tax, fine, or other penalty for selling farm or domestic products at other places in the city or town than the regular market houses. The charge made is in no sense a tax, fine, or penalty, but a legitimate fee designed as compensation for service rendered, and to enable the city to bear the expenses of a valid police regulation. *Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717.

#### K. BILLIARDS.

The keepers of a billiard saloon may be required to take out a license, and pay a tax thereon. *Lewellen v. Lockhart*, 21 Gratt. 570.

The fact that capital is invested in billiard tables and other necessary furniture of a billiard saloon, which capital may be taxed as property, under § 32 of the act of June, 1870, does not exempt the pursuit from a license tax. *Lewellen v. Lockhart*, 21 Gratt. 570.

"Any person who shall keep for compensation, a saloon or table at which to play at billiards, shall be deemed to keep a billiard saloon; and if a tax is imposed upon the tables kept therein, the same shall be on every table capable of being used for the purpose and kept therein, whether used or not. Any person who shall

keep a billiard saloon without a license shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each day he may continue the same.'" Act of July 9, 1870, § 41. The specific license tax on any person to keep a billiard table shall be one hundred dollars, and an additional tax of fifty dollars, for each additional table kept or to be kept therein. If the license be for a bowling or billiard saloon at a watering place, and is for four months or less, the tax thereon shall be fifty per centum of the taxes aforesaid. *Lewellen v. Lockhart*, 21 Gratt. 570.

#### L. CORPORATIONS.

See the title CORPORATIONS, vol. 3, p. 510.

Under the West Virginia Code, every corporation chartered under the laws of this state is required to take out a state license before doing or attempting any business in this state. See Code, 1891, ch. 32, §§ 1, 2. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000, 1003.

A licensed eating house in a town is a public place in the meaning of the Code, ch. 198, § 4, p. 806. *Neal v. Com.*, 22 Gratt. 917.

#### M. EATING HOUSES.

"An 'eating house' is a 'public place' in the meaning of the said section. What constitutes an 'eating house' is defined by law. 'Any person who shall cook, or otherwise furnish for compensation, diet or refreshments of any kind for casual visitors at his home, and sold for consumption therein, and who is not the keeper of an ordinary house of private entertainment or boarding house, shall be deemed to keep an eating house;' is required to obtain a license for doing so, and is subject to a fine for keeping such a house without obtaining such license. Acts of assembly, 1869-70, p. 239, § 27; 1870-71, p. 107, § 126, p. 281, § 40; 1871-72, p. 190, § 124, p. 481, § 42." *Neal v. Com.*, 22 Gratt. 917.



A county court has a discretion to grant or refuse a certificate for obtaining a license to retail ardent spirits, to a person who has obtained a license to keep an eating house; and the action of the county court is final and conclusive on the question. *French v. Noel*, 22 Gratt. 454. See the title INTOXICATING LIQUORS, vol. 8, p. 1.

### N. IMMIGRATION SOCIETIES.

Immigration societies, organized under the act of March 5, 1894 (acts, 1893-94, p. 723), are not authorized to sell lands of others than the members of the society without paying the license tax required by the acts of March 16, 1903 (acts, 1902-93, pp. 155, 188). The object of such societies, as declared by § 1 of the act first above mentioned, is "to advertise for sale and to sell or lease the lands of the members of said society," and more general language used in other sections of the act will be so construed as to carry out the declared object and intention of the legislature in enacting the statute, and thus reconcile all of the provisions of the act, and render it harmonious throughout. *Immigration Society v. Com.*, 103 Va. 46, 48 S. E. 509.

### O. COOK SHOPS.

A statute requiring a license to keep a cook shop, and laying a tax upon it, is not in conflict with, and does not avoid, an ordinance of the city of Richmond, passed in pursuance of its charter, prohibiting or restricting the keeping of cook shops by free negroes within the city. *Mayo v. James*, 12 Gratt. 17.

"The business of keeping a cook shop before the passage of the act, was a lawful business, which any man might pursue, subject only to such lawful public regulations as might be made in regard to its being carried on within the limits of a town. The effect of taxing it was to restrict, not to enlarge, the right of pursuing it, nor to

exempt it from such lawful police regulations." *Mayo v. James*, 12 Gratt. 17.

### P. SKATING RINKS.

Skating rinks are not enumerated in the act requiring license to be taken out "for public performance or exhibitions," and unless they be conducted so as to be clearly shown that they are properly "public performances or exhibitions," they can not be brought within that act. Where accused kept a skating rink ordinarily visited by persons for the purpose of skating, and took out no license, except when he gave a performance by professional skaters, and ordinarily charged ten cents for admission and ten cents more for use of skates, and some visitors skated, whilst others did not; held, the case does not clearly come within the statute requiring license. Acts, 1883-84, p. 593, et seq., §§ 80, 81. *Harris v. Com.*, 81 Va. 240.

### Q. HAWKERS AND PEDDLERS.

See the title HAWKERS AND PEDDLERS, vol. 7, p. 38.

### R. BUTCHERS.

"The act of April 19th, 1867 (§ 22), provides that 'no person shall, without a license authorized by law, canvass any county or corporation in this commonwealth, or any part thereof, for the purpose of buying or offering to buy, or shall actually buy, any matters of subsistence for man or beast, or for any beverage or for any clothing, or for any materials of which clothing is made.' This provision is copied from the act of February 13th, 1866, except that the words, 'or shall actually buy,' are not in the latter act. The act contains an exception of purchases made by a party for his own use, or for the use of his family." Under this act, a butcher carrying on his business in the markets of a city, who goes out into a county and buys cattle, sheep or hogs, and butchers the animals and sells the meat at his stall in the market, comes within the provisions of the act

of April 19th, 1867, § 22, cess. acts, 1867, p. 822, in relation to assessment of taxes on licenses, and must take out a license for so buying. *Sledd v. Com.*, 19 Gratt. 813.

"The language of the act is general, and embraces all persons except those who buy for their own use or for the use of their families." *Sledd v. Com.*, 19 Gratt. 813, 820.

"We think that the words 'matters of subsistence for man,' as used in the act, comprehend all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer, or are only consumed after undergoing a process of preparation, which is greater or less according to the character of the article. Nor do we perceive any ground for holding that the act applies, as contended by counsel, only to those who 'buy things as they sell them in kind.' The act, by its terms, applies to all who canvass and buy, without any reference to the mode in which they sell what they buy, and without any reference to the purpose for which they buy, with an exception only of those who buy for their own use or the use of their families. We are not authorized to introduce another exception by construction, without the clearest proof that it was the intention of the legislature to make it." *Sledd v. Com.*, 19 Gratt. 813, 822.

F., who lives outside of the city limits, rents a stall in the market house of the city of Richmond, where he carries on his business as a butcher. He prepares his meat for market at his house, and owns two carts and horses, which he uses to bring his meats from his house to his stall, and take out such of it as is not sold, and he pays a tax on these carts and horses as property in the county. Held, under the charter of the city, the city council may require F. to take out a license for so

using his carts and horses, and to pay a tax on said license. *Frommer v. Richmond*, 31 Gratt. 646.

### S. AUCTIONEERS.

See post, "Commission Merchants," VI. U. See generally, the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 174.

If a person who has no license as an auctioneer or commission merchant transact business in his own name under a general merchant's license, all the property, stock, and choses in action acquired or used in such business are liable for his debts under the express terms of § 2877 of the Code. Personal property consigned to such person under unrecorded written contracts, or left with him for sale in the course of his business under verbal instructions from the owner, is property "used in such business" within the meaning of said section, and is liable for the debts of such person. But personal property stored with such person with no power of sale, and office furniture rented with the building, are not so liable. *Edmunds v. Hobbie Piano Co.*, 97 Va. 588, 34 S. E. 472.

### T. BROKERS.

See the title BROKERS, vol. 2, p. 631.

A resident of this state who solicits orders for the sale of goods by sample, solely for nonresident owners, and who forwards such orders and receives a commission for sales negotiated by him, is a broker engaged in interstate commerce, and neither the state nor any municipal corporation can impose a license tax on him for such business. Congress alone can regulate such commerce, and the silence of congress on the subject is equivalent to a declaration that such commerce shall be absolutely free. A license tax on such broker is not a police regulation, but a revenue measure, and imposes an unlawful burden on interstate commerce. *Adkins v. Richmond*, 98 Va. 91, 34 S. E. 967.

## U. COMMISSION MERCHANTS.

See the title **FACTORS AND COMMISSION MERCHANTS**, vol. 5, p. 810.

Tobacco, the growth of the state, in the condition in which it is ordinarily prepared for market by the grower, is not goods, wares and merchandize, within the meaning of the act of 1822-23, ch. 3, and a commission merchant in Richmond is not obliged to obtain a merchant's license to justify him in selling the same. *Mitchell v. Com.*, 1 Leigh 572.

H. has taken out a license as a storager, and also as a tobacco auctioneer. But if H. receives tobacco from the grower on consignment, sells it at auction, makes advances to the owner, charges him storage and auction fee, and a commission on the amount of sales, independent of his charge as auctioneer, and accounts with him for the balance, he is bound to obtain a license as a commission merchant, and pay the tax assessed thereon according to law. *Neal v. Com.*, 21 Gratt. 511.

"Plaintiffs in error were commission merchants as well as tobacco auctioneers, and were liable to the tax imposed on each of those two classes, according to the true intent and meaning of the acts aforesaid. That they were tobacco auctioneers and storagers, and had licenses as such, did not prevent them from being commission merchants, or exempt them from the necessity of obtaining a license as such. The tax on a tobacco auctioneer and a storager as such is very trifling in amount comparatively. The specific tax on a license to the former is but thirty dollars, and no tax appears to be charged in the form of a percentage on the amount of his sales or of his commission. The specific tax on a license to a storager, is but twenty-five dollars on every house, except that in a city or town whose population is five thousand, the tax is \$50. and on

every yard, wagon yard or lot, \$10; while the specific license tax on every commission merchant or firm is \$35; and there is, moreover, a tax of three per centum on the amount of his commissions. If this specific and this per centum tax on a commission merchant could be avoided by obtaining license as a storager and a tobacco auctioneer, no one would ever obtain a license as a commission merchant for the purpose of selling tobacco on commission." *Neal v. Com.*, 21 Gratt. 511.

**Agents' Failure to Disclose Name of Principal.**—Where any person transacts business as a trader with the addition of the word "agent," and fails to disclose the name of his principal or partner, as required by § 13, ch. 100, W. Va. Code, all the property, stock, choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for his debts, unless such person be a licensed auctioneer or commission merchant. *Morris v. Clifton Forge Grocery Co.*, 46 W. Va. 197, 32 S. E. 997.

## V. IMPORTED CIGARETTES.

Cigarettes manufactured in another state, and imported into this state in the original package, may be sold in such original package; and the act of the legislature of West Virginia, passed February 21, 1895, amending and reenacting the Code, § 66, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes so imported and sold by the importer in West Virginia, is not an exercise of the police power of the state, but a regulation of interstate commerce, and therefore void. *State v. Goetze*, 43 W. Va. 495, 27 S. E. 225.

Where cigarettes are manufactured in a sister state, and placed in paper boxes for convenience of transportation and sale, and such boxes are provided with a proper label, giving the name of the cigarettes, the caution notice, the number of the factory, the

number of the revenue district, the name of the state in which they are manufactured and the proper internal revenue stamp, duly cancelled, is pasted across the end of such package so as to seal the same, in accordance with the requirements of the act of congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, such paper box must be regarded as an original package; and its character will not be changed by its being placed with other boxes of the same kind in a wooden box for shipment. *State v. Goetze*, 43 W. Va. 495, 27 S. E. 225.

#### W. LAWYERS.

See the title ATTORNEY AND CLIENT, vol. 2, p. 148.

#### X. STREET RAILWAYS.

See the title STREET RAILWAYS.

A municipal ordinance granting to a street railway company a franchise to construct its tracks and operate cars upon the streets of the city, though silent as to taxation, can not be construed as conferring immunity from the payment of a license tax, in the absence of an express stipulation to that effect. Exemption from taxation is never to be presumed. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645.

A license tax may be imposed by a city upon a street railway company, upon the business done in such city, although the lines of the company extend beyond the city limits. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645.

A city charter which authorizes a license tax upon certain pursuits therein named, and "upon all other business and pursuits upon which a license tax is levied by the state, and such other business as may be lawful," confers the power to impose a license tax on a street railway company, though not specifically named. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645.

The imposition of a license tax on a street railway company for the privilege of conducting its business, and a direct tax on the property engaged in carrying on the business is not double taxation. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645.

A license tax may be imposed on a street railway company by a municipal corporation through which it runs, either in pursuance of its general powers of taxation, or in the exercise of its police powers, and this right is not affected by the fact that the property used by the company in the conduct of its business is taxed both by the city and state upon the ad valorem basis. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645.

#### Y. TELEGRAPHS AND TELEPHONES.

See the title TELEGRAPHS AND TELEPHONES. And see ante, "Constitutionality of City Ordinance," III, A, 4.

Telegraph companies are instruments of commerce, and their business is commerce itself. When they have accepted the provisions of the acts of congress (§ 5268, Rev. Stat.) they become instruments of interstate commerce, and no state or municipal corporation can assess upon them a general license tax, though the property of such companies may be taxed as all other property is taxed. *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789.

A city may impose a license fee upon every telegraph company or agency, doing business in the city, for business done exclusively in the city, not including business done to and from points without the state, or business done for the government, its officers or agents, but, if engaged in interstate commerce, the license tax can not be in excess of what would be the tax on its property within the city

limits under the ordinary modes of taxation, and the payment of such license tax can not be made a prerequisite to the right of the company to transact business. *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789.

"A city may impose a license fee upon every telegraph company, or agency, doing business in the city, for business done exclusively in the city, not including business done to and from points without the state, or business done for the government, its officers or agents. *Postal Tel. Co. v. Charleston*, 153 U. S. 692." *Postal Tel. Cable Co. v. Richmond*, 99 Va. 102, 107, 37 S. E. 789.

### Z. VEHICLES.

A city ordinance imposing a fine on any person conducting a business, occupation or profession for the conduct of which a license is required, without first obtaining such license, has no application to a nonresident merchant whose place of business is without the state, and who keeps a team outside of the state which he uses upon the streets of the city in delivering goods to his customers, although a previous section of the same ordinance imposes a license tax for the privilege of running vehicles for conveying passengers or freight over the streets of the city. Such use of the streets is not a business occupation or profession for which a license is required. *Dooley v. Bristol*, 102 Va. 232, 46 S. E. 296.

The ordinances of the city of Bristol for running vehicles conveying freight over the streets requiring a license is as follows: "Sec. 78. The license tax for the privilege of running vehicles for conveying passengers or freight over the streets of Bristol shall be as follows: For every one-horse buggy, wagon, dray, cart, or hack, except such buggies and carriages as are kept for pleasure or family use, and not for hire, the license tax shall be two dollars; for every two-horse vehicle other

than an omnibus, three dollars; for every two-horse omnibus or hack, the tax shall be four dollars; and for every four-horse wagon, the tax shall be four dollars." *Dooley v. Bristol*, 102 Va. 232, 46 S. E. 296.

### AA. FOREIGN INSURANCE COMPANIES.

Only such assessment companies as raise money to pay a loss by a member's death, by assessment made upon those who survive him, are entitled, under act of May 18th, 1887, to be licensed without making the deposit of bonds under Code, 1887, § 1271. *Mutual Ben. Life Ins. Co. v. Marye*, 85 Va. 643, 8 S. E. 481.

"The claim to this exemption is based upon the provisions of the 57th section, ch. 385, acts of 1871-72, page 484. This section imposes a specific license tax of \$200 upon each insurance company doing business in the state, and in addition thereto a tax of one and one-half per centum upon the gross amount of all its assessments and premiums received in the state. It further provides, that any company paying this tax shall be entitled, without payment of any additional tax, to do business in any and every part of the state. It is insisted that the effect of this provision is to relieve insurance companies from the payment of any additional tax, state, county or municipal." *Humphreys v. Norfolk*, 25 Gratt. 97.

### VII. Double Taxation.

The law as laid down in the syllabus of the principal case is quoted with approval in *Morgan's Case*, 98 Va. 812, 814. 35 S. E. 448, the court saying: "Neither is it double taxation to require the accused to pay a license tax for the privilege of carrying on a business, and at the same time impose a tax upon the property used by him in carrying on that business. Attorneys at law, physicians and others pay li-

cense taxes for the privilege of practicing their professions and conducting their business, and taxes are imposed upon the property used by them in carrying on their professions and business. This has never been considered double taxation. Neither is the license tax in question in conflict with art. 10, § 4, of the constitution, which provides for a license tax on such business only as can not be reached by the ad valorem system. Whether a business can or can not be reached by the ad valorem system of taxation is primarily for the legislature. Its determination of that question will never be held erroneous unless it is manifestly so. The business of fishing in the waters owned by the state is no more within the reach of the ad valorem system than that of an itinerant peddler, a commission merchant, sample merchant or junk dealer, upon whom it has been held license taxes can be imposed. *Hirsh's Case*, 21 Gratt. 785." In *Com. v. Moore*, 25 Gratt. 951, 960, see the principal case cited and followed. See, in accord, footnote to *Lewellen v. Lockhart*, 21 Gratt. 570.

N. is assessed with a double tax for failing to take out a license as a commission merchant; and he proceeds under the act of 1870-71, § 176, p. 121, to be relieved from the tax on the ground that he was not bound to take out such license. This is a civil proceeding; and if the amount of tax assessed against him is less than \$500, no appeal lies to the court of appeals from the judgment of the court below against him. *Neal v. Com.*, 21 Gratt. 511.

Acts, March 3, 1898 (acts, 1897-98, p. 864), requiring a resident of the state taking and catching fish in the waters of the commonwealth to pay a license fee, and imposing a tax on the property used by him in carrying on such business, does not provide double taxation. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

## VIII. Prosecution and Punishment.

See ante, "Exercises in Particular Instances," VI.

**Jurisdiction.**—Under acts, 1897-98, pp. 289, 290, ch. 264, providing that county and corporation courts, police justices, and justices of the peace shall have concurrent jurisdiction of all violation of the state revenue laws, a county court had jurisdiction over violations of act, March 3, 1898 (acts, 1897-98, p. 864), requiring persons catching and taking fish in the commonwealth to first obtain a license and pay a tax, and providing a penalty for violations thereof. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

**Indictments.**—The allegation in the indictment, that the defendant "carried on the business of a druggist without a license therefor," using as it does the language of the statute is sufficient. *State v. Enoch*, 26 W. Va. 253.

It is sufficient if words used in indictment are equivalent to those employed in the statute describing the offense; and to charge a person with "practicing medicine" is equivalent, under acts, 1883-84, p. 597, § 92, to charging that he "practiced as a physician" without having a license. *Whitlock v. Com.*, 89 Va. 337, 15 S. E. 893.

It is immaterial that indictment charging a person with practicing as a physician without license failed to charge that he did so for compensation, under Code, § 534. *Whitlock v. Com.*, 89 Va. 337, 15 S. E. 893.

An indictment against S. for keeping an office and transacting business as agent of the Protection Insurance Company of Hartford, incorporated and authorized by the state of Connecticut, without having a license therefor, against the act, etc., does not state that the said company is an insurance company. This is cured by the verdict. *Slaughter v. Com.*, 13 Gratt. 767.

**Informations.**—An information for

retailing merchandise without a license concludes by claiming a penalty imposed by the statute. Upon the trial, if the jury find defendant guilty, they should assess the fine, and if upon a trial on such an information, the jury merely find the defendant guilty, no judgment can be entered on the verdict; but it should be set aside by the court, and a new trial awarded. *Com. v. Scott*, 5 Gratt. 697.

First section of the act passed February 13, 1866, sess. acts, 1865-66, p. 32, ch. 2, is in these words: "No person shall, without a license authorized by law, sell, contract to sell or offer to sell, for himself or for others, for profit or on commission, or for other compensation, any personal property by deed or other writing, by delivery, sample, card, or other representation, including as such, coal oil, salt, and copperas water, except as follows, to wit:" And an information under said section must allege that the sale was "for profit or on commission, or for other compensation," or it will be fatally defective on demurrer, or on motion in arrest of judgment. *Cousins v. Com.*, 19 Gratt. 807. See also, *Speer v. Com.*, 23 Gratt. 935.

**Fines.**—By the first section of the act of February 24, 1823 (Supplem. To Rev. Code, ch. 270, p. 326) it is declared, "that hereafter it shall not be lawful for any merchant to carry on his trade or occupation, until he shall have paid the tax imposed by law, and obtained a license or commission, agreeably to the provisions of this act." The second section, after prescribing the mode of obtaining a license to sell goods, wares and merchandise of foreign and domestic growth and manufacture, by wholesale or retail, or by retail only, proceeds to enact that "if any person or persons shall sell such goods, wares and merchandise, either by wholesale or retail, without having first obtained such license, such person or persons shall, for every such offense, forfeit and pay the sum of one

hundred dollars, one-half thereof to the use of the informer, and the other half to the use of the literary fund; to be recovered by motion in any court of record, on ten days' previous notice." *Com. v. Collins*, 9 Leigh 666.

**Punishment of Corporation.**—A corporation can only act through its officers and agents, and when the business itself involves a violation of the law, all who participate are liable. The vice-president and general manager of a corporation, in charge of its business, who knows that the subordinate agents of the company are peddling its goods without a license, may be punished criminally therefor, as for peddling without license. A principal is *prima facie* liable for the illegal acts of an agent done in the general course of an illegal business authorized by the principal, and if it be a misdemeanor he may be indicted without reference to the agent. *Crall v. Com.*, 103 Va. 855, 49 S. E. 638.

The general manager of a corporation, in active charge of its affairs, who knows that the subordinate agents of the company are actively peddling the company's goods without license, and who receives reports of such sales indirectly from such agents, is criminally liable for the offense of peddling goods without license. *Crall v. Com.*, 103 Va. 855, 49 S. E. 638.

**Imprisonment of Delinquent.**—The bill of rights of Virginia, which declares that no man shall "be deprived of his liberty except by the law of the land or the judgment of his peers," does not forbid the state to enforce the collection of the tax on licenses, by imprisonment of the delinquent, when no personal property can be found by the officer out of which to make the tax. *Com. v. Byrne*, 20 Gratt. 165.

**Burden of Proof.**—In prosecutions for carrying on the business of druggist without a state license, on the plea of not guilty, the burden of justifying under or proving license is on

the defendant. *State v. Horner*, 52 W. Va. 373, 43 S. E. 89.

**Evidence.**—Evidence which does not show accused was engaged in taking or catching fish, or that he caught or took fish, after act, March 3, 1898

(acts, 1897-98, p. 864), imposing a license tax on fishermen, and providing penalty for nonpayment thereof, took effect, will not support a conviction for violation of such act. *Morgan v. Com.*, 98 Va. 812, 35 S. E. 448.

## LIENS.

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### CROSS REFERENCES.

See the titles AGENCY, vol. 1, p. 240; ANNUITY, vol. 1, p. 385; ATTACHMENT AND GARNISHMENT, vol. 2, p. 70; ATTORNEY AND CLIENT, vol. 2, p. 144; BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645; CHATTEL MORTGAGES, vol. 2, p. 798; CONTRACTS, vol. 3, p. 307; CREDITORS' SUITS, vol. 3, p. 780; DEEDS, vol. 4, p. 364; DOWER, vol. 4, p. 782; ELEGIT, vol. 5, p. 58; EXECUTIONS, vol. 5, p. 416; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540; JUDGMENTS AND DECREES, vol. 8, p. 161; LANDLORD AND TENANT, ante, p. 112; LIS PENDENS; LOGS AND LOGGING; MARSHALING ASSETS AND SE-



**CURITIES; MECHANICS' LIENS; MORTGAGES AND DEEDS OF TRUST; PLEDGE AND COLLATERAL SECURITY; RECORDING ACTS; REFERENCE; SUBROGATION; USURY.**

As to agent's lien for commission, see the title **AGENCY**, vol. 1, p. 240. As to effect of award as a lien on real estate, see the title **ARBITRATION AND AWARD**, vol. 1, p. 687. As to assignment of a lien, see the title **ASSIGNMENTS**, vol. 1, p. 745. As to attachment liens, see the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 70. As to attorney's lien for fees, see the title **ATTORNEY AND CLIENT**, vol. 2, p. 144. As to liens of accounts between banks, see the title **BANKS AND BANKING**, vol. 2, p. 254. As to deed of trust liens, see the title **DEEDS**, vol. 4, p. 364. As to lien of dower, see the title **DOWER**, vol. 4, p. 782. As to lien of fieri facias, see the title **EXECUTIONS**, vol. 5, p. 416. As to the lien of a forthcoming bond, see the title **FORTHCOMING AND DELIVERY BONDS**, vol. 6, p. 411. As to lien of creditor attaching fraudulent or voluntary conveyances, see the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 540. As to lien of bankers and brokers for security for a debt, see the title **PLEDGE AND COLLATERAL SECURITY**. As to creation of liens upon separate estate of married women, see the title **SEPARATE ESTATE OF MARRIED WOMEN**. As to lien of joint stock company upon stock of each shareholder for balance due on shares, see the title **STOCK AND STOCKHOLDERS**. As to rights of liens of sureties, see the title **SURETYSHIP**. As to discharge of liens by trustee, see the title **TRUSTS AND TRUSTEES**. As to innkeeper's lien, see the title **INNS AND INNKEEPERS**, vol. 7, p. 655. As to livery stable keeper's lien, see the title **LIVERY STABLE KEEPERS**. As to agricultural liens, see the title **AGRICULTURE**, vol. 1, p. 288. As to vendor's lien, see the title **VENDOR'S LIEN**. As to lien for improvements, see the title **IMPROVEMENTS**, vol. 7, p. 325. As to charge of debts and legacies, see the title **MARSHALING ASSETS AND SECURITIES**.

## **I. Definition and Nature.**

A lien is a hold or claim which one person has upon the property of another, as a security for some debt or charge, and when the debt is paid, the right to subject or charge the property is gone and extinguished. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404, 418; *Central City Brick Co. v. Norfolk, etc.*, R. Co., 44 W. Va. 286, 28 S. E. 926; *Prentice v. Zane*, 2 Gratt. 262.

Or the ligament or tie which binds certain property to a particular debt for its payment or satisfaction. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

**Nature.**—"All the authorities hold that a lien upon land is not an estate or interest in the land. 'A lien is not, strictly speaking, either a *jus in re* or

*jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.' *Story's Eq. Jur.*, §§ 506, 1215; *Brace v. Knott*, 11 Vesey, 617. 'Lien is a term of very large and comprehensive signification. In its widest sense it may be defined to be a hold or claim which one person has upon the property of another as a security for some debt or charge. But it never imports more than security; it confers no right of property.' *Morrison v. Coal, etc., Co.*, 52 W. Va. 331, 43 S. E. 102.

## **II. Creation.**

### **A. BY STATUTE.**

See the various titles and consult table of cross references.

## B. BY AGREEMENT.

**In General.**—Personal and even transitory and fluctuating property may be made the subject of a lien, at the pleasure of the contracting parties; but, generally, explicit words should be used to effect that purpose, where such lien is not raised by operation of law or equity. *Williams v. Price*, 5 Munf. 507.

**Contract Express or Implied.**—"No man, having possession of the property of another, can resist the claim of the owner, either by set-off or otherwise, merely on the ground that the owner is his debtor. To make such resistance, it is essential that he shall have a lien on the property; and a lien can be acquired only by contract express or implied. There is no difference, in this respect, between a court of law and a court of equity; for a court of equity will not regard anything as a lien, which would not be regarded as a lien in a court of law also; as the case of *Ex parte Ockenden and Jones v. Smith*, which have been mentioned by my brethren, clearly established." *Gilliat v. Lynch*, 2 Leigh 493.

In *Gilliat v. Lynch*, 2 Leigh 493, the court used the following language: "Nor is there any circumstance from which we can imply an agreement, unless we can imply it from the single fact, that Gilliat required a pledge as a security for the first debt, and that he still held this pledge, at the time that he made the subsequent advance. But there never has been a case, in which that circumstance alone was held to amount to an agreement for a lien. Indeed, if that circumstance alone were sufficient, it would have put an end to almost all questions as to liens."

**Illustrative Cases.**—Where a party to a deed agrees to pay to the other party the sum of \$75 per annum for keeping up a certain dam, necessary to the mill property of the obligor, and that the obligation to pay the

same, in addition to being a personal one, "shall be a covenant running with the land, and binding upon the Ronceverte Flour Mills, race, and water power, into whosoever hands they may pass," he thereby creates a lien on such mill property, which, duly recorded, has priority over subsequent liens. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

And where K. made two entries and surveys on one tract of land of eighty-five acres and another of one hundred and eighty-seven acres, and persons claiming under C. entered a caveat to prevent grants issuing to K. for the two tracts, claiming that they were partly included in the tract formerly owned by C. There was an agreement that K. should receive \$200 for releasing all claim to the land supposed to be within the tract formerly owned by C. and that he should receive a conveyance for the land not within such tract. Upon a survey it was found that the 187 acre tract was wholly within, and the 85 acre tract without the tract owned by C. Held, that it was not error in the lower court to declare the \$200 with interest a lien on the 187 acre tract. *Cleggett v. Kittle*, 6 W. Va. 452.

**Cotenants of Party Wall.**—Where a party to a deed signed, sealed, and acknowledged, which establishes and secures to adjacent lotowners mutual interests in a party wall, covenants that he or his grantee, whenever they make use of such wall, will pay one-half of the expenses of the construction thereof, and further provides that such covenant shall run with the lot, a charge or lien is thereby created on such lot, which will bind the same in the hands of subsequent purchasers until discharged. *Parsons v. Baltimore Bldg., etc., Ass'n*, 44 W. Va. 335, 29 S. E. 999.

**Upon Conveyance.**—A person conveying real estate may create a lien

thereon, and charge the same with his support and maintenance by express words showing his intention to so charge the land. *McClure v. Cook*, 39 W. Va. 579, 20 S. E. 612; *Crim v. Holberry*, 42 W. Va. 667, 26 S. E. 314.

**Annuity—Letter Considered in Construing Contract.**—Sadlier granted Watson an annuity for life, the deed not containing the usual power of distress to enforce the annuity, and naming no lands, either specifically or by the general name of lands. But it did contain a covenant that Watson might recover and receive from Sadlier and his heirs, executors, etc., and from his and their estate, real and personal, such annuity. When this deed was about to be prepared, Sadlier wrote to Watson and named certain land which was to be charged with this annuity. The master of the rolls considered that from this letter an agreement should be implied, that the lands named in it were to be charged with the annuity, and that Watson had a lien therefor on them. *Smith v. Patton*, 12 W. Va. 541, 555.

**Covenant Not to Encumber Not Lien.**—"And the said company further covenants that it will not give any voluntary lien of any character whatever on any of its buildings, machinery or grounds so long as this debt remains unpaid." Of course this creates no lien or pledge of any property. It is simply negative; an agreement not to do a particular thing. The creation of a lien is an affirmative act and the intention to do such act can not be implied from an express negative. *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266.

### C. EFFECT OF CREATING LIEN TO PREFER CREDITORS.

If a chartered company create a lien on its property for the purpose of giving preference to one or more creditors of the company over any other creditor (except to secure a debt contracted at the time), such lien shall

enure to the benefit rateably of all the creditors existing at the time of the creation of the lien. So, where a creditor under contract made before the creation of the lien, is omitted, and after that time obtains a judgment for unliquidated damages for breach of the contract, the lien enures for his benefit, rateably with the other creditors. Code, 1873, ch. 57, § 63. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404.

"Any lien or encumbrance created by the voluntary act of a company chartered by a court, for the purpose of giving preference to one creditor over another creditor, except to secure a debt contracted or money borrowed at the time, is within the provisions of the statute, and by the express terms thereof enures to the benefit rateably of all its creditors." *Tate v. Commercial Bldg., Ass'n*, 97 Va. 74, 33 S. E. 382.

### III. Necessity of Possession.

It is essential to common-law liens that persons claiming them have the possession of the chattel upon which they are claimed to operate. Thus an agreement to pledge personal property for the security of a debt is ineffectual to create a pledge of or lien on the property, unless the property is put in the possession of the pledgee. *Williams v. Gillespie*, 30 W. Va. 586, 5 S. E. 210. See the title PLEDGE AND COLLATERAL SECURITY.

Under the statute in West Virginia giving one who keeps a horse or other live stock for compensation a lien, sole or exclusive possession is not necessary to the enforcement of such lien. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

### IV. Property Subject to Lien.

See the various particular titles.

Personal and even transitory and fluctuating property may be made the subject of a lien, at the pleasure of the contracting parties; but, generally, ex-

plicit words should be used to effect that purpose, where such lien is not raised by operation of law or equity. *Williams v. Price*, 5 Munf. 507.

## V. Common-Law Liens.

See the various particular titles such as JUDGMENTS AND DECREES, vol. 8, p. 161; LIVERY STABLE KEEPERS.

At common law no lien exists on real estate for borrowed money expended or repairs put thereon. *Lawyer v. Barker*, 45 W. Va. 468, 31 S. E. 964, 965.

## VI. Equitable Liens.

### A. NATURE OF LIEN.

"Bouvier's Law Dict., title, 'Lien.' An equitable lien is not an estate or property in the thing itself, nor a right to recover the thing; that is, a right which may become the basis of a possessory action; it is neither a *jus ad rem* nor a *jus in re*. It is simply a right of a special nature over the thing which constitutes a charge or encumbrance upon the thing so that the very thing itself may be proceeded against in an equitable action, and either sold, or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the party in whose favor the lien exists. It is of the very essence of this conception, that while the lien continues the possession of the thing remains with the debtor who holds the proprietary interest subject to the encumbrance. *Pom. Eq. Jur.*, §§ 165, 1233. See *Camden v. Alkire*, 24 W. Va. 674; *Criss v. Criss*, 28 W. Va. 388." *Morrison v. Coal, etc., Co.*, 52 W. Va. 331, 43 S. E. 102.

### B. CREATION.

**In General.**—"The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an in-

tention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien on the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of the heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property." *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266, 268.

To create an equitable mortgage or lien, it matters not what language is used, so the intention is apparent. 13 *Am. & Eng. Ency. Law*, 608. While it might be better, following the rule of this court in its opinions, to express the retention of a lien, or the grant of a charge or mortgage, in such plain and easy terms that even the unlearned in law and the weak of comprehension might understand, yet such is not an essential legal requirement. *Parsons v. Baltimore Bldg., etc., Ass'n*, 44 W. Va. 335, 29 S. E. 999, 1000.

**Creation by Contract.**—Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property. *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266.

The contract and the nature of the property should be considered in determining whether the contract gives an equitable lien. *Ruffners v. Putney*, 12 *Gratt.* 541; *William & Mary Col-*

lege v. Powell, 12 Gratt. 372; Patton v. Hoge, 22 Gratt. 443.

Every express executory agreement in writing whereby the contracting party indicates an intention to make some particular property, real or personal, or a fund therein identified, a security for a debt or other obligation, or whereby he promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property which is enforceable against the property. Fidelity Ins. Trust, etc., Co. v. Shenandoah Val. R. Co., 33 W. Va. 761, 11 S. E. 58.

### C. ILLUSTRATIVE CASES.

#### Agreements between Joint Tenants.

—And where two joint tenants of real estate agree with each other, that one shall, with his own money, erect improvements on the real estate, jointly held, and have a lien on the interest of the other, for the money expended, the agreement, with the actual erection of the improvements by the one and the acquiescence of the other, constitutes such a lien as will be recognized and enforced in a court of equity. But such a lien is not valid, and will not be enforced in favor of the tenant who erects the improvements, against a creditor of the other, who has caused his interest in the property to be attached or a purchaser under such attachment; whether the creditor attaching or the purchaser under the attachment, have notice of the previous equitable lien or not. Houston v. McCluney, 8 W. Va. 135.

“An agreement, on a sufficient consideration, to give a mortgage on specific property, creates an equitable lien upon such property which takes precedence of the claims of the promisor's general creditors, and of the claims of subsequent purchasers and incumbrancers with notice of the lien.” Fidelity Ins. Trust, etc., Co. v. Shenandoah Val. R. Co., 33 W. Va. 761, 11 S. E. 58.

**Instrument Invalid as Mortgage Not Good as Equitable Lien.**—An instru-

ment executed by a married woman as a mortgage on her separate estate, but invalid as such, her husband not uniting in its execution, does not create an equitable lien on the estate. Paxton v. Stuart, 80 Va. 873.

**Instrument Executed by Married Woman as Mortgage.**—An instrument executed by a married woman as a mortgage on her separate estate, but invalid as such, her husband not uniting in its execution, does not create an equitable lien on the estate. Norris v. Woods, 89 Va. 873, 17 S. E. 552.

#### Executory Contract of Purchase.

—And a contract in writing, whereby the contractor agrees to purchase a particular tract of land, and executes a mortgage thereon to secure a debt, creates an equitable lien on such land when purchased, which a court of equity will enforce against the contractor and against volunteers and purchasers with notice. Smith v. Patton, 12 W. Va. 541.

#### Paying More than Just Share.

—Where two persons purchase a tract of land jointly, and one of them pays more than his proportion of the purchase money, while the other takes a conveyance of the whole to himself, the person who has thus advanced more than his share, has a lien on the land for the money so advanced. Hays v. Wood, 4 Rand. 272.

If one cotenant has paid more than his just share of an incumbrance on the common property, or has advanced more than his proportion of the purchase money, the court may decree that payment of the excess be made to him, and, in default of such payment, that the moiety of the tenant in default may be sold to satisfy the amount equitably due from it. Grove v. Grove, 100 Va. 556, 42 S. E. 312, 314, quoting from Freeman on Cotenancy and Partition (2d Ed.), § 605, and citing the principal case; and Ballou v. Ballou, 94 Va. 350, 26 S. E. 840, sustain the proposition. See principal case also

cited with approval in *Dobyns v. Rawley*, 76 Va. 537, 539.

**Defectively Acknowledged Trust Deed.**—V., by deed dated November 22, 1876, conveyed a tract of land to E. and A., the wives of B. and H., and, to secure a residue of the purchase money to V., at the same time E. and A., together with their husbands, made a deed of trust to R., trustee, the acknowledgment of which was wholly insufficient. Held, that, although said trust deed conveyed no title from the wives to the trustee, yet the two deeds must be taken together, and an equitable lien is thereby created in favor of V., which can only be enforced in a court of equity. *Schmertz v. Hammond*, 47 W. Va. 527, 35 S. E. 945.

**Deed of Trust Creditor.**—A husband conveys a tract of land, one part of which is his own and the other part is his wife's maiden land, in trust to secure a debt. Afterwards the husband and wife unite in a conveyance of the land to a third person, upon the consideration of five hundred dollars, and that the grantee will pay the debt to secure which the land had been conveyed in trust by the husband. The creditor has an equitable lien upon the land under this last deed, which is good against parties claiming under the grantee. And if the five hundred dollars has been paid, it will be postponed to the creditor's lien. *William & Mary College v. Powell*, 12 Gratt. 372.

**Order on Particular Fund.**—See the title ASSIGNMENTS, vol. 1, p. 762.

A court of equity frequently implies a trust from the contracts of parties, though no words of trust be used. Thus an order to pay a debt out of a particular fund, gives to the creditor a lien on this fund, but this is distinguished from a covenant by a debtor to pay a debt out of a certain fund, such a covenant not creating a lien on the fund, but creating merely a personal obligation. *Smith v. Patton*, 12 W. Va. 541, 553.

An agreement by a debtor to pay a debt out of the proceeds of the sale of a particular piece of property does not constitute an assignment of, or lien upon such proceeds, but is only the personal covenant of the debtor. Nor can such an agreement affect a purchaser of the property who was ignorant of it, nor an assignee of the bonds given for the purchase price who had no notice of it. *Evans v. Rice*, 96 Va. 50, 30 S. E. 463.

Where there was an obligation entered into to pay a certain sum of money, and an agreement entered into to have certain property insured and the policy assigned to the obligee, which policy expired and was not renewed it was held, that no lien was thereby created on the property which was mentioned in the policy. *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266.

A holding a bond of B places it in C's hands to collect the money for him when due, and if not paid, to put it in an attorney's hands to collect by suit; the money was not paid when due, and C put the bond in attorney's hands for collection; then A addressed a letter to C telling him he owed D about \$200 out of the money B owed him; and desiring C when he collected the money from B, if A himself should not happen to be present, to pay the whole to D; and this letter being presented by D to C, C accepting the order therein contained, only told that B's bond was in the attorney's hands; the amount of B's bond exceeded the amount due from A to D. Held, the letter of A to C was neither an equitable assignment by A to D of so much of B's debt to A nor a security given by A to D for the debt he owed him. *Clayton v. Fawcett*, 2 Leigh 19.

A contract in writing, whereby the contractor agrees to apply the proceeds of a particular tract of land, or any portion thereof, to the payment of a debt, or whereby the contractor agrees to apply the rents and profits of a par-

ticular tract of land, or any portion thereof, to the payment of a debt, creates an equitable lien on such land, or such portion thereof, which a court of equity will enforce against volunteers and purchasers with notice. *Smith v. Patton*, 12 W. Va. 541.

**Charge on After-Acquired Property.**

—If a covenant or contract be to charge with the payment of a debt a particular specified tract of land, which the covenantor was thereafter to purchase, it would seem to be a fair deduction from the authorities, that when purchased a court of equity would regard it as held subject to an equitable lien, created by such covenant. *Smith v. Patton*, 12 W. Va. 541, 554.

**Deposit of Title Deeds.**—See the title MORTGAGES AND DEEDS OF TRUST.

In this state the deposit of title deeds creates no lien as against a subsequent bona fide purchaser or encumbrancer. *Kelly v. Lehigh Mining, etc., Co.*, 98 Va. 405, 36 S. E. 511.

**D. ASSIGNMENT.**

An equitable lien is assignable, and may be enforced in a court of equity by the assignee. *Schmertz v. Hammond*, 47 W. Va. 527, 35 S. E. 945.

**VII. Statutory Liens.**

**A. JUDGMENT LIENS.**

See the title JUDGMENTS AND DECREES, vol. 8, p. 320.

**B. LIEN FOR SUPPLIES OR LABORER'S LIEN.**

**Statutory Provision.**—Section 2485, ch. 110, of the Code, under which the lien in this case is claimed, provides a mode in which conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics or laborers, and all persons furnishing railroad iron, engines, cars, fuel and other supplies necessary to the operation of any railroad, canal or other transportation company, and all clerks, mechan-

ics and laborers, who furnish their services or labor to any mining or manufacturing company, whether such railways, canal or other transportation, or mining or manufacturing company be chartered under or by the laws of this state, or be chartered elsewhere, and doing business within the limits of this state, shall have a prior lien on the franchises, gross earnings, and all the real and personal property of said company, which is used in operating the same, to the extent of the moneys due them by such company for such wages or supplies. *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. 390.

**Construction of Statutes.**—Statutes giving lien to mechanics and laborers are remedial, and therefore should be construed liberally. *Virginia Devel. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

**Constitutionality of Statute.**—Act of March 21, 1877, amended April 2, 1879, entitled, "An act to secure payment of wages and salaries of certain employees of railway and other transportation companies," providing that employees and persons furnishing to such companies supplies, cars, and engines, is, as to the cars and engines, void, being repugnant to § 15, art. 3. Virginia constitution, which requires that "no law shall embrace more than one object, which shall be expressed in the title." *Fidelity Ins. Trust, etc., Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 9 S. E. 759.

The first section of the act enacts "that hereafter all conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, fuel, and all other supplies necessary for the operation of trains and engines, employed in the service of any railroad, canal, or other transportation company chartered under or by the laws of this state, or doing business

within its limits, shall have a prior lien on the franchise, the gross earnings, and on all the real and personal property of said company which is used in operating the same for and to the extent of the wages or salaries contracted to be paid them by said company; and no mortgage, deed of trust, sale, conveyance, or hypothecation hereafter executed of said property shall defeat or take precedence over said lien." *Fidelity Ins. Trust, etc., Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 4, 9 S. E. 759.

Code, § 2486, giving liens to persons furnishing supplies to a manufacturing corporation on all its property, superior to deeds of trust, etc., executed since March 21, 1877, is not contrary to amendment fourteen to the constitution of the United States as being special and class legislation. *Virginia Devel. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

**How Lien Perfected.**—In order to perfect the lien given to laborers and mechanics for mining and manufacturing companies by § 2485 of the Code, it is necessary that the memorandum required by § 2486 should be filed in the proper clerk's office within ninety days after such supplies are furnished or services rendered; but it is not necessary that this fact should appear from the memorandum, or from any paper filed therewith. It may be shown by evidence aliunde. *Overholt v. Old Dominion Mfg. Co.*, 98 Va. 654, 37 S. E. 307.

A laborer's lien against an insolvent corporation is not invalid because sworn to and filed in the county clerk's office after a suit to wind up its affairs and apply its property to creditors' debts has been instituted. *Kahle v. Oil Company*, 51 W. Va. 313, 41 S. E. 233.

**Construction of Words and Phrases in Statute.**—An apparatus for kiln drying lumber is not a part of the "supplies necessary to the operation" of a

sawmill, and therefore no lien is given therefor by § 2485 of the Code. *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. 390.

Pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, is "a supply" within the meaning of Va. Code, 1887, § 2485, giving a lien to all persons furnishing fuel and other supplies necessary to the operation of any manufacturing company. *Virginia Devel. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

After a manufacturing company has issued and negotiated to a bona fide holder for value warehouse receipts for its products, the goods represented by such receipts are not "personal property of such company" within the meaning of § 2485 of the Code so as to be liable to a lien for supplies furnished the company. *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 379, 44 S. E. 760.

Liens given by § 2485 are entitled to precedence as among themselves according to the times at which they are severally filed under § 2486, that first filed taking preference. *Virginia Devel. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

Liens for supplies given, by § 2485, priority over deeds of trust, etc., executed since March 21, 1877, are not restricted to deeds of trust, etc., executed between that date and the date of the taking effect of that act, but have precedence over deeds of trust, etc., executed after the latter date. *Virginia Devel. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

**Bonds of a manufacturing company,** secured by mortgage on its real and personal property, are of no value before issue, and represent nothing; when issued, and in the hands of bona fide holders for value, the holders become mortgagees, and as such are expressly protected by the terms of § 2485 of the Code against claims for



supplies not previously asserted. *Mill-hiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

**Priority of Receiver's Certificate.**—

Where the lien of appellants for supplies had been reported and confirmed without objection, and they had also their conceded lien by virtue of the deed of trust, and yet without notice to them, without representation, and without opportunity of being heard, their claim, the position of which had been thus ascertained and fixed, was subordinate to receiver's certificates issued under decrees which they had not opportunity to resist. *Osborne v. Bigstone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

**Recordation of Lien.**—A running account, in the absence of evidence to the contrary, is considered as falling due at the date of its last item; and a lien for supplies may be recorded within ninety days from the date of the last item. *Osborne v. Bigstone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

**Extinction or Discharge.**—A laborer's lien on the property of an insolvent corporation does not lapse and become lost by failure to sue upon it within six months after filing the account, if within that time he files his petition to enforce it in a suit brought by one creditor for himself and others to wind up the affairs of the corporation and apply its property for payment of its creditors. *Kahle v. Oil Company*, 51 W. Va. 313, 41 S. E. 233.

**Issuing Receiver's Certificate without Notice.**—Prior liens are unaffected by receiver's certificates issued without notice. *Osborne v. Bigstone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

**C. MECHANIC'S LIEN.**

See the title MECHANICS' LIENS.

**D. KEEPERS OF LIVE STOCK.**

See the title LIVERY STABLE KEEPERS. And see *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

**VIII. Priorities.**

See the titles ASSIGNMENTS, vol. 1, p. 745; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; CHATTEL MORTGAGES, vol. 1, p. 798; JUDGMENTS AND DECREES, vol. 8, p. 161; MORTGAGES AND DEEDS OF TRUST; and the various specific titles.

**Generally.**—Where liens are given by statute, the one being first in point of time takes precedence. *Puryear v. Taylor*, 12 Gratt. 401.

But though it is a general rule that between equities equal in all other respects the elder shall prevail, yet where a lien is secret, and another is permitted to take possession of property, hold and make payments on it without notice, his equity will be preferred. *Cox v. Romine*, 9 Gratt. 27.

Of two equitable incumbrances, he that hath the preferable right to call for the legal estate, is entitled to preference; though he hath not actually got in it, nor got an assignment, nor even possession of the deed conveying the outstanding legal title; and though his lien is of subsequent date to the other incumbrance. *Williamson v. Gordon*, 5 Munf. 257.

Where a purchaser of real estate has not the legal title, and a subsequent purchaser of the same property has paid his money, and has not indeed the legal title but the best right to call for the legal title before he receives notice, he shall be entitled to priority, notwithstanding he has not actually acquired such title. To this effect, the principal case is cited in *Preston v. Nash*, 75 Va. 949, 957; *Preston v. Nash*, 76 Va. 1, 9; *Camden v. Harris*, 15 W. Va. 554, 563. In *Hoult v. Donahue*, 21 W. Va. 294, 300, it is said: "He who buys an equitable title in ignorance of its nature, and under the belief that he is getting a good legal title, may, therefore, protect himself, by getting in the legal title, even where the effect is wholly to exclude equities prior to his

own. *Baggary v. Gaither*, 2 Johns Eq. 80; *Boone v. Chiles*, 10 Pet. 177; *Williamson v. Gordon*, 5 Munf. 237; *Mutual Assur. Soc. v. Stone*, 3 Leigh 218; *Cox v. Romine*, 9 Gratt. 27; *Bayley v. Greenleaf*, 7 Wheat. 46; *Camden v. Harris*, 15 W. Va. 554." See principal case also cited with approval in *Mutual Assur. Soc. v. Stone*, 3 Leigh 218, 236, and distinguished in *Colquhoun v. Atkinsons*, 6 Munf. 337.

A. sold to his son U. a tract of land, taking his bond for the purchase money, and a deed of trust on the land to secure them. He died, and his son U. qualified as his administrator. Shortly afterwards U. obtained a loan of money and stock from C. and gave a deed on this same land to secure it. Upon a bill by C. against the administrator *de bonis non* of A. and U. and his sureties on his official bond, to enforce his lien; the court being of opinion, from all the evidence that U. had not paid any part of his debt to A., though he represented to C. he had done it, and that he was fraudulently trying to get rid of the lien in favor of A., in order to raise money for his own purposes, and that C. either knew, or might have known, if he had wished it, the facts and made the loan with a knowledge of them, or in willful ignorance; held, in favor of A.'s estate and U.'s sureties, that the lien to secure A.'s debt was a valid subsisting lien, and had preference of the lien of C. *Utterback v. Cooper*, 28 Gratt. 233.

**Lien of Joint Purchaser.**—A. and B. are joint purchasers of real property. They give their notes for the payment of the purchase money, and receive a conveyance from the vendor. B. becomes insolvent, and A. pays more than a moiety of the purchase money. A. has a lien on the property to reimburse him all that he has paid above one moiety of the purchase money, in preference of the creditors of B. claiming under a deed of trust from B., unless they appear to be purchasers with-

out notice. *Tompkins v. Mitchell*, 2 Pand. 428.

## IX. Waiver, Discharge, or Release.

**Generally.**—"It is indeed elementary that no man can rightfully be deprived of his property, or any security or lien which he may have acquired, except by his own consent, or his own negligence or default, or by proceedings had in accordance with the law of the land—that is to say, the opportunity to be heard in defense of his rights." *Osborne v. Bigstone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

"To sustain this loss of lien we must place it on one or the other of two ideas—intentional waiver, or from loss of possession. As to the first, authority is abundant to show that one will not be held to waive a lien unless the intent be express or very plain and clear. The presumption is always against it. Merely taking a new security does not. *Bansimer v. Fell*, 39 W. Va. 448, 19 S. E. 545; *Hopkins v. Detwiler*, 25 W. Va. 734, 748; *Hess v. Dille*, 25 W. Va. 97. So with the innkeeper's lien, 11 Am. & Eng. Ency. Law, 49." *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

**Question of Intention.**—Whether or not a particular transaction amounts to the release of a lien on real estate is a question of intention on the part of the releasor. In a doubtful case such intention will not be implied; but, when it is clear that such was the intention, a court of equity will enforce the release, although no formal release has been executed. *Stribling v. Splint Coal Co.*, 31 W. Va. 82, 5 S. E. 321; *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 591.

In 1852, C. sold to M. a tract of land for \$3,564, for which she took his bond, and reserved a lien on the face of the deed given M., which was duly recorded. Between the sale in 1852 and December, 1855, there were other

transactions between C. and M., by which the latter became indebted to the former (inclusive of the purchase money for the land) \$10,630.50 and for which he executed his bond, with two personal sureties, and the bond for \$3,564 was surrendered. M. died in 1856, leaving his whole property to his wife, L., who was a sister of C. L., the widow, soon married W., and in 1863 W. and wife conveyed the land purchased of C., with other lands to H., made him a deed and put him in possession. On the 19th of October, 1866, the balance due on the \$10,630.50 bond was \$4,123, for which W., who was then the representative, and had married the widow of M., gave his bond, got possession of the \$10,630.50 bond, and confessed a judgment for the \$4,123 in favor of C., which he, W., alleges was in lieu of the bond which he got possession of. W. soon went into bankruptcy, and but a small portion of the judgment was paid. C. denies the statement of W. about his possession of the bond, and there is nothing in the record certainly to show affirmatively that she ever intended to release the lien reserved in the deed to M. H. denies all knowledge of the reserved lien at the time of the purchase, and until a long time thereafter. There was nothing done by C. to induce H. to believe that she had waived her lien, or to influence his conduct in any way. On a bill filed by C. against H. and W. and wife, in 1871, to enforce the lien for the purchase money then due on the land sold by C. to M. and afterwards by W. and wife to H.; held, the question of whether a lien reserved is surrendered is one of intention, on the part of the vendor, under the circumstances of each case; and there being nothing in this case to show such intention, the lien is not surrendered, and must be recognized as still existing. The lien was a security not for the bond but for the debt, and therefore the cancellation or surrender of the bond can not extinguish the

debt and the lien given for its payment, without a manifest intention to do so by the vendor, and the burden is on the purchaser to show such intention. *Coles v. Withers*, 33 Gratt. 186.

**By Whom Released.**—The court held that the contract created a charge or lien on the land as against a subsequent grantee, who had not assumed the same personally, and had no notice thereof other than the record of the instrument afforded. The court says: "Where the covenant concerns land, and is one that is capable of being annexed to the estate, and it appears that it is the intention of the parties, as expressed in the instrument, then it shall be construed as running with and charging the land thereafter." Having once attached as a lien, it could not be released except by the person for whose benefit it existed. *Parsons v. Baltimore Bldg., etc., Ass'n*, 44 W. Va. 335, 29 S. E. 999, 1000.

**By Execution or Attachment.**—After a full review of tax writers and decisions, it was held, in West Virginia, that taking property in execution at the suit of a party having a lien thereon is not a waiver or destruction of the lien. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

**As to Loss of Lien by Loss of Possession.**—An innkeeper having a lien has no right to sell the property without a judicial proceeding. If he does, he is liable to an action of trover for its unlawful conversion, besides losing his lien. His only remedy is to hold it till payment. Unreasonable this is; but where no statute can be found providing for a sale it is so, by much authority. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

**By Merger.**—An innkeeper or keeper of live stock who has a lien on the property does not lose the lien by levying an attachment upon the property. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

**Merely taking a new security** does not constitute a waiver or loss of the

lien. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

Where a bond is given for purchase money for land, and secured by a lien in the deed of conveyance, the mere giving of a new bond or note, in place of the original, does not release the lien, but the lien is good for the new bond or note. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49.

**By Extinguishment of Debt.**—When the debt is extinguished, the lien expires with it. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404, 418.

Though an assignment or transfer of a claim secured by lien would carry the lien, it does not follow that an assignment of the lien would carry the debt with it. Destruction of the debt extinguishes the lien, but the annihilation of the lien does not extinguish the debt. *Morrison v. Coal, etc., Co.*, 52 W. Va. 331, 43 S. E. 102.

Where real estate, whereon is a lien, is conveyed to a joint stock company, and a stockholder pays off the lien and takes an assignment thereof, the lien is extinguished as to the creditors of the corporation, and can not be revived by his assignment thereof to a third party. *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404.

A lien given to secure the debt due from an executor or administrator to his testator or intestate, is of course discharged when the debt is actually paid to the creditor or legatees and distributees of the creditor, but the introducing the debt into an administration account, as a charge to the executor or administrator is not sufficient to discharge the lien, either as against creditors, legatees or distributees of the creditor, or as against the sureties of the executor or administrator. *Utterback v. Cooper*, 28 Gratt. 233.

**Lien Not Waived by Transfer of Property.**—Real or personal property on which there is a lien may be transferred from one person to another and the lien is not thereby waived or lost.

*Dewing v. Hutton*, 40 W. Va. 521, 21 S. E. 780.

**Waiver by Failure to Assert before Transfer.**—N. filed his bill against B. and T. to recover the amount of \$621, due him for wood, staves, etc., sold by him to B., growing on the said N.'s land. This was by written agreement. B. made a contract with T. to cut this timber on shares. The timber, wood, staves, etc., having been cut, and the same sold, and the proceeds divided between B. and T.; B. failing to pay N. for the wood, staves, etc., N. filed his bill to have recovery of the same, and to charge the wood with a lien reserved in his contract with B. and to have the transactions between B. and T. settled up by the court, to ascertain and subject B.'s share of his debt. Held, that, if, by the agreement, T. and B. could be regarded as partners, no insolvency is averred; no claim is asserted against the firm, but only against B. By its terms, the wood was to be sold before N. was to be paid. It could not have been sold, if the sale had to be made under an alleged lien in favor of N. The sale was made, and the wood passed into the hands of purchasers for value without notice. The alleged lien could only be effective between N. and B.; and it has been waived by N., if he had any lien, by his failure to assert it on the wood in B.'s hands. His remedy is against B. for the proceeds. *Neff v. Baker*, 82 Va. 401, 4 S. E. 620.

**Discharge or Release by Mistake or Fraud.**—A lien discharged or released through fraud or mistake, will be restored in equity unless innocent third parties are affected. *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.

**Lien Not Effected by Transfer of Equity of Redemption.**—A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption, made him with a view of giving him a preference. *Carr v. Summerfield*, 47 W. Va. 155, 34 S. E. 804.

**Release of Public Trust Fund by Legislature.**—In the year of 1863 the general assembly authorized the payment of an amount in confederate currency, which in 1790 was bequeathed in trust for the poor of Prince William county and which was invested in land. Held, that the land was released from the lien. *Prince William School Board v. Stuart*, 80 Va. 64.

**Mortgage to Party Having No Notice of Equitable Lien.**—If a contractor renders an equitable lien unavailing by executing a mortgage on such land in favor of a party having no notice of such equitable lien, such conduct would not justify a court in charging any other lands of the covenantor with such debt. *Smith v. Patton*, 12 W. Va. 541.

## X. Enforcement of Liens.

As to enforcement of the particular liens, see the various particular titles, such as JUDGMENTS AND DECREES, vol. 8, p. 460.

### A. IN EQUITY.

A common-law lien on personal property for work and labor performed is the mere right of detention of such property until satisfaction of debt, and is not the subject of equitable jurisdiction or protection in the absence of statutory provision or other grounds of equitable interference. *Burrough v. Ely*, 54 W. Va. 118, 46 S. E. 371. See *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

Defendant, being about to start a newspaper, procured sufficient money to buy a printing outfit from complainant, who, to secure himself against loss, reserved a monthly rent sufficient to pay interest on his outlay, and to cover wear and tear. It was provided that defendant should become absolute owner of the printing outfit on his refunding its cost to complainant in six quarterly payments, but he made no such payment, and paid only two months' rent. To secure his debt to complainant, defendant gave him an

order on the receiver in a chancery cause for what might come to him therein, and complainant applied what he received on this order generally to these and other claims held by him against defendant without objection on defendant's part. Held, that a court of equity had jurisdiction to restrain defendant from disposing of the printing outfit as his own, and to ascertain and enforce complainant's lien on the property. *Lacy, J., dissenting. Morrison v. Wilkinson*, 1 Va. Dec. 772.

The committee of a vendor of land files a bill, which on the death of the vendor, is revived in the name of his heirs, to set aside a contract and deed for the sale and conveyance of land on the ground of the vendor's incompetency, of the improper influence exercised upon him, and for inadequacy of consideration. The court sets aside the deed and directs that the vendees shall surrender the land, unless within ninety days they file a bill for the specific execution of the contract, which they do. Held, if upon taking the account there is a balance found due, it is a lien upon the land, and may be enforced in equity. *Stearns v. Beckham*, 31 Gratt. 379.

**Objection to Jurisdiction.**—Where the title to personal property has been retained by the vendor, his remedy in respect thereto is at law and not in equity. If a bill in equity be filed by the vendor to enforce a lien on the property, or to subject it to sale, objection thereto for want of jurisdiction may be taken for the first time in the appellate court, though the bill was not demurred to. The objection being jurisdictional may be raised at any time, and the court may, of its own motion, dismiss the bill, though the objection be not raised by the pleadings, nor suggested by the parties. Nor in such case can the court render any personal decree against the defendant. A personal decree can only be rendered in a case where the complainant is in court upon a case properly cognizable

by a court of equity. *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 91, 26 S. E. 390.

### B. PARTIES.

In a suit to enforce liens for the benefit of all lienholders against the land of a debtor, if it appears necessary to a safe and proper decision between the debtor and any lienholder that such lien holder should be a formal party the court may, and should, require him to be made a party, though his debt has been reported as a lien by a commissioner's report, made under an order to convene lienholders, and report their liens after publication of notice to them. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68.

A deed by M. and H. to D. conveying a tract of land with general warranty of title, in consideration of \$1,250 of which \$646 is paid, \$604 the residue thereof is to be paid, whenever two bonds of \$200 each are produced which J. executed to R. Held, that a lien is retained for the unpaid purchase money \$604 but it can not be enforced in equity without making M. and H. parties defendant. *Robinson v. Dix*, 18 W. Va. 528.

When the beneficiaries of a trust are known to the plaintiffs instituting a general creditors' suit against the trustee to subject his property to the payment of his debts, such beneficiaries must be made formal parties to such suit; and they are not bound by the decrees therein by reason of the publication of the general notice to lienholders required by ch. 139 of the Code. *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300.

**Equitable Liens.**—A debtor contracts to give a lien on two adjoining tenements to secure a debt, and the creditor is in possession of one of the tenements under an agreement by which the rent of the tenement is to be taken in satisfaction of the interest on the debt. Afterwards the debtor becoming embarrassed in his circumstances, con-

veys all of his property in trust to pay his debts. Held, the creditor is entitled to enforce his equitable lien not only against the debtor but his creditors. *Ott v. King*, 8 Gratt. 224.

### C. SERVICE OF PROCESS.

See the title SERVICE OF PROCESS.

Petitions for relief in a cause filed by new parties must have process against parties to be affected thereby; but, if they seek to enforce liens, and an order to convene liens is made, the liens stated in the petition may be presented to a commissioner without such process on such petition. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

### D. ENFORCEMENT BY ACTION OR SUIT.

**A common-law lien on personal property for work and labor performed** is the mere right of detention of such property until satisfaction of debt, and is not the subject of equitable jurisdiction or protection in the absence of statutory provision or other grounds of equitable interference. *Burrough v. Ely*, 54 W. Va. 118, 46 S. E. 371.

Such lien only secures to the lienor the right of possession and it is not otherwise enforceable. A sale made by him of the property would be wrongful. *Burrough v. Ely*, 54 W. Va. 118, 46 S. E. 371.

For the deprivation of such possession, the lienor may maintain detinue or trover, or under execution or attachment properly obtained he may have sale of the property. *Burrough v. Ely*, 54 W. Va. 118, 46 S. E. 371.

Retention of possession is the full force of such lien and nothing more. To this extent alone it is enforceable and this by suit at law. 19 Amer. and Eng. Ency. Law (2d Ed.) 34; 13 Ency. Plead. and Prac. 123, 126. *Burrough v. Ely*, 54 W. Va. 118, 46 S. E. 371.

**An innkeeper**, on the mere strength of the lien, can sue neither at law nor in equity, if there is no statute to allow

it. It is different from a pledge or pawn. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951, citing 13 Ency. Pl. and Prac. 127; 1 Jones, Liens, 1033, 1038.

#### **E. DECREE.**

See the title **VENDOR'S LIEN**.

On a bill filed to enforce a lien reserved on real estate for balance of purchase price thereof, there may be a personal decree against the purchaser for the purchase money before the sale, and not merely for the balance due after crediting the proceeds of the sale of the land. But there can be no personal decree against one who was no party to the contract of purchase. *Dellinger v. Foltz*, 93 Va. 729, 25 S. E. 998.

#### **F. MULTIFARIOUSNESS.**

See the title **MULTIFARIOUSNESS**.

The uniting a purely legal demand in a bill which seeks the enforcement of an equitable demand, will not render

the bill liable to be dismissed as multifarious. *Smith v. Patton*, 12 W. Va. 541.

#### **G. ENFORCEMENT OF INN-KEEPER'S LIEN.**

See the title **INNS AND INN-KEEPERS**, vol. 7, p. 655.

"An innkeeper having a lien has no right to sell the property without a judicial proceeding. If he does, he is liable to an action of trover for its unlawful conversion, besides losing his lien. His only remedy is to hold it till payment. Unreasonable this is; but, where no statute can be found providing for a sale, it is so, by much authority. 11 Am. & Eng. Ency. Law (1st Ed.) 46; Jones, Liens, § 523. In fact, on the mere strength of lien, he can sue neither at law nor in equity, if there is no statute to allow it. It is different from a pledge or pawn. 13 Ency. Pl. & Prac. 127; 1 Jones, Liens, §§ 1033, 1038." *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951.

### **Lieutenant Governor.**

See the title **GOVERNOR**, vol. 6, p. 740.

### **Life.**

See the titles **ESTATES**, vol. 5, p. 182; **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS**.

### **Life Estates.**

See the title **ESTATES**, vol. 5, p. 182.

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### **CROSS REFERENCES.**

See the titles ACCIDENT INSURANCE, vol. 1, p. 71; ASSIGNMENTS, vol. 1, p. 753; BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 244; CONTRACTS, vol. 3, p. 307; ESTOPPEL, vol. 5, p. 191; FRAUD AND DECEIT, vol. 6, p. 448; INSURANCE, vol. 7, p. 746; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 856; MUTUAL INSURANCE; PAROL EVIDENCE; PARTIES; PLEADING; RESCISSION, CANCELLATION AND REFORMATION; VENUE.

### **I. Scope of Title.**

In this title it is intended to set out and classify the Virginia and West Virginia decisions relating peculiarly to the subject of life insurance, the definition, nature, form and requisites of contracts, or policies of life insurance, the rights, duties and liabilities of the parties thereto, the reformation, rescission, cancellation, and the enforcement of such contracts. No attempt will be made to treat the general principles of insurance law, save in their application to the particular branch of the subject now under consideration, as such general principles will be found fully discussed under the title INSURANCE, vol. 7, p. 743.

## II. Definition.

**In General.**—Insurance upon life is a contract whereby the insurer, in consideration of a certain premium, either in shape of a gross sum or by annual payment, undertakes to pay to the person for whose benefit the insurance is made a certain sum of money or an annuity, on the death of the person whose life is insured. The insurance may be for the whole term of life or for a limited period. If the insurance be for the whole life, the insurer undertakes to make the payment whenever the death occurs; if otherwise, he undertakes to make it in case the death should happen within a named period, for which period the insurance is said to be made. 3 Min. Inst. (2d Ed.), pt. 2, p. 1189.

## III. The Contract or Policy.

### A. NATURE.

A contract of life insurance is not a contract of indemnity for a definite period, as is a policy against fire, but it is a contract to pay a certain sum of money, for the consideration mentioned, upon the happening of an event, which is inevitable, and only uncertain as to the time it may transpire. *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614.

**Nature of Interest of Insured.**—The interest of the insured, in a policy on his life which has no present market value, but is dependent for its continued existence on voluntary payments to be made in future by him, is not such an interest or estate as can be reached by a *fieri facias*. It is immaterial that the insured in a given contingency is allowed to surrender his policy and take in lieu thereof a paid-up policy for a different amount. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647. See the title EXECUTIONS, vol. 5, p. 416.

### B. FORM AND REQUISITES.

#### 1. Form.

**In General.**—Generally, to the point

that no particular form is required in insurance contracts, the validity of parol contracts, etc., see the title INSURANCE, vol. 7, p. 773.

**Statutory Provisions as to Style of Printing Conditions and Restrictive Provisions.**—Section 3252 of the Code of Virginia, as to the size of type in which the conditions and restrictive provisions shall be printed, applies alike to the application and the policy, where the application is expressly made a part of the contract of insurance. *Burress v. National Life Ass'n*, 96 Va. 543, 32 S. E. 49.

Section 3252 of the Code of Virginia, requiring that conditions and restrictive provisions of insurance policies must be written or printed in type of a prescribed size, should be liberally construed. The whole provision relied on must be in writing or printed in type of the prescribed size, or else it is not available as a defense to an action on the policy. *National Life Ass'n v. Berkeley*, 97 Va. 571, 34 S. E. 469.

#### 2. Requisites.

##### a. In General.

As to the requisites of insurance contracts generally, see the title INSURANCE, vol. 7, p. 776, et seq.

##### b. Insurable Interest.

###### (1) Necessity.

**General Rule.**—Persons having no insurable interest in the life of another, can neither take out a policy nor take an assignment of a policy on the life of the latter. *Roller v. Moore*, 86 Va. 512, 10 S. E. 241.

One who receives and accepts the benefit of a policy of insurance on the life of a third person in whose life he has no insurable interest is liable to the representative or assignee of the assured for the sum so received, less premium and expenses paid, if any, and such liability is not affected by the fact that there was a prior contract, without consideration, to effect such insurance. The prior contract

was void as against public policy, and a void contract can not defeat a lawful right. *Tate v. Commercial Bldg., etc., Ass'n*, 97 Va. 74, 33 S. E. 382.

"When there is no interest at all to be protected, a policy will be invalid, as counter to the spirit and purpose of the contract, as well as against public policy." "When the insured has nothing to lose, but everything to gain, by the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation to destroy the property or the life upon which the insurance is effected." *May on Ins.* §§ 74, 75." *Tyree v. Virginia Fire, etc., Ins. Co.*, 55 W. Va. 63, 46 S. E. 706.

**Want of Insurable Interest as Affecting Assignee of Policy.**—As to the former and present rule as to assignments of policies of life insurance, amount of recovery by assignee, etc., see post, "Assignment or Transfer of Policy," III, D.

**Estoppel to Deny Insurable Interest.**—Where a complainant in her original bill admits that one of the defendants had an insurable interest in the life of her husband, and seeks a recovery on the ground that, having a double security for his debt, he had collected both, she can not, in her bill of review, deny the insurable interest, and seek relief on other grounds. *Beatty v. Barley*, 97 Va. 11, 32 S. E. 794.

## (2) What Constitutes.

**In General.**—"It is not easy to define with precision what will, in all cases, constitute an insurable interest. It may be stated generally, however, to be such an interest, arising from the relation of the party obtaining the insurance, either as creditor of, or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary, that the expectation of advantage or benefit should be always capable

of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the assured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood, or affinity, to expect some benefit or advantage from the continuance of the life of the assured." *Roller v. Moore*, 86 Va. 512, 10 S. E. 241; quoting Justice Field in *Warnock v. Davis*, 104 U. S. 779. See also, *Tate v. Commercial Bldg., etc., Ass'n*, 97 Va. 74, 33 S. E. 382.

**Interest of Creditor in Life of Debtor.**—A creditor may insure the life of his debtor, or may acquire, by assignment, a policy on his life after it has been issued to the debtor. The interest of the creditor in the policy, however, will be limited to the amount of the debt at the time of the death of the assured, together with such premiums as the creditor has paid to preserve the policy, with interest thereon. *First Nat. Bank v. Terry*, 99 Va. 194, 37 S. E. 843.

**A building association has no insurable interest in the life of a member who is in no wise indebted to it; and the fact that the member becomes surety for the association does not create an insurable interest.** *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382.

**Interest Arising from Relation of Husband and Wife.**—A husband has an insurable interest in the life of his wife, as has the wife in the life of her husband. *Roller v. Moore*, 86 Va. 512, 10 S. E. 241; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355.

"It shall be lawful for any married woman, by herself and in her name,

or in the name of any third person, with her assent, as her trustee, to cause to be insured for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, and for her own use, free from the claims of the representatives of her husband or any of his creditors; but such exemption shall not apply where the amount of premium annually paid out of the funds or property of the husband shall exceed one hundred and fifty dollars." W. Va. Code, 1899, ch. 66, § 5.

"The amount of the insurance may be made payable in case of the death of the wife before the decease of her husband, to his or her children for their use, as shall be provided in the policy of insurance, and to their guardian, if under age." W. Va. Code, 1899, ch. 66, § 6.

**Interest Arising from Relation of Parent and Child.**—It is well settled that a parent has an insurable interest in the life of the child and the child in the life of the parent. *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421; *Roller v. Moore*, 86 Va. 512, 10 S. E. 241.

"No matter what doubt may have been formerly entertained on the subject, it is now well settled that a father has an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father. *Bliss on Life Ins.* (2d Ed.), 41 42; *Warnocks v. Davis*, 14 Otto 779; *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. R. 498." *Valley Mut Life Ass'n v. Teewalt*, 79 Va. 421.

#### c. Agreement.

Generally, as to the necessity for a mutual agreement between the parties to a contract of insurance, see the title **INSURANCE**, vol. 7, p. 776.

The application for insurance is a mere proposal on the part of the applicant. When the answer signifies the acceptance of it to the proposer, and not before, the minds of the parties meet, and the contract is made. If anything remains to be done, if the agreement is not consummated, if all the terms have not been mutually agreed upon, no contract arises between the parties. *McCully v. Phoenix, etc., Ins. Co.*, 18 W. Va. 782.

#### d. Payment of Premium and Delivery of Policy.

##### (1) Prepayment and Delivery as Conditions Precedent to Insurer's Liability.

Generally, as to prepayment of premium and delivery of policy as conditions precedent to liability on the contract, and also for the general rules as to necessity of payment, what constitutes, forfeiture for nonpayment, waiver of such forfeiture, etc., see the title **INSURANCE**, vol. 7, p. 779, and cross references there found.

##### (2) Necessity for Punctuality in Payment.

###### (a) In General.

Payment of the premium is of the essence of the contract of insurance. Punctuality in such payment is essential. A failure to pay within the specified time will avoid the policy, unless the company has waived such payment or the delay is due to some omission on its part. *Richards on Insurance* (2d Ed.), p. 205; *Southern Mut. Ins. Co. v. Taylor*, 33 Gratt. 743; *Easley v. Valley Mut. Life Ass'n*, 91 Va. 161, 21 S. E. 235.

###### (b) Forfeiture for Nonpayment.

**In General.**—Where a policy provides that if a note given for the premium be not paid at maturity, such nonpayment shall terminate the insurance and the note shall be considered the premium for the risk thus terminated, the policy is forfeited for nonpayment of the note when due. *Muhle-*

man *v.* National Ins. Co., 6 W. Va. 508. And see cases cited in preceding paragraphs.

A policy of life insurance, which stipulates for the payment of an annual premium by the assured with a condition to be void on nonpayment promptly, is not an insurance from year to year like a common fire policy but the premium constitutes an annuity, the whole of which is the consideration for the entire assurance for life, and the condition is a condition subsequent, the nonperformance of which makes the policy void. The time of payment in such a policy is material and of the essence of the contract. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

**Waiver of Forfeiture for Nonpayment.**—The assistant secretary of a life insurance company held to have authority to waive the forfeiture of a policy for the failure to pay the premium on the day it was due, and to reinstate the policy. *Piedmont, etc., Ins. Co. v. McLean*, 31 Gratt. 517.

Generally, as to the forfeiture of policy for noncompliance with its conditions, waiver of such forfeiture, etc., see post, "Avoidance or Forfeiture of Policy for Misrepresentation, Fraud or Breach of Warranty or Conditions," IV.

#### (c) Extension of Time of Payment.

A letter from an insurance company in reply to a request from the assured, agreeing to grant an extension of time of payment of the premium on a policy upon the execution and return, before the policy lapsed, of an extension note enclosed in the letter, is not of itself a completed contract binding the company to grant extension without the execution and return of the note. *Aetna Life Ins. Co. v. Ragsdale*, 95 Va. 579, 29 S. E. 328.

#### (3) Place of Payment.

In *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, the policy contained a condition to the following effect: "Not binding on the company

until countersigned by J. B. Macmurdo, Richmond, and the advance premium paid." On the back of this policy was endorsed "no payment of premium binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company." The court held that this was a Virginia contract and to be performed with Macmurdo, the agent of the company at Richmond, Virginia; and that payment of the premiums to him, as the agent of the company at Richmond, by the insured as they respectively fell due, was a compliance with the terms of the contract according to its spirit and legal effect, and as it was understood by the parties.

#### (4) Possession of Policy as Evidence of Payment.

The possession of a policy of insurance is sufficient evidence of the payment of the premium thereon, on a demurrer to the evidence by the insurance company. *Fidelity, etc., Co. v. Chambers*, 93 Va. 138, 24 S. E. 896.

#### (5) Recovery Back of Premiums Paid.

**Right of Insured Where Payment Wrongfully Refused by Insurer.**—When a life insurance company wrongfully determines the contract of insurance, by refusing to receive a premium, due at the end of the first year, for the second year, and lapses the policy issued, the insured, on the company so doing, has the right to treat the policy as at an end, and to recover all the money he has paid under it. *McCall v. Phoenix Mut. Life Ins. Co.*, 9 W. Va. 237.

**Where Policy Annulled for Failure to Pay Premiums Pending War.**—See post, "Remedies on Annulment for Nonpayment of Premiums during War," X.

### C. CONSTRUCTION AND INTERPRETATION.

#### 1. In General.

The same rules of interpretation applicable to other instruments are applicable to policies of life insurance,

which are to be interpreted according to their sense and meaning. *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532. See the titles INSURANCE, vol. 7, p. 782; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 856.

**Application Construed as Part of Policy.**—See the title INSURANCE, vol. 7, p. 788.

**Statute as Part of Contract.**—See the title INSURANCE, vol. 7, p. 788.

**Construction of Provisions as to Avoidance and Forfeiture.**—See post, "General Rule as to Construction in Doubtful Cases," IV, B, 1.

## 2. Construction of Provisions as to Paid-Up Policies.

**Available Only on Compliance with Conditions.**—Where a policy provides that when at least three full annual premiums are paid and the policy duly receipted and transmitted to and received by the company before default in payment of any premium due thereon, or within thirty days thereafter, the same may be exchanged for a paid-up term policy for the same amount; and within thirty days after default, attorneys wrote that the policy had been left with them to procure a term policy, and demanded such term policy, saying that on receipt thereof they would send the original policy duly receipted. Held, the plaintiff has no right to a term policy or to payment of any amount from the insurance company upon their contract, not having complied with its conditions. *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532.

**Stipulation Involves Making a New Contract.**—Where a policy of life insurance provides that the insured in a given contingency shall be allowed to surrender his policy, and take in lieu thereof a paid-up policy for a different amount, to do so involves not merely a change of the contract but the making of a new contract between

the insured and the company. *Boisseau v. Bass*, 100 Va. 207, 40 S. E. 647.

## D. ASSIGNMENT OR TRANSFER OF POLICY.

### 1. Validity and Effect as Dependent on Insurable Interest in Assignee.

#### a. Former Rule.

**Insurable Interest Essential.**—Prior to the enactment of § 2859a of the Virginia Code the rule was well established in Virginia that in order to constitute a valid assignment of a life policy, the assignee must have an insurable interest in the life of the insured. *Roller v. Moore*, 86 Va. 512, 10 S. E. 241.

"We are of opinion to follow the decisions on this subject of the supreme court of the United States, and those of other courts in accord therewith; and we are of the opinion that, if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured (which will not be denied), it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which should invalidate the one should invalidate the other, so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject, we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life." *Roller v. Moore*, 86 Va. 512, 10 S. E. 241.

"To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of

its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money." *Roller v. Moore*, 86 Va. 512, 10 S. E. 241.

**Rights of Assignee without Insurable Interest.**—An assignee of a policy having no insurable interest in the life of the insured can only retain so much of the proceeds, where the insurance was lawfully effected, as is necessary to reimburse him for the premiums paid, expenses incurred, and interest thereon. *Tate v. Commercial Bldg., etc., Ass'n*, 97 Va. 74, 33 S. E. 382; *Roller v. Moore*, 86 Va. 512, 10 S. E. 241; *Long v. Meriden Britannia Co.*, 94 Va. 594, 27 S. E. 499, 3 Va. Law Reg. 287, 832; *Beaty v. Downing*, 96 Va. 451, 31 S. E. 612; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475.

A creditor may insure the life of his debtor, or may acquire, by assignment, a policy on his life after it has been issued to the debtor. The interest of the creditor in the policy, however, will be limited to the amount of the debt at the time of the death of the assured, together with such premiums as the creditor has paid to preserve the policy, with interest thereon. *First Nat. Bank v. Terry*, 99 Va. 194, 37 S. E. 843.

It is immaterial whether the assignment of a life policy by a debtor to his creditor is absolute and unconditional, or is collateral for the amount of the debt. In either case, equity will regard the assignment as only a collateral security. *First Nat. Bank v. Terry*, 99 Va. 194, 37 S. E. 843.

Where a life insurance policy, valid in its inception, has been assigned by the insured, as a security for the premiums advanced by the assignee who is not otherwise interested in the life of the insured, the limit of the assignee's recovery is the amount necessary to reimburse him for his advances. *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475.

"However valid the transaction, this was all that he could recover in any event, and the residue of the proceeds of the policies belong to the estate of the insured. *Roller v. Moore*, 86 Va. 512, and *Long v. Meriden Britannia Co.*, 94 Va. 594, 27 S. E. 499." *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475.

If a policy of life insurance, lawfully effected, be assigned by the assured as collateral for a debt for which he is a mere surety, and upon his death the amount of insurance be applied towards the payment of the debt, the personal representative or subsequent assignee of the assured may recover of the principal debtor, in the absence of an insurable interest in him, the amount received on such policy less premiums and expenses paid by him, although the policy may have been issued at his instance, and the premiums advanced by him. *Tate v. Commercial Bldg., etc., Ass'n*, 97 Va. 74, 33 S. E. 382.

Assured made assignee an assignment absolute on its face of a policy of insurance on his life. The evidence, however, showed that in former transactions about the same matter the policy was held by assignee as security for advancements made by him for premiums and assessments on the policy. Held, the assignment was not a new contract between the parties and an absolute assignment, but it bore the impress of the original transactions, and stood merely as a security for the advances made by assignee. *Roller v. Moore*, 86 Va. 512, 10 S. E. 241.

As to the duty of an administrator to require a third party holding a policy of insurance on the life of a decedent who collects and retains of the proceeds more than he is entitled to, to account for the excess, see the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 519.

**b. Rule Changed by Statute.**

Under § 2859a of the Virginia Code

of 1904, "a policy of insurance on life, taken out by the insured himself, or by a person having an insurable interest in his life, in good faith, and not for the mere purpose of assignment, may be lawfully assigned to any one, for a valuable consideration, as any other chose in action, without regard to whether the assignee has an insurable interest in the life insured or not, and the assignee may recover upon it whatever the insured may have recovered but for such assignment."

## **2. Delivery as Essential to Valid Assignment.**

See generally, the title **ASSIGNMENTS**, vol. 1, p. 760.

If the assured, in a policy on his life, intending to make a gift thereof to a third party, without consideration, executes an assignment thereof in duplicate, whereby the benefit of said policy is assigned to such third party, and delivers one of the assignments to the insurance company for its protection, and not as agent of the assignee, and fails to deliver either the policy or the assignment thereof to the assignee, this is an incomplete gift, and can not be enforced by the assignee either at law or in equity. *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

"Our conclusion is that, however much Hilbish may have intended at one time to assign the policy to Spooner, he never executed his intention, and that the policy remained his property, and constitutes assets of his estate, which his executor had the right to recover for the payment of his debts." *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

"The case of *Roller v. Moore*, 86 Va. 512, 10 S. E. 241, is a direct precedent for the maintenance of the present suit. That case was, as is this, a creditors' suit brought against the administrator and widow and heirs of a decedent, to have an account of the debts, and to subject the real and per-

sonal assets to the payment of the debts. And the main controversy there, as is the case here, was with the claimant of a policy of insurance under an assignment from the decedent in his lifetime." *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751.

## **E. EXISTENCE OF WAR AS AFFECTING CONTRACT.**

### **1. In Virginia.**

#### **a. In General.**

It is now settled law in Virginia, that contracts of life insurance entered into before the late war, are not abrogated, but only suspended by the war. *New York Life Ins. Co. v. Hendren*, 24 Gratt. 536.

"It is now settled by the decisions of this court, in *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614; and in the recent case of *Mutual Benefit Life Insurance Company v. Atwood's adm'r* (not yet reported); and also by the decisions of the special court of appeals, in *New York Life Insurance Company v. White*, the *Ins. L. Journal* for December, 1873, p. 917, that contracts of life insurance entered into before the late war are not abrogated, but only suspended by the war. And with these Virginia decisions the highest judicial tribunals of the states of Kentucky, New York, New Jersey and Mississippi, and the federal circuit courts for the southern district of New York, J. Blatchford, and for the eastern district of Virginia, J. Bond, are in accord." *New York Life Ins. Co. v. Hendren*, 24 Gratt. 536.

#### **b. As Excusing Payment or Tender of Payment of Premiums.**

This suspension extends to the stipulation requiring payment of premiums at dates falling within the period of such separation. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

Where the performance of the condition in a policy as to the payment of premiums is prevented by the existence of war, the contract of insurance



is suspended, not abrogated thereby, and such nonpayment, where the insured was ready and willing to pay, does not relieve the company from liability under the policy. *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 3 Am. Rep. 218; *Mutual Ben. Life Ins. Co. v. Atwood*, 24 Gratt. 497, 18 Am. Rep. 652; *New York Life Ins. Co. v. Hendren*, 24 Gratt. 536; *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355; S. C., 77 Va. 366.

The propositions of law deduced from the decisions in the case of *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614, 3 Am. Rep. 218, must be regarded as "res adjudicata," whether the payment of premiums be treated as in the nature of conditions precedent or not; for, the contract being lawful and merely suspended, but not abrogated by the war, the performance of the condition, which is part of the contract, is suspended also or excused. *Mutual Ben. Life Ins. Co. v. Atwood*, 24 Gratt. 497.

Nor in such case is it material whether tender of such payment was made at the day or not, even though the insurer's agent, resident in the state of the domicile of the insured prior to the war, continued to reside there on the same side with the insured whilst the insurer and insured were so separated. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

If such tender would in any case be material, it will at any rate not be when before the premium in question became due such agent had publicly proclaimed his purpose not to receive any more premiums, which declaration was probably made known to the insured and was the cause of the failure to tender, and especially when insurer after the war refused to ratify the act of said agent in receiving payment of a premium from another person as much as a month before the premium in question was due. *Connecticut*

*Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

In such case, however, it is the duty of the insured to tender payment within a reasonable time after the war, if living; and his failure so to do will occasion a forfeiture of the policy. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

But in case of the death of the insured pending the war, his personal representative would be under no obligation to make such a tender, for then there would be in the hands of the insurer a fund of the insured out of which he could deduct the unpaid premium. Nothing more would then be necessary on the part of the insured than that the insurer should within a reasonable time from the ending of the war be informed of such death and of its date. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

Such information will be sufficient though unaccompanied by any formal demand of payment or assertion of right to it. *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. 630.

In *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366, affirming 76 Va. 355, it was held, that the repudiation by the insurer of the binding force of the contract, excused a tender of premiums by the insured.

## 2. In West Virginia.

**General Rule.**—In West Virginia it is held, that if the failure to pay the annual premium is caused by the intervention of war between the states, in which the insurance company and the insured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless annulled, if the company insist on the condition of forfeiture. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

The doctrine of the revival of contracts suspended during the war is based on considerations of equity and justice, and can not be invoked to revive a contract, which it would be un-

just or inequitable to revive, as when time is of the essence of the contract, or the parties can not be made equal. *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400.

### 3. Rights of Insured on Annulment for Nonpayment of Premiums.

See post, "Remedies on Annulment for Nonpayment of Premiums during War," X.

## F. RESCISSION, CANCELLATION OR REFORMATION.

See generally, the titles INSURANCE, vol. 7, p. 790; RESCISSION, CANCELLATION AND REFORMATION.

As to the right of the insurer to annul a policy of life insurance for nonpayment of premiums though payment was prevented by the existence of war, see ante, "Existence of War as Affecting Contract," III, E.

**Diligence Essential to Right of Insured to Rescind.**—A right of the insured to rescind his contract for non-compliance by the insurer with certain stipulations as to the form of the contract or on the ground that the contract was obtained by fraud may be lost by want of diligence or unreasonable delay. *Fennell v. Zimmerman*, 96 Va. 197, 31 S. E. 22.

**False Representations of Agent as Ground for Rescission.**—A contract of life insurance procured by the false representation of an agent is not voidable at the option of the party deceived where it appears that the representation was the mere expression of an opinion, and did not amount to an engagement or undertaking that the fact was as represented. *Garber v. Breesee*, 96 Va. 644, 32 S. E. 39.

## IV. Avoidance or Forfeiture of Policy for Misrepresentation, Fraud or Breach of Warranty or Conditions.

### A. IN GENERAL.

Generally, as to the validity of provisions and conditions in policies of in-

surance, rules for construing avoidance and forfeiture clauses, etc., see the title INSURANCE, vol. 7, p. 793, et seq.

**Violation of Terms of Contract as Barring Recovery.**—Where the insured has violated the plain terms of the contract of life insurance he can not recover. *Universal Life Ins. Co. v. Devore*, 88 Va. 778, 14 S. E. 532.

## B. EFFECT OF ANSWERS IN APPLICATION.

### 1. General Rule as to Construction in Doubtful Cases.

Where a policy contains contradictory provisions or is so framed as to render it doubtful whether the parties intended that the exact truth of the applicant's statement should be considered a condition precedent to any binding contract, the construction which imposes on the insured the obligations of a warranty should not be favored. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

If a portion of the policy or application would indicate them to be warranties, but another portion of the application shows, that they were to be regarded as representations, the answers to these questions will not be regarded as warranted to be true. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

### 2. Effect of Misrepresentations.

If insurance be effected upon the life of a debtor for the benefit of his creditor, and misrepresentations of material facts inducing the contract be made by the debtor, the policy will be vitiated, although the beneficiary was ignorant of such misrepresentations. *Burress v. National Life Ass'n*, 96 Va. 543, 32 S. E. 49.

No recovery can be had on a life insurance policy procured upon willfully false statements of the assured of facts material to the risk, although the insurance was solicited by the agent of the insurance company, and the beneficiary informed the agent that he did not believe insured could obtain in-

surance, that he had heard that insured was in bad health, and had been rejected by other companies. *Burress v. National Life Ass'n*, 96 Va. 543, 32 S. E. 49.

Though the policy be construed as not warranting the truth of the answers of the insured, yet if these answers to specific questions are misrepresentations, the policy will be avoided, whether the court or jury regard the answers as material or not; for the parties by putting and answering such questions have declared, that they regarded them as material. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

A false answer to a question, in order to be such a misrepresentation as will forfeit a policy, must be fraudulently false, that is in making the answer the insured must be guilty of actual fraud or legal fraud. By actual fraud is meant an intention to deceive; but legal fraud may exist, where there is no intention to deceive as where the insured states in his answer, that he knows personally, that his answer is true, when it really is not true, or when the answer contains a statement which from its nature the insurers must necessarily regard as made on the personal knowledge of the insured, which statement is false, in both these cases the insured is guilty of a legal fraud, which will forfeit the policy, though the false statement was made without any intent to deceive but was the result of carelessness or forgetfulness. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

If, however, the answer is such, as must have been made not on the personal knowledge of the insured but upon his best judgment and belief, as that he was of "sound body," and it be untrue, it will still not forfeit the policy, if the answer was made in perfect good faith, and the insured had no suspicion, that he was unsound of body, though it be afterwards shown

that he had then a fatal internal disease, of which he afterwards died. Perfect good faith is all that is required in such a case. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

### 3. Effect of False Answers Considered as Warranties.

#### a. In General.

Where the application for a life insurance policy is made a part of the policy and its statements are deemed warranties, a false statement therein, whether material or not, will avoid the policy. *Metropolitan Life Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383; *Home Ins. Co. v. Sibert*, 96 Va. 403, 31 S. E. 519.

The warranty being untrue, the plaintiff can not recover. *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361.

Being warranties, they are in the nature of conditions precedent, and, like them, must be strictly complied with. *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361.

If by the contract and policy the applicant warrants his answers to be true in all respects, then this removes their materiality from the consideration of the jury or of the court, and if the answers are any of them untrue, although they be such as the court or jury might believe could not have prejudiced the defendant or in any degree influenced him in entering into the contract or issuing the policy, yet the insured, or person for whose benefit the policy was taken, can not recover upon it. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

If any of the answers are false in fact, the policy is thereby forfeited, though the answers were made in perfect good faith. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

**Illustrations.**—A breach of warranty contained in the application, that no proposal or application to insure the

life of the applicant had ever been made to any company or agent upon which the insured had been rejected, or upon which a policy had not been issued and received by him, avoids the policy. *National Life Ass'n v. Hopkins*, 97 Va. 167, 33 S. E. 539.

On an application to a second company for insurance as a "rejected risk" based upon and averring the truth of the statements in the application to the first company, failure to disclose the fact that since rejection by the first company the applicant had been twice examined and rejected as unsound by the medical examiners of the second company is a breach of the warranty contained in the application that no proposal or application to insure the life of the applicant had ever been made to any company or agent upon which assured had been rejected, or upon which a policy had not been issued and received by him. *National Life Ass'n v. Hopkins*, 97 Va. 167, 33 S. E. 539.

If a life policy makes the statements of the application on which it is issued warranties, and such application states that the death of the father of the assured was caused by one disease, and the proof of loss made by the beneficiary and offered in evidence by him states that said death was caused by a different disease, on a demurrer to the evidence of the beneficiary, in an action against the insurance company, judgment should be given for the company. *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361.

In an application for life insurance which is made a part of the policy, and its statements deemed warranties, the applicant stated that he had never had any disease of the urinary organs and was then in sound health, but also stated that he had had disease of the kidneys, and jaundice. Held, if prior to the time these statements were made the applicant had had any disease of the urinary organs other than disease of the kidneys, the defendant company

was released from liability, although that disease was caused by disease of the kidneys. And if the applicant was not in sound health when insured, except so far as his health was impaired by the disease which he stated in his application he had had, the company was also released. The object of the question as to disease of the urinary organs was to ascertain whether the applicant had had any disease of the urinary organs, no matter how caused, by which their ordinary operation had been seriously disturbed, or their vital powers materially weakened, and it was proper for the jury to consider the object of the question and the circumstances under which the answer was made. *Metropolitan Life Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383.

Father took out policy on his life for use of his daughter in 1877, and died. Daughter and her husband sued on the policy. She was offered as witness and refused. Defendant plead non est factum; and two special pleas (both same in effect, that in application of assured it was stated that the age of assured was fifty-nine years, when in fact he was much older. During trial, on motion of defendant, court instructed jury that if from the evidence they believed assured was more than fifty-nine years old at the time of his application, they should find for defendant. Verdict: "We, the jury, find for the defendant on the issue joined." Plaintiffs moved in arrest of judgment. Motion overruled. Judgment for defendant. Plaintiffs excepted. It was held, that the single question was: "Was assured older than he represented himself in the application?" And that the instructions were proper. *Hayes v. Virginia, etc., Ass'n*, 76 Va. 225.

#### **Effect of False Answer Inserted by Agent without Knowledge of Insured.**

—If an agent of an insurance company fills up the answers of the insured in a printed form of application furnished

to the agent by the insurance company and procures the insured to sign such application, and in this application the agent has filled up an answer to a question, which he never propounded to the insured, and the insured trusting to this agent never read the application, and did not know, that it showed any such question to have been put or answered, though he may have had an opportunity of reading the application either before or after he signed it, yet if such answer to such question so inserted in the application without the knowledge of the insured be false, it can not operate as a forfeiture of the policy, as the making of such answer under these circumstances will not be regarded as the answer of the insured but as the act of the insurance company by its agent. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 624.

#### **b. Rule as Changed by Statute.**

In Virginia it has been provided by act of assembly approved February 26th, 1900 (Va. Code, 1904, § 3344a), that no answer to any interrogations made by applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was willfully false or fraudulently made, or that it was material.

#### **4. Evidence as to Fraud or Misstatements.**

**Evidence of Fraud.**—Fraud may be established by circumstantial evidence as well as by direct testimony, but, in either case, it must be clearly and satisfactorily proved. It will not be presumed from doubtful evidence, or circumstances of suspicion. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475.

**Declarations of Insured.**—Generally, as to the admissibility in evidence, and the effect of declarations and admissions, see the title DECLARATIONS AND ADMISSIONS, vol. 4, p. 325.

"It has been held, that statements as to health made by the insured some months prior to the insurance to persons other than the company or the physician were inadmissible. (*Swift v. Massachusetts Mutual Life Insurance Company*, 2 N. Y. Supreme R. 303. See also, *Reed v. N. Y. C. Railroad Company*, 45 N. Y. 574.)" *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

"So the previous declarations of the insured as to his habits have been held mere hearsay and inadmissible against the assured (*Rawels v. American Mutual Life Insurance Company*, 36 Barb. 357), and his statements subsequent to the issuing of the policy are equally inadmissible. (27 N. Y. 282.)" *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

If declarations were made by the insured as to his having had at some previous time a severe attack of sickness, in contradiction of his statement in the application for the policy, whether these declarations were made before or after the issuing of the policy being mere hearsay evidence, they are inadmissible as evidence against the plaintiffs. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

Statements of insured, some time before his application for policy, are not admissible evidence to disprove representations of his age contained in said application; and the same is true quoad statements of insured to company's agent several months after policy issued. *Valley Mut. Life Ass'n Co. v. Teewalt*, 79 Va. 421.

In an action upon a life policy where defense is made on the ground, that the assured had falsely and fraudulently misrepresented his age, his declarations as to his age in a former ap-

plication to another company for a policy for the benefit of another person can not be received in evidence against the beneficiary in the policy in suit to prove the facts stated therein, but after proof tending to show that his age is different from what he represented it to be, it may be received to show that he had knowledge of his age, and falsely and fraudulently misrepresented it. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

### C. WAIVER OF OR ESTOPPEL TO CLAIM FORFEITURE.

#### 1. In General.

Generally, as to the rule that provisions in insurance policies as to forfeiture and avoidance on breach of conditions therein contained, being for the benefit of the insurer, may be waived by him or his legal agent, and also as to what will constitute such waiver, form thereof, etc., see the title INSURANCE, vol. 7, p. 803, et seq.

As to waiver of forfeiture for nonpayment of premiums, see ante, "Forfeiture for Nonpayment," III, B, 2, d, (2), (b).

As to waiver of proof of death, see post, "Notice and Proofs of Death," VIII.

#### 2. Power of Agents to Waive.

See generally, the title INSURANCE, vol. 7, p. 803, and cross references there found.

An agent, who writes policies, settles the terms of insurance, investigates losses and recommends payment or nonpayment, must be deemed a general agent, without regard to extent of territory or scope of powers; and such agent has the power to waive the conditions of a policy as to the preliminary proof of loss. *Traveler's Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553.

Where the company ratifies an agent's unauthorized acts, it can not afterwards object to his want of authority. *New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879.

#### 3. Effect of Knowledge of Company or Agent.

A life insurance company is chargeable with knowledge of all the facts stated by the applicant for insurance to the agent, as to the time of his birth, and he having truly stated to the agent the time of his birth, can not be held to have made a misstatement towards the insurer, although the written application as drawn up by the agent, does not correspond with the verbal statement. *McCall v. Phoenix Mut. Life Ins. Co.*, 9 W. Va. 237.

If, when an insurance company issues a policy, it knows certain facts, which are material to the risk taken, it can not claim a forfeiture of the policy because of the existence of these facts, though the insured in his answer to questions may have stated that such facts did not exist. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 624.

If after the issuing of a policy certain facts become known to an insurance company, which, under the terms of the policy it has issued, would operate as a forfeiture of the policy, and the company, after it has acquired the knowledge of these facts continues to receive premiums from the insured or to levy assessments on him and to receive payment of these assessments from the insured, such conduct of the company will estop it from claiming, that such facts so known to it operate as a forfeiture of the policy. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 624.

#### 4. Evidence.

Parol evidence is admissible to prove that the conditions inserted in the receipts were in violation of the agreement of the assignee of the insured and the secretary of the company, and that by that agreement the forfeiture of the policy, if it had been forfeited, was unconditionally waived. *McLean v. Piedmont, etc., Ins. Co.*, 29 Gratt. 361.

## V. The Risk.

See generally, the title INSURANCE, vol. 7, p. 793.

In life insurance, as in other insurance contracts, the event insured against is the risk. In this species of insurance the risk is the death of the party insured, an event which is inevitable, and only uncertain as to the time of its occurrence. *Minor's Inst.*, vol. 3, pt. 1, p. 318; vol. 3, pt. 2, p. 1189. And see *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614.

## VI. Measure of Insurer's Liability.

**In General.**—It may be stated generally that the measure of the insurer's liability on a contract of life insurance, is the certain sum, or annuity which the insurer stipulates to pay upon the death of the insured. *Minor's Inst.*, vol. 3, pt. 1, p. 318; vol. 3, pt. 2, p. 1189. And see *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614.

**Effect of Provision for Deduction of any "Indebtedness Due the Company."**—If a plain, unambiguous policy of insurance stipulates that, in consideration of a stated bimonthly premium, there shall be paid to the beneficiary a given sum upon the death of the insured less any "indebtedness due the company" issuing the policy, such "indebtedness" can not refer to unearned or unaccrued premium, but must refer to real or actual "indebtedness" that the insured or beneficiary is liable for to the company when the policy matures. *Nat. Life Ins. Co. v. Berkeley*, 97 Va. 571, 34 S. E. 469.

**Right of Insurer to Indemnification Where Assignment Held Invalid.**—In *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751, it was assigned as error that the court below authorized and directed the insurance company to retain out of the \$1,000, withheld by it out of its policy on the life of Spooner, the amount of two judgments recovered against it as garnishee by his

creditors in his lifetime, based upon validity of the assignment to him of the policy on the life of Hilbish. In affirming the decree the supreme court said: "It is not easy to see how this could be resisted. These judgments had been recovered against and paid by the company with the knowledge of Spooner. After this suit had been instituted to contest the validity of the claim of Spooner to the policy of Hilbish, and after the death of Spooner, the company paid to his executor the residue of the proceeds of the policy on the life of Spooner, upon the express agreement that it might hold back the \$1,000 as indemnity against loss in the event that it should be decided that the policy on the life of Hilbish belonged to his estate, and not to Spooner. The appellant was estopped from denying, under the circumstances, the right of the company to reimburse itself out of the \$1,000. All of the parties were before the court, and the issue was directly made between the company and the personal representative of Spooner by proceedings to that end. We find no error in the decrees complained of, and the same must be affirmed."

**Where Policy Annulled for Nonpayment of Premiums during War.**—As to measure of the insurer's liability in actions by policy holders where a policy was repudiated for nonpayment of premiums during the war, see post, "Remedies on Annulment for Nonpayment of Premiums during War," X.

**In Actions to Enforce Claim of Policy Holders on Insolvency of Insurer.**—See post, "Enforcement of Claims of Policy Holders on Insolvency of Insurer," XI.

## VII. Persons Having Interest in Insurance or Entitled to Proceeds.

**General Rule as to Rights of Person Named as Beneficiary.**—The general rule is, that a policy of insurance and

the money to become due under it before, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his deed or will to transfer to any other person the interest of the person named in the policy. (*Bliss on Life Ins.*, § 318.) The person, whose life is insured, is under no obligation to pay the premiums, unless he has covenanted so to do; but if he does, the person originally designated in the policy will derive the benefit. The change of designation can only be made by the person originally designated, therefore such person must concur in the change. *Hechmer v. Gilligan*, 28 W. Va. 750, 755.

Generally, as to beneficiaries in beneficial and benevolent associations, change thereof, etc., see the title **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 2, p. 348, et seq.

#### **Vesting of Rights of Beneficiary.—**

Where the insured took out a policy for his wife, and in case she died before him, then to her children, and his wife did die before him, the child's rights in the policy, being derived from the company under the policy and not through her mother, vested immediately upon the death of her mother. *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355.

**Rights of Children by Former Marriage.**—By his first wife insured has one child, and by his last, five children. He insured his life for \$5,000 "for the benefit of his wife and their children." The widow and the children had received those proceeds, leaving debts of the decedent unpaid. It was held, that the child by the first as well as the children by the last wife is entitled to share the proceeds of the policy, and having received their shares, they and the widow must contribute (to the extent of the premiums paid by the in-

sured) ratably to the payment of those debts. *Stigler v. Stigler*, 77 Va. 163.

"A similar case was decided by the supreme court of New York, in which the facts were these: The insured, who had been twice married, insured his life for the benefit of his wife and their children. He died, leaving surviving him the wife and his children by his first wife. He left no children by the second wife, but she had a child by a former husband. It was held, that the proceeds of the policy went to the widow and the children by the first wife and the child of the second wife, each child taking an equal sum. See *Bliss on Life Ins.* (2d Ed.), § 345." *Stigler v. Stigler*, 77 Va. 163.

**Rights of Creditors.**—Under Va. Code, 1873, ch. 114, § 2, so far as the means of insured are withdrawn from creditors to pay premiums, they are entitled out of the proceeds of policy to have the sums so paid, applied to their claims. *Stigler v. Stigler*, 77 Va. 163.

"We think the provisions of our own statute, embraced in section two, chapter 114 of the Code of 1873, is decisive of the question. The material portion of it is as follows: 'Every gift, conveyance, assignment, transfer, or charge which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made.' In this case each of the policies was intended as a gift to accrue to the beneficiaries therein named. When the premiums on them were paid, the insured was indebted. The obvious intent of the statute is to invalidate as against existing claims of creditors every gift or voluntary assignment of the debtor's property, without regard to its object or the form in which it is made. It is plain, therefore, that to the extent the means of the insured were withdrawn from creditors and applied to the payment of premiums on the policies in question, the pay-



ments were void as against creditors, and that they were entitled to have the sums so paid applied to the discharge of their claims, out of the proceeds of the policies." *Stigler v. Stigler*, 77 Va. 163. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540.

### VIII. Notice and Proofs of Death.

**Necessity.**—Policies of life insurance may and usually do contain a provision that the amount named therein shall not be payable until a specified time after proofs of the death of the insured have been furnished the company. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361.

As to the necessity and sufficiency of notice in actions on policies repudiated for nonpayment of premiums during the war, where death of insured occurred pending the war, see ante, "Existence of War as Affecting Contract," III, E.

**As to burden of proof** as to furnishing proof of death, see post, "Effect of Failure by Defendant to Charge Non-compliance with Conditions or Warranties," IX, F, 3, b.

**Waiver.**—When the general agent refuses to recognize any claim, such refusal waives compliance with the conditions as to preliminary notice and proof, and authorizes immediate suit. *Traveler's Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553.

**Admissibility and Effect as Evidence.**—In an action on a policy of life insurance the defendant having on demand of the plaintiff produced the proofs of the death of the insured, the court may properly allow the plaintiff to read to the jury the endorsements on the back of such proofs for the purpose of showing when they were received by the defendant, without requiring the plaintiff to read to the jury

the proofs of death. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

The preliminary proofs of loss under an insurance policy introduced in evidence generally by the beneficiary are prima facie evidence in favor of the insurance company of the facts therein stated. The company has the right to rely on the truth of such statements, and, in the absence of evidence of mistake or misapprehension of fact, the beneficiary who made such statements is bound by them. *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361.

### IX. Actions on Policy.

#### A. SURRENDER OF POLICY AS CONDITION PRECEDENT.

Though the policy provides for the amount named being paid upon the receipt by the defendant of the policy, still, if the defendant positively refuses to pay the policy because unjust, the plaintiffs could sue upon it and recover without proving that they offered to surrender the policy on its payment. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

#### B. JURISDICTION AND VENUE.

**Equity Jurisdiction.**—See the title INSURANCE, vol. 7, p. 806.

**Venue.**—See generally, the title INSURANCE, vol. 7, p. 807.

**In Virginia** an action at law or suit in equity may be brought to recover under a life policy in any county or corporation wherein the person whose life was insured resided at the date of the policy. Va. Code, 1887, § 3214.

**In West Virginia** a suit to recover a loss under any policy of insurance upon the life of a person, may be brought in the county where any such persons had a legal residence at the time when the right of action accrued. W. Va. Code, 1899, ch. 123, § 1, cl. 5.

#### C. FORM OF ACTION.

See generally, the title INSURANCE, vol. 7, p. 810.

**Motion.**—"Section 3211 of the Code authorizes a party entitled to recover money from a life insurance company on a policy of insurance to proceed against it by motion upon notice. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Long v. Pence's Com.*, 93 Va. 584, 25 S. E. 593." *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 151, 26 S. E. 421.

**As to recovery under statutory complaint**, see post, "Statutory Form," IX, F, 1, a.

#### D. PARTIES.

See generally, the title PARTIES.

As to proper parties plaintiff in actions on policies annulled for nonpayment of premiums during the war, see post, "Parties Plaintiff," X, A, 2.

#### E. PROCESS AND SERVICE.

See the titles INSURANCE, vol. 7, p. 752; SERVICE OF PROCESS; SUMMONS AND PROCESS.

#### F. PLEADING.

##### 1. Declaration or Complaint.

###### a. Statutory Form.

For the provisions of the Virginia Code as to the complaint in actions on policies of insurance, see the title INSURANCE, vol. 7, p. 812.

The statutory complaint on a life insurance policy can only be filed where the death insured against occurred before the institution of the suit. It can not be filed upon an averment that the company has wholly repudiated and abandoned the contract. *Lee v. Mutual, etc., Life Ass'n*, 97 Va. 160, 33 S. E. 556.

In West Virginia it is provided by ch. 125, § 61, of the Code of 1899, that "a declaration or count on a policy of insurance, whether the policy be under seal or not, may be in effect as follows: 'A— B— complains of C— D—, who has been summoned to answer this: For that the defendant, by virtue of the policy of insurance

herewith filed (a copy of which is herewith filed), owes (here state the amount claimed under the policy) to the plaintiff for loss in respect to the property (or subject) insured by said policy, caused by (here insert the cause of loss in general terms, for example; by fire, by the damages of navigation, or otherwise, according to the fact) on or about the — day of —, in the year —, at (or near to —, stating the place at or near to which the loss occurred).' If the declaration or count be on a life policy, then it shall be sufficient to follow the above form in effect down to and including the word 'plaintiff' and add thereto in effect as follows: 'Because of the death of E. F., whose life was insured by said policy, and who died on or about the — day of —, in the year —, at (or near to, stating the place where his death occurred) —,' or, if the fact be so, the plaintiff may state in the declaration or count that the time or place where the loss or death occurred is unknown to him, giving in general terms such information as may be in his power in respect thereto. Nothing contained in this section shall render insufficient in law any declaration, or count which would be sufficient if this section had not been passed."

###### b. Requisites and Sufficiency.

**In General.**—See generally, the title INSURANCE, vol. 7, p. 813.

A motion may be maintained, under § 3211 of the Code for a judgment for money due on an insurance policy, and the notice of the motion takes the place of both the writ and the declaration. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487. But, when the plaintiff elects to bring a different form of action, the declaration filed must conform to the rules governing in the form of action adopted. *Grubbs v. National Life, etc., Ins. Co.*, 94 Va. 589, 27 S. E. 464.

A declaration drawn in substantial conformity with Virginia Code, 1873,

ch. 174, § 14, is sufficient. *Valley Mut. Life Ins. Co. v. Teewalt*, 79 Va. 421.

**Averment of Death.**—The declaration or complaint in an action on a policy of life insurance under § 3251 of the Virginia Code, 1904, must set forth the death relied upon as the ground of the plaintiff's recovery. *Lee v. Mutual, etc., Life Ass'n*, 97 Va. 160, 33 S. E. 356.

**Averment of Performance of Conditions Precedent.**—Where an act is to be done by one party as a condition precedent to his right to claim performance of another, he can not claim such performance without averring the doing of such act, or giving some excuse for its nonperformance. Hence, in an action on an insurance policy, where the money is only payable on the performance of certain acts and the existence of certain facts, the declaration must aver the performance of those acts, and the existence of those facts. There can be no recovery upon such policy upon a declaration which contains only the common counts. If the common counts were sufficient, then the act for simplifying declarations on insurance policies (acts, 1871-72, p. 578) was wholly unnecessary. *Metropolitan Life Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383.

"If money due upon such policies of insurance could be recovered upon the common counts, the acts of assembly of February 9, 1872, entitled an act to simplify declarations in actions against insurance companies (acts, 1871-72, pp. 57, 58), and now found in substance in the Code as § 3251, was wholly unnecessary. That section of the Code provides 'that in an action on a policy of insurance, if the plaintiff file the policy or a sworn copy thereof with his declaration, it shall not be necessary, in respect to the conditions and provisos of such policy to set forth in the declaration every such condition and proviso, nor to allege observance thereof or compliance therewith in particulars; but in respect to such conditions and

provisos it shall be sufficient to refer to the policy or copy and allege, in general terms, the performance of all its conditions, and the violation of none of its provisions.'" *Metropolitan Life Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383.

## 2. Plea or Answer.

**In General.**—Generally, as to pleas in actions on policies of insurance, see the title INSURANCE, vol. 7, p. 814.

Section 4, ch. 66, of the West Virginia acts of 1877, provides that "to any declaration or count in a policy of insurance, whether the same be in the form prescribed by this act or not, and whether the action be covenant, debt or assumpsit, the defendant may plead that he is not liable to the plaintiff, as in said declaration alleged." *Cappellar v. Queen Ins. Co.*, 21 W. Va. 576.

As to special pleas setting up fraud, breach of warranty, etc., see post, "Additional Statements as to Nature of Claim or Defense, Specification of Breaches, etc.," IX, F, 3.

**Sufficient Averment of Fraud in Answer.**—An averment in an answer that a policy of insurance was procured by the suppression of material facts, and that the assured and another conspired to thus obtain the policy, is a sufficient charge of fraud to admit evidence to prove the facts. *National Life Ass'n v. Hopkins*, 97 Va. 167, 33 S. E. 539.

## 3. Additional Statements as to Nature of Claim or Defense, Specification of Breaches, etc.

### a. In General.

For a summary of the Virginia and West Virginia Code provisions as to additional statements by the plaintiff or defendant showing more particularly the nature of the claim or defense, or of the facts expected to be proved at the trial, see the title INSURANCE, vol. 7, p. 815.

If it is intended to rely by way of

defense on fraudulent conduct or representations of the insured in procuring the policy, the defense could only be made by special plea under the statute, that the policy was fraudulently procured. *Hayes v. Virginia, etc., Ass'n*, 76 Va. 225.

**Application to Proceedings by Motion on Notice.**—If the defendant desires to have more specific information of the plaintiff's claim than is contained in the notice, he has the right to move the court to order the plaintiff to file a statement of the particulars of his claim. If the court makes such order and the plaintiff fails to comply with it, the court may exclude evidence of any matter not so plainly described in the notice as to give the defendant information of its character. Code, § 3249. *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421.

**b. Effect of Failure by Defendant to Charge Noncompliance with Conditions or Warranties.**

In *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 624, it was held, that if a life policy contains a provision, that the amount of the insurance shall be payable ninety days after the proof of the death of the insured is delivered to the company, and a suit is brought on such policy under chapter sixty-six of acts of 1877, or under chapter seventy-one of acts of 1882, § 61, et seq., and the defendant fails in his statement of defenses to state that he relies upon the failure of the plaintiffs to furnish these proofs of the death of the insured to the defendant before suit was brought, still the plaintiffs can not recover without proving, that they furnished these proofs of the death of the insured as required by the policy; for this constitutes a part of the plaintiffs' case, and without this proof they do not make out a prima facie case; and it does not constitute a matter of defense and therefore need not be stated in the statement of the defenses filed by the defendants.

The above case was, however, expressly overruled in *Rosenthal Clothing, etc., Co. v. Scottish Union Ins. Co.*, 55 W. Va. 238, 46 S. E. 1021, holding that, in an action on an insurance policy under the declaration prescribed by § 61, ch. 125, W. Va. Code, 1899, if the defense is because of failure of the insured to comply with, or his violation of any clause, condition or warranty of the policy, though a precedent condition to recovery, no evidence is required of the plaintiff of his compliance therewith, unless the defendant file the statement required by § 64 of said chapter, specifying the clause, condition or warranty not kept or violated. When such statement of defense is filed, the burden of proof to show compliance with the clause, condition or warranty specified in it, if a condition precedent to recovery, is upon the plaintiff. See the title FIRE INSURANCE, vol. 6, p. 120.

**c. Replication to Special Plea of Breach of Condition or Warranty.**

In *Hayes v. Virginia, etc., Ass'n*, 76 Va. 225, it was held, that if the plaintiff intended to rely, by way of estoppel, upon the alleged knowledge of the company that the insured was older than he alleged himself to be, or that the application was not signed by him, or by his authority, or upon any other matter by way of confession and avoidance, in answer to the pleas, such estoppel or other matter should have been replied specially.

**G. EVIDENCE.**

See generally, the titles EVIDENCE, vol. 5, p. 295; PAROL EVIDENCE; WITNESSES.

As to evidence of payment of premiums, see ante, "Possession of Policy as Evidence of Payment," III, B, 2, d, (4).

**Evidence of Fraud or Falsehood in Answers of Insured.**—See ante, "Evidence as to Fraud or Misstatements," IV, B, 4.

**Evidence as to Waiver of Forfeiture.**

—See ante, "Evidence," IV, C, 4.

**Proof Held Sufficient on Motion to Exclude from Jury.**—A suit is brought by the wife and children on a life policy issued on the life of a man for their benefit; they prove the issuing of the policy sued upon by the defendant; and that it was issued for the benefit of plaintiffs; that the man insured died more than six months before the bringing of the suit; that the proof of his death required by the policy to be delivered ninety days before the policy should be payable was delivered to the defendant more than ninety days before the suit was brought; that more than a month before that suit was brought the defendant refused to pay the policy when called upon by the plaintiffs to do so, and did so without making any objection to the proofs of death of the person whose life was insured, but the plaintiffs did not produce proofs of the death, which had been delivered to the defendant, though they could have produced them, and did not show that they had offered to deliver up the policy on payment of the amount to the defendant, the policy requiring the payment to be made after proof of the death of the insured upon receipt and surrender of the policy. On motion by the defendant to exclude the plaintiffs' evidence, this being all of it, the court did not err in overruling the motion, such evidence being sufficient to establish plaintiffs' case. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622.

**Questions as to Character of Risk.**

A question asked of the examining physician and of a man engaged in the insurance business as experts, as to what would be the character of the risk of a man's life, if within three months he had a hemorrhage of the stomach, was properly not allowed to be put or answered. *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 623.

**X. Remedies on Annulment for Nonpayment of Premiums during War.****A. IN VIRGINIA.****1. Election to Sue for Breach or on Policy.**

In *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366, affirming 76 Va. 353, the court held, in accordance with the well settled law of the state, that the war did not abrogate, but merely suspended the contract of insurance, and that after the repudiation by the company of the binding force of the contract and a repetition by the company of its denial of further obligation, the insured had a right of election between remedies, either to sue at once for damages for breach of the contract or to await the event on which the sum assured became payable under the policy, and when it became payable, to sue for its recovery.

**2. Parties Plaintiff.**

Dr. A., then of New Hampshire, in December, 1846, obtained from the M. B. Life Ins. Co. of Newark, New Jersey, a policy of insurance upon his life for \$2,600, in favor of his then wife, S.; with the usual clauses vacating the policy for the failure to pay at the day the annual premiums, and forfeiting all previous payments. About the year 1850, Dr. A. removed to Virginia, where he lived until his death. His wife, S., died about two years after her marriage, leaving a child, who died an infant; and Dr. A. was twice married after her death. He paid the premiums regularly up to December, 1861; after his removal to Virginia, paying to the agent here; and he offered to pay to the agent the premium for December, 1861, but the agent declined to receive it until he could hear from the company; but took his note for it. Dr. A. died in November, 1862, and his widow qualified as his administratrix, and she as administratrix brought this suit against the company to recover the amount of the policy. Held, the

company is bound to pay the amount of the policy, less the last unpaid premium. *Dr. A. having paid the premiums for thirteen years after the death of his wife, S., his administratrix is entitled to recover the money for the benefit of his estate. Mutual Ben. Life Ins. Co. v. Atwood, 24 Gratt. 497.*

Husband took out policy on his life, for his wife, and in case she died before him, then for her children. Premiums paid up to the war. After the war, the insurance company repudiated the policy. Then wife died, only one child surviving. Suit was brought by the child, during life of insured, for damages for breach of policy. Pending suit, insured died. At trial circuit court instructed the jury that if they believed from the evidence that the insurance company repudiated the policy during wife's life, action accrued to wife; and, after her death, action survived to her personal representative, and they must find for defendant; and refused to give other instructions. Held: 1. The instruction was erroneous. As soon as wife died, the child's rights vested. After the insurance company repudiated policy, wife might have sued, in her own name (Code, 1873, ch. 12, § 2), for damages for breach or await the event on which the sum assured became payable to her, if she survived the insured; to her children, if she did not survive him. *Clemmitt v. New York Life Ins. Co., 76 Va. 355.*

### 3. Evidence.

In an action against an insurance company for breach of one of its policies, a circular issued by the defendant company showing its business and mode of doing it, is not admissible as evidence. *Clemmitt v. New York Life Ins. Co., 76 Va. 355, 77 Va. 366.*

Nor is it admissible on such trial to show by evidence of "general notoriety and common rumor," that the agent of the insurance company refused to receive premiums during the war.

*Clemmitt v. New York Life Ins. Co., 76 Va. 355, 77 Va. 366.*

### 4. Amount of Recovery.

#### a. In Action on Policy.

In an action on a life insurance policy issued in 1856, the jury found a verdict for the whole amount of the policy, with interest from February, 1870. The person insured died in August, 1862, and notice of his death was given December 2d, 1869. If the premiums after February, 1861, were not paid, the interest on the policy from the time it should have been paid, was more than the unpaid premiums, and therefore the verdict was not excessive. *New York L. Ins. Co. v. Hendren, 24 Gratt. 536.*

In July, 1857, W., of Richmond, obtains from the M. Ins. Co. of New York, through their agent in Richmond, a policy of insurance for the life of S., his debtor, forfeited if premiums not paid on the day. An endorsement on the policy says: No payments of premiums binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company. Payments of premiums are paid and such receipts given, signed by an officer in New York, countersigned by the agent here to whom the money is paid, until 1861; when the premium is paid to the agent here, but only the receipt of the agent here given for it; and the company does not receive it. In July, 1862, W. offers to pay the premium to the agent here; but he declines to receive it, the company having directed him that the premium must be paid in New York. S. dies in November, 1862. The M. Ins. Co. is liable to W. for the amount of the insurance, less the last premium which he had not paid. *Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 614.*

#### b. In Actions for Damages for Breach.

Where the insured is alive, at date of judgment, with no decrease of health except from efflux of time, the rule to ascertain the value of a life

policy is laid down in *Universal Life Ins. Co. v. Binford*, 76 Va. 103; *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366, 76 Va. 355. For a statement of the rule as laid down in the case cited from 76 Va. 355, see post, "Enforcement of Claims of Policy Holders on Insolvency of Insurer," XI.

**Where the breach occurred and suit is brought during insured's life, and he dies before judgment**, the value of the policy is the present value, as at the date of the insurance company's repudiation of the sum assured, and payable at the death of the assured, to be diminished, however, at the same date, by the present value of the premiums subsequently accrued, and also by the amount of the premiums previously accrued (which are unpaid), and interest thereon. *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355, 77 Va. 366.

"If George Washington Minnis (whose life was insured) had continued alive until and after the trial, with no deterioration of health except such as naturally resulted from mere efflux of time, the case of *Universal Life Ins. Co. v. Binford* and others, lately decided by this court, 76 Va. 103; would have furnished the rule; or, if the plaintiff had brought her action after her father's death, the amount of recovery would have been easily determined. The difficulty is created by the death occurring after the commencement of the action and before trial. The difficulty, however, is rather apparent than real. The bringing of the suit was the election of the plaintiff to hold the defendant liable for damages for the repudiation of its undertaking. In estimating the damages, we perceive no good reason why the jury may not be allowed to consider the event—the cessation of the life insured—as an element in fixing the quantum of damages. It is looked to not as determining the right of action, but as a circumstance and an important one in fixing the amount of recovery. Ord-

inarily, in estimating the value of a policy on a life in being, we are compelled to consider the duration of life according to the tables of longevity. This results from the necessity of the case. But when the life ceases, there is no occasion for speculation. The event on which the sum assured becomes payable, has actually occurred, and is susceptible of proof. We find no adjudged case precisely in point. *People v. Security Life Ins. and Annuity Co.* (decided by New York court of appeals in 1879), 78 N. York Rep. 114, is analogous in some of its features to the case in hand." *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355, 77 Va. 366.

Life policy being repudiated as abrogated by nonpayment of premiums, flagrant *bello*, and suit being instituted for its adjustment, and the adjustment, proceeding on the basis of the payment of all premiums with interest, such premiums are paid, and the insured is entitled to his dividends just as though he had paid his premiums annually, the delay being occasioned by the company's own act. *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366, 76 Va. 355.

## B. IN WEST VIRGINIA.

### 1. Right of Insured to Recover Premiums Paid.

**In General.**—If such forfeiture for failure to pay is insisted on, the insured is entitled to have refunded the premiums actually paid, after the retention by the company of so much of them as will compensate it for the risk which it incurred of having to pay the amount insured, while the policy was in force. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400.

**This sum, which the company has a right to retain, is the actual cost of insurance** during the several years the policy was in force and not the charges, which the company would have made for an insurance for the number of years the policy was in

force. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400.

When an insurance company thus elects to annul the policy, it is entitled to no profits by reason of the policy having been issued, but only to the actual cost of insurance, while the policy was in force. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400.

The case of the New York Life Insurance Co. *v. Stathouse*, 3 Otto (95 U. S.) 24, disapproved as far as it holds, that in such a case, as is stated in syllabus 10, the assured is entitled to the equitable value of the policy arising from the premiums actually paid. If this was the extent of the rights of the assured, the company would be allowed to retain a profit out of a policy, which they elected to annul, when in justice it can in such case out of the premiums, it has received, retain only the actual costs incurred by it in carrying the risk, when the policy was in force. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400.

**Allowance of Interest on Premiums Paid.**—The premiums paid by the assured in such case after subtracting from them each year the actual cost of carrying the assurance that year should bear interest from the times they were respectively paid. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400.

## 2. Procedure.

**Form of Action.**—The action in such a case should be assumpsit on the implied promise of the company to pay what *ex æquo* is due. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400, 402.

**The plaintiff in such action** should be the person, who, under the provisions of the policy, paid the premiums, though by the policy the amounts assured were to be paid on the death of the assured to a third party. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400, 402.

**The declaration** in such action need contain nothing but the common-

money counts. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400, 402.

**In such a suit the mortality tables may be taken notice of by the court judicially**, though not offered in evidence. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400, 402.

## XI. Enforcement of Claims of Policy Holders on Insolvency of Insurer.

**Right to Recover on Insolvency Notwithstanding Subsequent Change in Condition.**—A New York insurance company was reported by the state insurance superintendent to the attorney general as not in the condition required by law. Thereupon proceedings were started to dissolve the company and appoint a receiver. Soon after, each of eight Virginia policy holders sued out his attachment and levied it on property of the company in Richmond, and each filed his bill, alleging that the company had become insolvent and would not be able to fulfill its contract when his policy matured, and praying for the enforcement of his lien. It was held, that the company being insolvent when the bills were filed, complainants were entitled to recover; and no subsequent change in its condition, effected by other policy holders, could defeat their recovery. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

**These attachments did not enure to the benefit of all the policy holders**, whether parties to the suits or not. This case is unlike that of *Finney v. Bennett*, 27 Gratt. 365, where the bank had ceased business and a "creditors' bill" had been filed to settle its affairs and distribute its assets. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

**Jurisdiction.**—Where the purpose of the action is to subject the deposit required by law to be made by foreign insurance companies with the state of Virginia for the protection of the insured, the policy holder may sue in



the circuit court of the city of Richmond. *Universal Life Ins. Co. v. Cogbill*, 30 Gratt. 72. See the title INSURANCE, vol. 7, p. 758.

**Evidence.**—The report of the state insurance superintendent having been, without objection, read as evidence in the court below, the failure to except there is tantamount to a waiver of objection on appeal. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

**Measure of Recovery.**—Each policy holder is entitled to a sum of money which, on the day of the company's insolvency, would purchase from a solvent company a policy of the same kind, for the same amount and for the same rate of premium. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

This sum is ascertained by treating the difference between the premiums paid the defendant company and the premiums to be paid the new insuring company, as an annuity for the assured's expectation of life, and calculating its cash value. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

Where policy holder has died, or become uninsurable before the company's insolvency, what would be the value of the policy need not be, and is not, here determined. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

Restoration to his former status is all the policy holder can ask. He is not entitled to profit in addition. He can not take the difference between the premium he has paid for a non-participating (inferior) policy and the

premium to be paid for a participating (superior) policy as the basis of the calculation of the measure of his recovery. *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

"It is agreed, I believe, on all sides, that assuming the right of recovery each of the complainants is entitled to just such a sum of money as will place him where he would have stood if the Universal Life Insurance Company had continued solvent; in short, to such a sum as would restore substantially the status in quo. If there were a successor of that company, perfectly solvent, continuing the business on the same terms and conditions, and issuing policies of precisely the same character and description in every respect as its predecessor, the sum which would be required to be paid by each of the complainants to the succeeding company on the 17th day of July, 1877 (the date of the insolvency of the former company), to continue the old policy in force according to its tenor, as upon a new policy of that date, would seem to be the exact measure of recovery. The proposition may be stated in a more general form. Each policy holder is entitled to a sum of money which, on the 17th day of July, 1877, would have purchased from a solvent company a policy of the same kind and description as the old, for the same amount and at the same rate of premium." *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

## Life Tables.

See references under MORTALITY TABLES.

## Life Tenants and Remaindermen.

See the titles FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 315; PARTIES; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WASTE.

**LIFETIME.**—In *Miller v. Beverly*, 1 Hen. & M. 368, 369, it is said: "It is a known principle of law, that when there is a jointure, before marriage, and in lieu of dower, the wife can not demand the latter. But it does not appear from the record that the jointure was made at any time other than 'in the lifetime' of the husband. That is a very indefinite expression. His **lifetime** existed both before and after marriage. The finding was too vague for the court to give any judgment upon."

## **Light and Air.**

See the title **ADJOINING LANDOWNERS**, vol. 1, p. 178.

## **Lights in Mines.**

See the title **MINES AND MINERALS**.

**LIKE.**—In *State v. Gaughan*, 55 W. Va. 692, 700, 48 S. E. 210, it is said: "The word '**like**' is not a precise term. We often say that a certain thing is **like** a certain other thing, and use the term correctly when in fact the two things are quite unlike in many particulars. In such cases we have reference to some peculiar feature or distinctive character in which they are alike and in the sense they may properly be said to be alike, no matter how widely they may differ in non-essential." See also, the title **GAMING**, vol. 6, p. 697.

## **Limitation.**

See the titles **LIMITATION OF ACTIONS; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.**

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#### CROSS REFERENCES.

See the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 82; ACTIONS, vol. 1, p. 122; ADVERSE POSSESSION, vol. 1, p. 199; AGENCY, vol. 1, p. 240; APPEAL AND ERROR, vol. 1, p. 418; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232; BILL OF REVIEW, vol. 2, p. 383; BONDS, vol. 2, p. 507; BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613; CONFLICT OF LAWS, vol. 3, p. 100; CONSTITUTIONAL LAW, vol. 3, p. 140; CORPORATIONS, vol. 3, p. 510; COUNTIES, vol. 3, p. 636; CREDITORS' SUITS, vol. 3, p. 780; DEATH BY WRONGFUL ACT, vol. 4, p. 226; DEMURRERS, vol. 4, p. 456; DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 4, p. 683; DOWER, vol. 4, p. 782; EJECTMENT, vol. 4, p. 871; EXECUTIONS, vol. 5, p. 416; EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483; FORCIBLE ENTRY AND DETAINER, vol. 6, p. 156; FRAUD AND DECEIT, vol. 6, p. 448; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540; HUSBAND AND WIFE, vol. 7, p. 178; JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89; JUDGMENTS AND DECREES, vol. 8, p. 161; LACHES, ante, p. 93; LANDLORD AND TENANT, ante, p. 112; LIENS, ante, p. 325; LOANS; MALICIOUS PROSECUTION; MECHANICS' LIENS; MISTAKE AND ACCIDENT; MORTGAGES AND DEEDS OF TRUST; PARTITION; PARTNERSHIP, PAYMENT; PRESUMPTIONS AND BURDEN OF PROOF; SCIRE FACIAS; SET-OFF, RECOUPMENT AND COUNTERCLAIM; SHERIFFS AND CONSTABLES; STOCK AND STOCKHOLDERS; STREETS AND HIGHWAYS; TROVER AND CONVERSION; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER; VENDOR'S LIEN; WAIVER.

As to limitation upon right to review, see the titles **APPEAL AND ERROR**, vol. 1, p. 418; **BILL OF REVIEW**, vol. 2, p. 383. As to limitation upon reinstatement of cases dismissed, see the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 4, p. 710. As to presumption of payment from lapse of time, see the titles **PAYMENT; PRESUMPTIONS AND BURDEN OF PROOF**. As to limitation in particular actions, see the various titles throughout this work in which the specific actions are treated, as **EJECTMENT**, vol. 4, p. 871; **FORCIBLE ENTRY AND DETAINER**, vol. 6, p. 156; **TROVER AND CONVERSION**, etc. As to operation of statute on judgments and decrees, see the title **JUDGMENTS AND DECREES**, vol. 8, p. 161.

## I. Nature of Statutes of Limitation.

**Distinguished from Presumption of Payment.**—There is a recognized distinction between the statute of limitations, and the presumption of payment from lapse of time, the condition of the parties, and their relations towards each other. In the former case the bar is absolute; in the latter it is a rule of evidence, and may be rebutted. *Clendenning v. Thompson*, 91 Va. 518, 22 S. E. 233. Generally, as to presumption of payment, see the title **PAYMENT**.

**Statutes of Repose.**—Statutes of limitation are to be enforced by the courts like any other statute. They are statutes of repose, and are dictated by a wise policy founded upon the presumption against him, who has unreasonably delayed the assertion of his demand, and in favor of him who has long exercised the dominion of owner. *Templeman v. Pugh*, 102 Va. 441, 46 S. E. 474; *Virginia Mining, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. 689; *Taylor v. Burnside*, 1 Gratt. 165, 187; *Flanagan v. Grimmet*, 10 Gratt. 421; *Smith v. Chapman*, 10 Gratt. 445; *Anderson v. Harvey*, 10 Gratt. 386.

"They are founded on sound public policy, and should be so construed as to advance the policy they were designed to promote." *Templeman v. Pugh*, 102 Va. 441, 46 S. E. 474.

## II. Constitutionality of Statutes.

See the title **CONSTITUTIONAL LAW**, vol. 3, p. 140.

**Act of March 25, 1873.**—The act, passed by the legislature, March 25, 1873, entitled "An act concerning the limitation of actions in certain cases," is void for want of expression of its object in the title thereof, as required by the first clause of § 30, art. 6, of the constitution, providing that, "No act hereafter passed, shall embrace more than one object, and that shall be expressed in its title." *Stewart v. Tennant*, 52 W. Va. 559, 561, 44 S. E. 223. See the title **STATUTES**.

Even if the act could be held free from the fatal defect of unconstitutionality, it would be within the repealing clause of the act of March 16, 1882, constituting ch. 104 of the Code, and not available as a defense to any action or suit. *Stewart v. Tennant*, 52 W. Va. 559, 561, 44 S. E. 223.

**Statute Fixing Limitation for Recovery of Land Leased for Oil or Minerals.**—Chapter 61, acts 1872-73, fixing three years' limitation for suits to recover land leased for oil or other mineral, was unconstitutional and void, because of failure in its title to express the object of the act. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 618, 44 S. E. 508. See the title **STATUTES**.

**Constitutionality of Statutes Changing Limitation.**—See the title **CONSTITUTIONAL LAW**, vol. 3, p. 223.

## III. Retroactive Effect of Statutes.

**In General.**—Statutes of limitation are never to be construed retrospectively, unless such construction is re-



quired by express command, or by necessary and unavoidable implication. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437. See generally, the title **STATUTES**.

**Limitation of Actions on Indemnifying Bonds.**—The proviso in the act of February 28, 1828 (Sup. Rev. Code, 272, § 1), limiting actions on indemnifying bonds to seven years, does not apply to an action on a bond executed prior to the passage of the act. *Duval v. Malone*, 14 Gratt. 24.

**Judgments.**—The fifth section of the act of limitations of 1792 does not apply to judgments which existed before the act took effect. *Day v. Pickett*, 4 Munf. 104.

The ten years' statute of limitations, which in §§ 12, ch. 139, W. Va. Code, 1869, is made applicable to judgments, applies to judgments rendered before the 1st day of April, 1869, at which date the Code took effect. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561.

Section 3, ch. 141, and §§ 11, 12, ch. 139, of the West Virginia Code, 1881, prescribing limitations as to the time in which execution may issue upon a judgment, apply alike to judgments obtained before and to judgments obtained since the Code went into effect. *Spang v. Robinson*, 24 W. Va. 327. See the title **JUDGMENTS AND DECREES**, vol. 8, p. 161.

The statute (Code, ch. 35, § 20, as amended and re-enacted by acts, 1882, ch. 18), providing that statutes of limitation shall apply to the state, was held to apply to judgments rendered in favor of the state before its re-enactment. *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476.

**Notes.**—The statute changing the limitation upon unsealed contracts in writing from five years in certain cases to ten in all cases was not retrospective in its operation. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437.

**Open Account.**—In *Brooke v. Shelly*,

4 Hen. & M. 266, the act of 1792, which makes it the duty of the court to expunge, in an action upon an open account against an executor or administrator, all items appearing to have been due five years prior to the death of the testator or intestate, was construed to apply to open accounts existing before the first of October, 1793, when the act took effect. See the title **ACCOUNTS AND ACCOUNTING**, vol. 1, p. 82.

**Vendor's Lien or Owelty of Partition.**—Prior to the Code of 1887, there was no statutory limit to the enforcement of a vendor's lien, or the lien for owelty of partition, but they continued to exist until waived, released, satisfied, or until payment was presumed. If the statute, § 2935, Va. Code, 1887, applies to a lien for owelty of partition, it has no application to a case where the creation of the lien arose prior to the enactment of the statute. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861. See the title **VENDOR'S LIEN**.

**Suit to Set Aside Recorded Transfers.**—The statute (acts of 1895, ch. 4) providing that if a conveyance is recorded within eight months after its execution, an action to avoid it must be brought within four months after its record, is not retroactive. *Lawyer v. Barker*, 45 W. Va. 468, 31 S. E. 964; *Baer Sons Grocer Co. v. Williams*, 43 W. Va. 323, 27 S. E. 345; *Casto v. Greer*, 44 W. Va. 332, 30 S. E. 100. See generally, the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 540.

**Act Providing for Suspension of Statute by Removal of Debtor.**—It was held, that the act of 1897-98, amending § 2933, Code of 1887, by dispensing with necessity of prior residence by debtor departing from or removing out of state, was not retroactive. *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 238. See post, "Obstruction of Prosecution," IX, G.

**Statutes Changing Limitation.**—A statute changing the period of limitations will not be applied to antecedent transactions, unless its letter or necessary intent demand a retroactive construction. *Walker v. Burgess*, 44 W. Va. 399, 30 S. E. 99; *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736. And though the statutes of limitation do not destroy the right, but affect only the remedy, the West Virginia court has applied this rule to such statute in numerous cases. *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476.

As to constitutionality of statute changing period of limitation, see the title CONSTITUTIONAL LAW, vol. 3, p. 223.

## IV. Against Whom Statute Operates.

### A. STATE.

#### 1. In Absence of Statute.

The statute of limitations never runs against the commonwealth, unless there be an express provision in the statute to that effect. *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Hall v. Webb*, 21 W. Va. 318.

#### 2. In Virginia.

**In General.**—The English maxim, *nullum tempus occurrit regi*, has been adopted in Virginia in relation to the commonwealth, on which principle it has been held, that the acts of limitation do not extend to the commonwealth in civil suits, not founded on any penal act expressly limiting the commencement of the action. Va. Code, 1904, § 2937; *Nimmo v. Com.*, 4 Hen. & M. 57, 4 Am. Dec. 488; *Hale v. Branscum*, 10 Gratt. 418; *Staats v. Board*, 10 Gratt. 400; *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802; *Levasser v. Washburn*, 11 Gratt. 572; *Com. v. Ford*, 29 Gratt. 688; *Hall v. Webb*, 21 W. Va. 318, 322; *Kemp v. Com.*, 1 Hen.

& M. 85; *Shanks v. Lancaster*, 5 Gratt. 110, *Seekright v. Lawson*, 8 Leigh 458; *Saunders v. Com.*, 10 Gratt. 494; *Koiner v. Rankin*, 11 Gratt. 420; *Wild v. Serpell*, 10 Gratt. 405.

#### Dedication of Land to Public.

Where land has been dedicated to the public, no title by adverse possession can be acquired to it, as time does not run against the state, nor bar the right of the public. *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830; *Taylor's Case*, 29 Gratt. 780; *Norfolk v. Chamberlaine*, 29 Gratt. 534; *Yates v. Warrenton*, 84 Va. 337, 4 S. E. 818.

#### Adverse Possession against State.

See the title ADVERSE POSSESSION, vol. 1, p. 220.

### 3. In West Virginia.

#### a. Former Rule.

It was formerly the rule in West Virginia that the statutes of limitation were inoperative to bar the right of the state. *Hall v. Webb*, 21 W. Va. 318.

**Adverse Possession.**—See the title ADVERSE POSSESSION, vol. 1, p. 220.

#### b. Present Rule.

**In General.**—But it is now provided by the statute that the statute applies alike to state and individuals. Code, 1899, ch. 35, § 20; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283; *Calwell v. Prindle*, 19 W. Va. 604, 653; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476.

Section 20, ch. 35, of the West Virginia Code of 1868, abolished the common-law rule that time does not run against the state, and made the state's rights subject to every statute of limitation, the same as individual rights. *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476; *Calwell v. Prindle*, 19 W. Va. 604, 653; *State v. Sponaugle*, 45 W. Va. 415, 32 S. E. 283.

**Judgments in Behalf of State.**—Section 19, ch. 55, of the acts of 1875,

providing that the statute of limitations should not apply to proceedings on "judgments on behalf of the state, or any claim due the state," did not wholly repeal § 20, ch. 35, of the West Virginia Code, 1838, but only limited its operation by taking out of it judgments and money claims of the state; and when this section was subsequently repealed by the act of March 17, 1881, ch. 13, such judgment and claims were again made subject to statutes of limitation. *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. 476. See the title JUDGMENTS AND DECREES, vol. 8, p. 161.

#### 4. State Suing in Another State.

In a sovereign state enters the courts of a foreign state, she does so with no other right and immunities than those which pertain to private corporations or individuals, and is not exempted from the operation of the statute of limitations of the *lex fori*. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

**State Charitable Institution Suing in Another State.**—A state charitable institution, suing in the courts of a foreign state, is subject to the statute of limitations of the forum, even if at its domicile it be regarded as a part of the state government. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740; *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977.

### B. PUBLIC CORPORATIONS.

#### 1. In General.

"In a note to *Herrington v. Harkins*, 1 Rob. 591, in the Va. Rep. Anno., p. 273, it is said: 'Statutes of limitations run against public corporations, whether they are municipal or mere agencies of the state. Such corporations are more or less branches of the government, and necessarily are clothed with the attributes and incidents of sovereignty; yet when they have power to sue and be sued, to

have a common seal, to take and hold property, and transact business, they are governed by the same laws and regulations, and subject to the same limitations, as natural persons, unless exempt by positive law.'" *Johnson v. Black*, 103 Va. 477, 492, 49 S. E. 633, citing *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644; *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977.

#### 2. Municipal Corporations.

See the title MUNICIPAL CORPORATIONS.

#### 3. Counties.

See the titles ADVERSE POSSESSION, vol. 1, p. 220; COUNTIES, vol. 3, p. 694.

#### 4. Charitable Corporations.

The Western Lunatic Asylum is subject to the statute of limitations. *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

### C. PROPRIETORS OF NORTHERN NECK OF VIRGINIA.

The maxim, *nullum tempus occurrit regi*, never applied to the proprietors of the Northern Neck of Virginia. *Birch v. Alexander*, 1 Wash. 34.

### D. OPERATION AS AGAINST RIGHTS OF PUBLIC IN PUBLIC EASEMENTS.

The maxim, *nullum tempus occurrit regi*, applies to all the sovereign rights of the people of the state dedicated to public uses, and of which they can not be deprived otherwise than according to their express will and appointment. The public easements in the public highways of the state are not subject to the statute of limitations. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, overruling *Wheeling v. Campbell*, 12 W. Va. 36; *Forsyth v. Wheeling*, 19 W. Va. 318; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400. See the title STREETS AND HIGHWAYS.

"That the statute of limitations applies to municipal corporations there can be no question; that it now applies to the state in like manner as to individuals, by express statutory provision, there can be no question; but it does not apply to the sovereign rights of the people, except as they are restricted in the constitution by their manifest will therein contained." *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326.

"The only logical conclusion that can possibly be reached is that the public easement in all the highways of the state, wherever situated, is sacred from individual encroachment, and all interference therewith, by private interests, in a continuing public nuisance, subject to abatement whenever the growing necessities of the people require such easement for the uses to which the land to which it attaches was originally dedicated." *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 330.

#### **-E. ALIENS.**

See the title ALIENS, vol. 1, p. 296.

#### **F. REVOLUTIONARY OFFICERS.**

The act of limitations does not apply to the claim of an officer of the state navy of Virginia during the war of the revolution, who became supernumerary before, and so continued until the end of the war, and who was entitled to half pay for life under the act of May, 1779. *Com. v. Lilly*, 1 Leigh 525.

#### **V. In Whose Favor Statute Operates.**

**Foreign Corporations.**—An insurance company chartered by another state, but doing business in this state in compliance with the statute of 1855-56, is to be considered, for the purpose of being sued, as domiciled in this state, and is entitled to rely on the statute of limitations just as if it were a company which had been chartered by the leg-

islature of this state. *Connecticut, etc., Ins. Co. v. Duerson*, 28 Gratt. 630.

#### **VI. To What Proceedings Statute Applies.**

As to particular actions or proceedings, see the various titles throughout this work, such as EJECTMENT, vol. 4, p. 871; FORCIBLE ENTRY AND DETAINER, vol. 6, p. 156; TROVER AND CONVERSION, etc. As to particular crimes, see the specific titles treating of crimes, such as ASSAULT AND BATTERY, vol. 1, p. 729; HOMICIDE, vol. 7, p. 105, etc.

#### **A. ACTIONS OR PROCEEDINGS AT LAW.**

##### **1. Civil Actions or Proceedings.**

###### **a. Motions.**

Motions are included in the terms "suits" and "actions" in the act of 1789, for limitation of suits upon penal statutes. *Auditor v. Graham*, 1 Call 475. See the title MOTIONS.

It was held, in *Stratton v. Mutual Assur. Society*, 6 Rand. 22, that on a motion for quotas the act of limitations does not apply, because the declaration for insurance is a sealed instrument.

###### **b. Action against Carrier for Embezzlement.**

The act of limitations may be pleaded in bar to an action against a common carrier, for fraudulently embezzling goods entrusted to his care. *Cook v. Darby*, 4 Munf. 444.

###### **c. Action on Contract Imposing Continuing Obligation.**

The statute of limitations will not bar action against a railroad company upon a covenant in a right of way grant to build and maintain a crossing or fence, the action being merely for such failure; but if actual damage result from such failure, then the statute will begin to run from the date of such damage in an action for compensating damages. *Douglass v. Ohio River R. Co.*, 51 W. Va. 523, 524, 41 S. E. 911.

#### d. Action on Contracts Secured by Liens.

**Deed of Trust.**—A deed of trust is regarded merely as a security for the debt, and therefore as long as a recovery on the bond or note given for the debt is not barred by the statute, the right to enforce the lien of the trust continues and it may be enforced. *Camden v. Alkire*, 24 W. Va. 674; *King v. King*, 90 Va. 177, 17 S. E. 894; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531; *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483. See the title MORTGAGES AND DEEDS OF TRUST.

And the fact that the debt secured by a deed of trust is barred by the statute, does not affect the right to enforce the lien of the trust deed, which is not barred by statute or presumption of payment. *Criss v. Criss*, 28 W. Va. 388; *Pitzer v. Burns*, 7 W. Va. 63; *Smith v. Washington, etc., R. Co.*, 33 Gratt. 617; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 537; *Bowie v. Poor School Society*, 75 Va. 300; *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Hanna v. Wilson*, 3 Gratt. 243; *Coles v. Withers*, 33 Gratt. 186; *Gibson v. Green*, 89 Va. 524, 16 S. E. 661.

**Vendor's Lien.**—A lien reserved in a deed of real estate to secure a judgment is not effected by the judgment having become barred by the statute of limitations. *Morehead v. Horner*, 30 W. Va. 548, 4 S. E. 448.

The statute of limitations has no application to bar a lien for purchase money reserved in a conveyance of land. Though action on a note, given for such purchase money, be barred, so as to defeat its collection out of other property of the debtor, the lien against the particular land conveyed is not barred. *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623; *Hopkins v. Cockerell*, 2 Gratt. 88; *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49.

In the leading case of *Hanna v. Wilson*, 3 Gratt. 243, it was decided

that although an action at law to recover the purchase money was barred by the statute, yet the right to maintain a suit in equity to enforce the vendor's lien on the land could not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565. See the title VENDOR'S LIEN.

**Pledge or Collateral Security.**—Where a creditor holds a pledge or collateral security for his debt, he will be entitled to retain the same in his possession against the pledgor or debtor, notwithstanding the statute of limitations is, or might be, successfully pleaded against the debt for the security of which the pledge was made. *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483. See the title PLEDGE AND COLLATERAL SECURITY.

#### e. Action to Set Aside Award.

When the conflicting claims of a judgment creditor and the beneficiaries under a trust deed, to the surplus from a prior trust deed, are submitted to arbitration, seven years after the award, the successful party under the award will be protected by the statute of limitations. *Lesslie v. Brown*, 1 Pat. & H. 216. See the title ARBITRATION AND AWARD, vol. 1, p. 687.

#### f. Suit to Set Aside Tax Sale.

A suit brought to set aside a tax deed, because the lands were redeemed, and because the party to whom the deed was made sustained such relation to the land that he could not acquire a title thereto, and it does not appear that any adverse possession was claimed, is not barred by the statute of limitations. *Battin v. Woods*, 27 W. Va. 58. See the title TAXATION.

#### g. Claim for Taxes upon Redemption of Forfeited Land.

Where in a proceeding by a commissioner of school lands to obtain a decree for the sale of a lot, which has been forfeited by the failure of the owner to enter the same upon the

land books, the former owner thereof files his petition praying that he may be allowed to redeem, and the city files a petition claiming an amount to be due it for taxes on said lot, it will not be deemed thereby to have brought a suit for said amount of taxes, and the statute of limitations will not be applied to the taxes due thereon. *Tebbetts v. Forfeited Lot*, 33 W. Va. 705, 11 S. E. 23. See the title TAXATION.

#### **h. Action for Ground Rent Imposed under Authority of Statute.**

Where ground rent is reserved in land conveyed by trustees, by authority of an act of assembly, which rent is to be paid to the owner of the land when he is ascertained, the statute of limitations does not run against the claim of the proprietor against the purchaser to recover such rents. *Mulliday v. Machir*, 4 Gratt. 1.

#### **i. Actions against Estates of Decedents.**

As to the interposition of defense of statute of limitations by executors and administrators in actions against decedents' estates, see the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 712, et seq.

#### **2. Criminal Proceedings.**

**In General.**—In *State v. Beasley*, 21 W. Va. 777, which was decided in 1882, it was held, that § 12, ch. 13, of the Code, which said, "The time that any act is to be done shall be computed by excluding the first day and including the last," applied to criminal as well as to civil statutes of limitation.

A presentment is the bringing of a prosecution, and if the prosecution is not barred when commenced, the failure to file an information before the regular time expires will not bar it. *Com. v. Christian*, 7 Gratt. 631.

**Misdemeanors.**—An indictment for a misdemeanor was found against B. on June 3d, 1879, and the evidence proved that the offense charged was committed on June 3d, 1878, the prosecution is not barred by § 10, ch. 152, of

the West Virginia Code, in force in 1883, which provided, that "a prosecution for a misdemeanor shall be commenced within one year next after there was cause therefor," etc. *State v. Beasley*, 21 W. Va. 777.

**Information for Assault.**—Under the act of January 25, 1805, § 2, amending the penal laws, an information for an assault can not be filed after more than one year from the commission of the assault. *Com. v. Chichester*, 1 Va. Cas. 312. See the title ASSAULT AND BATTERY, vol. 1, p. 729.

**An information in the nature of a writ of quo warranto**, though in form a criminal proceeding, yet is in substance a civil proceeding for the trial of a civil right, and therefore the act which limits the prosecution of an information on any penal law to one year does not apply to such informations. *Com. v. Birchett*, 2 Va. Cas. 51. See the title QUO WARRANTO.

**Averments of Indictment.**—When the time within which the prosecution for offenses is limited by statute, the time as averred in the indictment should appear to be within the limit; but it is not necessary to aver that it occurred within that period. *State v. Ball*, 30 W. Va. 382, 4 S. E. 645.

If an indictment for an offense, the prosecution of which is by statute limited to a certain period after the offense was committed, shows upon its face that at the time of the indictment the prosecution was barred by such statute, it is fatally defective, and the defendant may take advantage of such defect by motion to quash the indictment, by demurrer, or by motion in arrest of judgment. *State v. Ball*, 30 W. Va. 382, 4 S. E. 645. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 371.

**Presumption upon Conviction.**—After a conviction on a trial for a misdemeanor, the presumption in the appellate court is that the offense was

proved to be within the period of limitations, in the absence of anything in the record to the contrary. *Earhart v. Com.*, 9 Leigh 671.

## **B. IN EQUITY.**

### **1. In General.**

There is no positive direction in the statute that courts of equity shall be bound by the periods therein prescribed. *Harrison v. Harrison*, 1 Call 419, 429.

The fact that a person, if left to his legal remedies, will lose his debt if the statute of limitations be pleaded, is no ground of relief in equity. Courts should adjust the rights of parties according to the law, and leave the consequences to take care of themselves. *Pendleton v. Taylor*, 77 Va. 580, 581.

It is no ground for relief in equity that plaintiff sold goods to infant children, and by mistake charged them to their deceased father's estate, and that his debtors kept him from suing them by their repeated promises to pay, until his claim was barred by the statute of limitations, his remedy being at law. *Nelson v. Hammer*, 84 Va. 909, 6 S. E. 462.

### **2. In Cases Cognizable Exclusively in Equity.**

#### **a. Statement and Applications of General Rule.**

**In General.**—With respect to matters which are exclusively cognizable in equity, the statute of limitations is not binding on chancery courts. If a suit is founded on a right of purely equitable nature and without any corresponding legal right, it must be determined entirely upon equity principles and rules, regardless of the statute of limitations. *Cramner v. McSwords*, 24 W. Va. 594; *Heiskell v. Powell*, 23 W. Va. 717.

As it respects mere equitable demands, length of time can not be set up as an absolute bar; for, in relation to them, length of time operates as a bar, not *ex jure*, but as a fact showing acquiescence and furnishing evidence

that the claim has been adjusted. *Fore v. Foster*, 86 Va. 104, 106, 9 S. E. 497.

In cases of claims of an equitable nature, equity acts by analogy; that is, it applies the same bar to such claims that would be applied at law, under the statute, to legal claims of analogous character. *Harshberger v. Alger*, 31 Gratt. 52, 67.

#### **Enforcement of Charges Made by Will against Real Estate of Decedent.**

—Where a testator by his will charges his real estate with the payment of his debts, an equitable lien is created in favor of creditors on his lands, in the hands of his devisees, to which there is no bar unless the debts are barred as against the estate of the testator. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

#### **Enforcement of Mortgages and Deeds of Trust.**—See the title MORTGAGES AND DEEDS OF TRUST.

**Enforcement of Judgments.**—Although a judgment is actually barred by the statute of limitations, yet the remedy in equity to enforce the lien is not affected by any time short of the period sufficient to raise the presumption of payment. *Gibson v. Green*, 89 Va. 524, 16 S. E. 661; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531. See the title JUDGMENTS AND DECREES, vol. 8, p. 161.

**Liability of Guardian.**—Although an action by an infant on the bond of his guardian is barred both as to the guardian and his sureties, after ten years from the arrival of the ward at age, yet an action may be maintained against a guardian on his general responsibility in equity, if not barred by laches. *Magruder v. Goodwyn*, 2 Pat. & H. 561.

**Suit to Surcharge and Falsify Accounts.**—There is no statute of limitations, fixing time within which suits may be brought to surcharge and falsify settlements of accounts of committees of lunatics. *Trowbridge v. Stone*, 42 W. Va. 454, 26 S. E. 363.

See the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 82; INSANITY, vol. 7, p. 668.

**Suits to Recover Legacy.**—It was held, in early cases that the statute of limitations is no bar to a suit for a legacy, as a legacy is not within that statute. *Waddy v. Sturman*, Jeff. 5. See generally, the title WILLS.

**Suits for Partition and Compensation as Incident of Partition.**—Statutes of limitation have no application to suits for partition, nor to the equity for compensation which arises only when the partition is asked for. *Bal-lou v. Ballou*, 94 Va. 350, 353, 26 S. E. 840; *Grove v. Grove*, 100 Va. 556, 42 S. E. 312.

The right of a tenant to enforce against the share of his cotenant the equitable lien arising from the payment, by the tenant, of more than his share of the purchase money, does not arise until suit for partition is brought, and the statute of limitations has no application to such suits. *Grove v. Grove*, 100 Va. 556, 42 S. E. 312.

On partition, part of a tract was set off to the survivor of the two equal owners, and the remainder, belonging to the heirs of the deceased joint owner, was sold to complainant. Several years later it was discovered that the part set off to the surviving owner contained a large quantity in excess of his share, and that the part sold to complainant was proportionately deficient. The right to relief being purely equitable, the statute of limitations can not be set up as a bar. *Fore v. Foster*, 86 Va. 104, 9 S. E. 497. See the title PARTITION.

**Specific Performance.**—In a suit in equity by the assignee of the purchase money of land against the purchaser and assignor, the suit being for a specific performance of the contract, the statute of limitations is no bar to the claim as it is inapplicable to the case. *Mayo v. Carrington*, 19 Gratt. 74. See the title SPECIFIC PERFORMANCE.

## b. Trusts.

### (1) Direct or Express Trusts.

#### (a) General Rule.

The statute of limitations does not run in cases of direct or express trusts, and is ineffectual to bar the rights of one of the parties. *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630, 7 Va. Law Reg. 851; *Lamar v. Hale*, 79 Va. 147; *Rankin v. Bradford*, 1 Leigh 163, 171; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 222; *Turner v. Campbell*, 3 Gratt. 77; *Rowe v. Bentley*, 29 Gratt. 756, 762; *Saum v. Coffelt*, 79 Va. 510; *Massie v. Heiskell*, 80 Va. 789; *Williams v. Lewis*, 5 Leigh 686; *Sheppards v. Turpin*, 3 Gratt. 373; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579; *Farley v. Shippen*, Wythe 254; *Harrison v. Harrison*, 1 Call 419; *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544; *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647.

Beneficiaries who have possession of the trust property can not set up the statute of limitations to defeat the right of the other beneficiaries to share in the trust property. *Turner v. Campbell*, 3 Gratt. 77.

#### (b) What Trusts Are within Rule.

**In General.**—"To exempt a trust from the bar of the statute, it must be, first, a direct trust; secondly, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, thirdly, the question must arise between trustee and cestui que trust." *Beecher v. Foster*, 51 W. Va. 605, 616, 42 S. E. 647.

"The trusts against which the statute does not run are those technical and continuing trusts not cognizable at law, and falling within the proper, peculiar and exclusive jurisdiction of equity; but such other trusts as may be ground of action at law are subject to



the operation of the statute." *Rowan v. Chenoweth*, 49 W. Va. 287, 291, 38 S. E. 544; *Heiskell v. Powell*, 23 W. Va. 717, 729; *Newberger v. Wells*, 51 W. Va. 624, 632, 42 S. E. 625; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Sheppards v. Turpin*, 3 Gratt. 373; *Harshberger v. Alger*, 31 Gratt. 52, 67; *Redford v. Clarke*, 100 Va. 121, 40 S. E. 630, 636.

The statute of limitations has no application to persons acting as trustee, whether regularly appointed or not. *Lamar v. Hale*, 79 Va. 147.

**Trust Must Be Cognizable in Equity.**

—It has been held, that in order for a trust to be exempt from the operation of the statute of limitations it must be cognizable only in equity. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Rowan v. Chenoweth*, 49 W. Va. 287, 291, 38 S. E. 544; *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309; *Beecher v. Foster*, 51 W. Va. 605, 617, 42 S. E. 647.

**Absolute Deed Intended as Trust Deed or Mortgage.**—Where a vendor conveys land by deed, which though absolute on its face, is in fact a mere trust or mortgage, and continues in possession after the conveyance, such possession will not be adverse to the title of the vendee, and start the running of the statute of limitations, there must be a disclaimer or repudiation of the trust relation, and notice of that fact to the vendee. *Flynn v. Lee*, 31 W. Va. 487, 7 S. E. 430. See the title MORTGAGES AND DEEDS OF TRUST.

**Rule between Fiduciary and Beneficiary.**—The statute of limitations has no application to fiduciaries. It is otherwise as to their sureties. Section 9, ch. 146, Code, 1873; *McCormick v. Wright*, 79 Va. 524; *Peale v. Thurmond*, 77 Va. 753.

As to fiduciaries there is no limitation except what results from staleness of demand or presumption of payment, it is otherwise as to their

sureties. Va. Code, 1873, ch. 146, § 9; *McCormick v. Wright*, 79 Va. 524.

To prevent length of time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims, its being fiduciary as to any other person, is not sufficient. *Spotswood v. Dandridge*, 4 Hen. & M. 139.

"There is no statutory bar to surcharging and falsifying the accounts of fiduciary. *Burwell v. Anderson*, 3 Leigh 338; Code of 1868, ch. 87, § 22." *Bruce v. Bickerton*, 18 W. Va. 342, 357.

**Claims by Legatees against Personal Representatives.**—The doctrine is well established that an executor, as respects legatees and distributees, is to be deemed a trustee exercising a continuous trust, not affected by any statutory limitation. *Leake v. Leake*, 75 Va. 792; *Jones v. Jones*, 92 Va. 590, 24 S. E. 255. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

The personal representative of a decedent is deemed a trustee exercising a continuing trust as to legatees, and though he may rely on the staleness of the demand of a legatee, or upon any presumption of payment or satisfaction arising from lapse of time, yet the statute of limitations has no application to a suit by the legatee to recover his legacy. *Jones v. Jones*, 92 Va. 590, 24 S. E. 255.

**Executors de son tort** are liable to account for the property of the decedent to his distributees or legatees, like other executors, and can not rely on the statute of limitations to protect them from such accountability. *Hansford v. Elliott*, 9 Leigh 79.

**Claim against Sheriff.**—The act of limitations will not bar a motion against a sheriff for clerk's tickets put into his hands to collect. *Lee v. Peachy*, 3 Call 220. See the title SHERIFFS AND CONSTABLES.

**Claim against Attorney for Collections Made.**—An attorney is not considered a trustee and the statute may be pleaded in an action against him for an accounting for money collected. *Kinney v. McClure*, 1 Rand. 284.

In the absence of fraudulent concealment on the part of an attorney in fact, whose authority is simply to collect and pay over money, the principal's cause of action against his attorney for failure to make such payment arise at the date of the collection by the attorney, or at least in a reasonable time thereafter. There is no trust relation between the parties, and the mere fact that a part of the money was collected several years after the first collection is no evidence of a continuing trust, and does not change the original character of the relation of the parties. *Hasher v. Hasher*, 96 Va. 584, 32 S. E. 41.

**Trust by Will for Payment of Testator's Debts.**—A trust created by will for the payment of debts by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay, and therefore an undertaking which is merely nudum pactum is not comprehended, and may be barred by the act of limitations. *Chandler v. Hill*, 2 Hen. & M. 124.

**Secret Trust.**—A fraudulent secret trust was partly executed by the trustee who did not object to completing it. The trust property having come into the hands of one of the cestuis que trust, on a bill filed by the others to have the trust executed, against the cestui que trust in possession, the statute of limitations is no bar. *Turner v. Campbell*, 3 Gratt. 77; *Turner v. Campbell*, 1 Pat. & H. 256.

A fraudulent bill of sale is made of a female slave, absolute on its face with a secret trust for the grantor's daughters, of whom the grantee becomes guardian in 1827, and in 1829 he settles his guardianship accounts, both wards

having then attained to full age; they then set up a claim to the property, which the grantee denies to be just, and in 1837, they file a bill to establish the secret trust. Held, the statute of limitations would alone be a bar to the bill, as the law is well settled that the quiet possession of slaves for five years transfers title to the holder. *Owen v. Sharp*, 12 Leigh 427.

#### (c) Application of Rule.

**Breach of Trust by Trustee.**—"The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract, equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court." *Beecher v. Foster*, 51 W. Va. 605, 616, 42 S. E. 647.

**Retention of Funds by Trustee.**—Where a trustee retains money in his hands the statute of limitations does not begin to run against the demand of the cestui que until the trust is concluded. *Lomax v. Pendleton*, 3 Call 538, Wythe 4.

**Acceptance of Drafts by Trustee Payable Out of Separate Estate of Wife.**—Father by will directed that certain part of his estate be paid over to his daughter for the sole and separate use of herself and child or children, during her life, and after her death to be vested in fee in her child or children. Afterwards, in 1871, daughter drew two drafts on her trustee for \$500 and for \$2,026.58, which were duly accepted by the trustee "payable when funds are in my hands payable to her." The money for which said drafts were given was due by her husband, or advanced by B. to him to pay his debts, or to embark in business. Not being paid at maturity, suit was brought to subject her separate estate for their payment. It was held, that

the act of limitations does not apply to the case. The drafts being drawn on her trust fund and accepted as payable out of that fund, operated as an equitable assignment pro tanto of that fund. A trust was thus created in favor of the drawee, which is not subject to statutory limitation. *Bain v. Buff*, 76 Va. 371. See the title SEPARATE ESTATE OF MARRIED WOMEN.

**(d) Effect of Purchase with Notice of Trust.**

Where a purchaser buys with notice of a trust he becomes charged with it himself, and the statute of limitations does not run against the rights of the beneficiaries. *Rankin v. Bradford*, 1 Leigh 163.

Where a debtor conveys land in trust for the payment of his debts, and then for the benefit of his wife and children, and a creditor sues to enforce the trust and has the land sold to him under the decree, in an equity suit by the children of the debtor against this creditor to recover the land, it was held, that he was not precluded from setting up the statute of limitations, because he acquired the land with notice of the trust in favor of the plaintiffs. *Drumright v. Hite*, 2 Va. Dec. 465 (1897).

**(e) Effect of Termination of Trust.**

"The doctrine is well settled, that while in cases of direct or express trusts, as between the trustee and cestui que trust, the statute of limitations has no application during the continuance and recognition of the trust, yet if the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold and control the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the cestui que trust in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the cestui que trust. 2 Perry

on Trusts, §§ 863, 864; Ang. on Lim., § 174; *Nease v. Capehart*, 8 W. Va. 95; *Cooley v. Porter*, 22 W. Va. 120; *Bargamin v. Clarke*, 20 Gratt. 544; *Rowe v. Bentley*, 29 Gratt. 756, 760." *Jones v. Lemon*, 26 W. Va. 629, 634; *Lomax v. Pendleton*, 3 Call 538.

When the subject is land, of which the trustee has the legal title, and the cestui que trust is a member of his family living upon the land, if the trustee, asserting title in himself, conveys a part of the land, by deed in his own name, to a third person whom he places in possession of the part so sold and takes the purchase money to himself, the deed is put upon record and there is no evidence that the trustee ever thereafter recognized the trust, but on the contrary claimed the residue of the land as his own; these acts and transactions will be regarded as a repudiation of the trust, and the statute of limitations will begin to run against the cestui que trust from that time. *Jones v. Lemon*, 26 W. Va. 629.

And if a trustee unequivocally repudiates the trust, and such is brought to the knowledge of the beneficiary, the statute begins to run from the time of such knowledge. *Rowe v. Bentley*, 29 Gratt. 756; *Nease v. Capehart*, 8 W. Va. 95; *Key v. Hughes*, 32 W. Va. 184, 9 S. E. 77; *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647.

Thus where the treasurer of a special fund of a town died, and his personal representative delivered all securities, books, and papers belonging to the office, to his successor, with evidence of the decedent's exact indebtedness to the treasury, on which an action at law might have been maintained against the personal representative, the trust was terminated, and the statute of limitations began to run against the recovery of such indebtedness from that day. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

**(2) Indirect Trusts.**

**In General.**—"Those which come un-

der the general head of indirect trusts, and which are subject to the laws of limitation, are resulting, implied and constructive trusts." *Beecher v. Foster*, 51 W. Va. 605, 616, 42 S. E. 647.

Express trusts, cognizable only in equity, are alone free from limitation created by laches or statute. All other trusts, whether legal or equitable, are either subject to the statute of limitations, or liable to be barred by laches. *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

**Implied Trusts.**—Implied trusts are within the statute of limitations and the statute begins to run from the time the wrong was committed by which the person becomes chargeable as trustee by implication. *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544; *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Rowe v. Bentley*, 29 Gratt. 756, 762; *Saum v. Coffelt*, 79 Va. 510; *Massie v. Heiskell*, 80 Va. 789; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Williams v. Lewis*, 5 Leigh 686; *Sheppards v. Turpin*, 3 Gratt. 373; *Lamar v. Hale*, 79 Va. 147; *Rankin v. Bradford*, 1 Leigh 163, 171; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 222; *Turner v. Campbell*, 3 Gratt. 77.

**Constructive Trusts.**—Constructive trusts are not within the rule, but are subject to the operation of the statute of limitations, unless there has been a fraudulent concealment of the cause of action; and the statute is as complete a bar in equity as at law. *Beecher v. Foster*, 51 W. Va. 605, 616, 42 S. E. 647; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544; *Woods v. Stephenson*, 43 W. Va. 149, 27 S. E. 309; *Sheppards v. Turpin*, 3 Gratt. 373; *Redford v. Clarke*,

100 Va. 115, 40 S. E. 630. *Lamar v. Hale*, 79 Va. 147; *Rankin v. Bradford*, 1 Leigh 163, 171; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 222; *Turner v. Campbell*, 3 Gratt. 77; *Rowe v. Bentley*, 29 Gratt. 756, 762; *Saum v. Coffelt*, 79 Va. 510; *Massie v. Heiskell*, 80 Va. 789; *Williams v. Lewis*, 5 Leigh 686; *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579.

Where property conveyed in a deed of trust was taken under execution and sold, and the purchasers remained in peaceful possession thereof for five years before suit was instituted by the trustees, or cestui que trust to recover it; it was held, that the statute of limitations was a bar to recovery. *Sheppards v. Turpin*, 3 Gratt. 373; *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647.

If the statute of limitations will bar the action of the trustee against a third person for the recovery of the trust property, it will equally bar the action of the cestui que trust for the same subject matter. *Sheppards v. Turpin*, 3 Gratt. 373; *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647.

### 3. In Cases of Concurrent Jurisdiction.

**In General.**—In demands strictly legal, of which equity has jurisdiction concurrent with the law courts, equity follows the law literally in applying the statute of limitations. *Hars'berger v. Alger*, 31 Gratt. 52, 67; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *McCarty v. Ball*, 82 Va. 872, 1 S. E. 189; *Ayre v. Burke*, 82 Va. 338, 341, 4 S. E. 618; *Cottrell v. Watkins*, 89 Va. 801, 810, 17 S. E. 328; *Rankin v. Bradford*, 1 Leigh 163; *Harrison v. Harrison*, 1 Call 419; *Pendleton v. Taylor*, 77 Va. 580; *Gibson v. Green*, 89 Va. 524, 16 S. E. 661; *Coles v. Ballard*, 78 Va. 139; *Switzer v. Noffsinger*, 82 Va. 518; *Hutcheson v. Grubbs*, 80 Va. 251; *Drumright v. Hite*, 2 Va. Dec. 465; *Fore v. Foster*, 86 Va. 104, 9 S. E. 497; *Houck v. Dunham*, 92 Va. 211, 23 S. E. 228; *Rowe v. Bentley*, 29 Gratt. 756; *Wheeling v. Campbell*,

12 W. Va. 36, 46; *Graham v. Graham*, 16 W. Va. 598; *Maxwell v. Wilson*, 54 W. Va. 495, 46 S. E. 349; *Wilsons v. Harper*, 25 W. Va. 179; *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420; *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625.

"The general rule undoubtedly is that in the application of statutes of limitations equity follows the law, and wherever a demand would be barred at law, an equitable demand of the like character will be barred in equity. The bar is applied by analogy, or according to some authorities, by obedience to the statutory enactment." *Rowe v. Bentley*, 29 Gratt. 756.

"Equity, with respect to statutes of limitation, as a general rule, follows the law. If a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred in a suit to enforce it in the equitable forum. *Rowe v. Bentley*, 29 Gratt. 756, 759; *Harshberger v. Alger*, 31 Gratt. 52, 67; *Hutcheson v. Grubbs*, 80 Va. 251, 257." *Drumright v. Hite*, 2 Va. Dec. 465.

A legal demand sued on in equity is subject to the statute of limitations and not laches. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

In matters of concurrent jurisdiction, equity, by analogy, applies to stale claims, the bar of the statute of limitations, and recognizes the same exceptions to its operations that are allowed in courts of law. *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625.

**Action for Recovery of Real Estate.**—It was held, in *Drumright v. Hite*, 2 Va. Dec. 465, that § 2915 of the Code, limiting an action to recover land east of the Alleghany mountains to fifteen years next after the right to bring it accrues, will be applied in equity when a suit is brought for the land, and for an account of the rents and profits.

In *Wilsons v. Harper*, 25 W. Va. 179, it was held, that when a suit for land was not brought until twenty-five years

after the right of action accrued, the bar of the statute was complete, as the time prescribed by statute to bar an entry on land was fifteen years when the cause of action accrued.

The statute of limitations runs in equity in favor of an adverse possession. *Harrison v. Harrison*, 1 Call 419.

**Recovery Back of Money Paid under Mistake of Fact.**—Where an administrator has invoked the aid of a court of equity to recover from a guardian of a distributee money alleged to have been paid by mistake to such guardian, and the evidence adduced in support of such payment shows that it was paid more than five years before the suit was brought, and such guardian relies upon and pleads the statute of limitations, the court will, in analogy to proceedings at law, hold such demand barred by the statute of limitations, unless the plaintiff can bring himself within some of the exceptions of that act. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660.

An administrator suing in a court of equity to recover money alleged to have been paid in ignorance of a material fact to a distributee in excess of what he was entitled to, can not avoid the bar of the statute of limitations on the ground that the mistake was not discovered until after the statutory limitation for the commencement of the action had expired, if it appears that such material fact was sooner known to him, or that he was informed of such other facts as would be sufficient to put him upon such inquiry as would have led to the discovery of such material fact before such cause of action was barred. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660. See generally, the title PAYMENT.

**Recovery of Money from Attorney.**—The act of limitations is a good plea to a suit in equity, brought to recover money collected by an attorney for the plaintiff, and not accounted for by him. *Kinney v. McClure*, 1 Rand. 284.

**Claim for Deficiency in Land.**—A claim for compensation for deficiency in quantity of land conveyed by deed, where the purchase money has been paid, is a mere personal demand, not cognizable alone in equity, but at law, and is subject to the statute of limitations. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028.

**Claim for Money Deposited.**—Money deposited by one person with another to be paid to a third, and not paid, does not create a trust cognizable alone in equity, not subject to the statute of limitations, but is only a legal demand and is subject to the statute. *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028.

**Recovery of Debt from Estate by Executor.**—In 1755 a creditor was made an executor and guardian of the children of his debtor, but attended very little to the duties of executor. The devisees obtained possession of the estate of the testator, and the executor endeavored to have a settlement of the administration. In 1784 all parties expressing a desire for a settlement of accounts, an order was entered for that purpose, but the defendants refusing to proceed, the administrators of the executor filed a bill for that purpose. The defendants plead the statute of limitations which was held to be a bar. *Pendleton v. Whiting*, Wythe 38. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

## VII. When Statute Commences to Run.

### A. GENERAL RULE—ACCRUAL OF CAUSE OF ACTION.

As a general rule, the statute of limitations commences to run against a cause of action at the time of its accrual. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910; *Cann v. Cann*, 45 W. Va. 563, 31 S. E. 923; *Bowles v. Elmore*, 7 Gratt. 385; *Andrews v. Roanoke Bldg., etc., Co.*, 98 Va. 445, 36 S. E. 531; *Cookus v. Peyton*, 1 Gratt. 431; *Perkins v.*

*Seigfried*, 97 Va. 441, 34 S. E. 64; *Scott v. Osborn*, 2 Munf. 413; *Bickle v. Chrisman*, 76 Va. 678, 684; *Garber v. Armentrout*, 32 Gratt. 235; *Huston v. Cantril*, 11 Leigh 136.

"It is well established at law that the limitation begins to run from the moment that the cause of action accrues, and not from the time that it is ascertained that damage has been actually sustained by the breach of contract." *Huston v. Cantril*, 11 Leigh 136, 149.

### B. WHEN CAUSE OF ACTION ACCRUES.

#### 1. When Demand Is Necessary.

If a demand be necessary before suit, the period of limitation under statutes of limitation does not start until demand. But demand must be made within a reasonable time, which is the term fixed by the statute of limitation, if not made before. Where no demand is shown, it will be presumed that it was made within that period, and the statute will then run. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

#### 2. Fraud and Mistake.

##### a. Fraud.

##### (1) Right of Action Arising Out of Fraud.

##### (a) At Law.

It seems that at law the statute of limitations begins to run as soon as the fraud is perpetrated and is not postponed to its discovery. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Callis v. Waddy*, 2 Munf. 511; *Rice v. White*, 4 Leigh 474; *Cook v. Darby*, 4 Munf. 444; *Fant v. Fant*, 17 Gratt. 11, 14.

"In the cases of fraud the authorities are conflicting, as to whether at law the statute begins to run from the commission of the fraud, or from its discovery. *Angell on Lim.*, § 183 to § 189; *Callis v. Waddy*, 2 Munf. 511; *Rice v. White*, 4 Leigh 474; 1 Rob. Prac. (old Ed.) pp. 82, 87, 110." *Rowe v. Bentley*, 29 Gratt. 756, 760.

In an action for deceit in the sale of a chattel, there is a plea of the statute of limitation, a general replication thereto, and issue thereon joined. It was held, that the cause of action accrued at the time of the practicing of the deceit, and that the limitation began to run immediately. *Rice v. White*, 4 Leigh 474.

If the obligee of a bond transferred it to an assignee with knowledge that there was usury in the transfer, he was guilty of deceit, and the statute of limitations began to run from the time of the transfer. *Fant v. Fant*, 17 Gratt. 11.

**(b) In Equity.**

**Discovery of Fraud.**—It seems to be the general rule in equity that the statute of limitations begins to run only from the discovery of the fraud. *Shields v. Anderson*, 3 Leigh 729; *Rowe v. Bentley*, 29 Gratt. 756; *Massie v. Heiskell*, 80 Va. 789, 804; *Hunter v. Spotswood*, 1 Wash. 145; *Redwood v. Riddick*, 4 Munf. 222; *Lamar v. Hale*, 79 Va. 147, 164; *Rankin v. Radford*, 1 Leigh 163, 171; *Turner v. Campbell*, 3 Gratt. 77. But the soundness of this rule has been questioned in at least one case. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

In cases of concealed fraud the act of limitations does not run except from the discovery of the fraud. *Harshberger v. Alger*, 31 Gratt. 52; *Rowe v. Bentley*, 29 Gratt. 756.

**Necessity for Diligence in Discovering Fraud.**—Where the rule prevails, even in equity, that time runs only from the discovery of the fraud, negligence will prevent the party's saying he did not sooner discover. If he has means of knowing or ascertaining, where he is put on inquiry, where ordinary prudence, for his own interests, suggests that he inquire, he must do so; else the statute runs. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795, 799.

"As said in *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262, 265 'And the

law is, where one has means of knowledge of a fraud, or sufficient notice to put him on inquiry, it is enough to count time against him. *Kerr, Fraul. & M.* 310. Where he has means of knowing or ascertaining, where he is put on inquiry, where ordinary prudence for his interests suggests that he inquire, he must do so, or else time runs.' Opinion in *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795." *Herold v. Barlow* (W. Va.), 36 S. E. 13.

**Fraudulent and Voluntary Conveyances.**—In case of fraudulent conveyances, affected with actual fraud, the statute of limitations does not run until the fraud is discovered. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Shields v. Anderson*, 3 Leigh 729. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 647.

It was held, that under Code, 1873, ch. 146, § 16, providing for the avoidance of voluntary conveyances by creditors within five years from the date of the conveyance, the statute began to run from the date of the execution of the deed, and not from the time the right of action accrued. *Bickle v. Chrisman*, 76 Va. 678; *Hunter v. Hunter*, 10 W. Va. 321.

"Common justice, the repose of families, and the security of property, required that some limitation should be imposed upon the rights of creditors to proceed in such cases. And, accordingly, the legislature declared that after the lapse of five years, the conveyance, gift or assignment should be unassailable. If the creditors of the settler or donor did not think proper, within that period, to assert their demands, they should be forever excluded. And even though there might be some whose rights of action could not accrue within five years, it was deemed better that they should be without remedy, than that the parties concerned should be held liable for an

indefinite period to the claims of the donor's creditors." *Bickle v. Chrisman*, 76 Va. 678, 684.

**(2) Obstruction of Action by Fraudulent Concealment of Facts.**

If it appear by the proper pleadings supported by proof that the facts on which the cause of action is founded, were exclusively in the knowledge of the defendant, that he fraudulently concealed those facts, and that by such ways and means he deceived and obstructed the plaintiff from bringing his action within the time limited, the statute of limitations is answered. *Vanbibber v. Beirne*, 6 W. Va. 168; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795, 799.

It was said by Brannon, J., in *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795, 799, that "The statute starts from the act of fraud done, open or concealed—that is, whether the act be of such a character that it conceals itself or not; but fraudulent tricks or acts of the defendant to conceal and obstruct the prosecution of an action are another matter, for that is an express exception in the statute. That very exception denies the right to say that time does not run from the act of fraud, because it only allows the time of actual obstruction to be excluded. It assumes that the statute has begun to run, and excludes certain time for certain causes—simply makes a subtraction from the total time. From reading, I think there has been a confusion of mind on this matter, and that it largely explains the conflict of opinion."

**b. Mistake.**

**In General.**—It has been held, that no lapse of time or delay in bringing suit, however long, will defeat the remedy in cases of mutual mistake, if the injured party was in the meantime ignorant of the mistake without fault on his part. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. 235.

And it has been said in several cases

that cases of mistake are not within the statute of limitations and that the statute does not run until the discovery of the mistake. *Rowe v. Bentley*, 29 Gratt. 756, 760; *Hunter v. Spottswood*, 1 Wash. 145; *Massie v. Heiskell*, 80 Va. 789; *Harshberger v. Alger*, 31 Gratt. 52.

**Delivery of Property under Mistake as to Title.**—Where property had been delivered under a common or mutual mistake of fact, it was held, that the statute of limitations did not begin to run until the mistake had been discovered. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. 235.

**Recovery of Distributive Shares upon Discovery of Will.**—Where the will of a supposed intestate was discovered twenty years after the distribution of his estate, the statute of limitations to recover from a distributee, who was not a legatee, the amount paid to him, did not begin to run until the discovery of the mistake. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. 235.

**Deficiency in Land Sold.**—The right of a purchaser to recover the value of a deficiency in land sold, is not affected by the statute of limitations, when he is ignorant of the mistake, and suit is brought soon after its discovery. *Hull v. Watts*, 95 Va. 10, 27 S. E. 829.

**Erection of House on Another's Land.**—But where the plaintiff contributed money to build a house on the land of another, relying on the idea that she was to have an interest in the property, and her claim for the money so loaned was barred by the statute of limitations, no right of action accrued against the estate of the owner on his death, because of failure of consideration, or of the mistaken belief that she was entitled to such interest. *Walker v. Tyler*, 94 Va. 532, 27 S. E. 434.

**3. In Particular Cases.**

**a. Action on Contract.**

**(1) Instruments Due or Payable on Demand.**

The statute of limitations runs from



the date and delivery of a note payable on demand, and not from the time of demand. *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. 809, 25 Am. St. Rep. 825; *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437.

**(2) Promise to Pay in Future.**

**Claim Payable Out of Fund to Be Raised in Future.**—Where a father promised to let a son-in-law have the amount of a particular bond when collected, the claim of the son-in-law did not accrue until such collection, and hence the statute of limitations did not begin to run against him until that time. *Scott v. Osborne*, 2 Munf. 413.

An action of debt was brought on a note, payable one day after date, which stipulated that it was to be paid "out of the proceeds of the furnace." When more than sufficient funds had been realized by the sale of the furnace to pay the note more than five years previous to the institution of the action, it was held, that it was barred by limitation. *Sayers v. Sayers*, 90 Va. 755, 19 S. E. 844.

**Promise to Make Provision for Employees in Will.**—If an employer promises to make compensation for services at the time of his death, by will or otherwise, the statute of limitations does not begin to run until the death of such person. *Cann v. Cann*, 45 W. Va. 563, 31 S. E. 923.

**(3) Contract to Execute Purchase Money Notes.**

In covenant for alleged breach of contract to execute purchase money notes, the fact that defendant accepted a deed to the property from plaintiffs six years after the time specified in the agreement does not constitute a waiver of the stipulation, so as to cause the statute of limitations to run only from the acceptance of such deed, where plaintiffs do not aver that they were ready and willing and offered to convey at the time specified, or were prevented from being ready and willing to convey or from conveying at that

time by defendant, and there is no evidence that at the time of defendant's accepting the deed there was an agreement that the original contract was waived. *Davis v. McMullen*, 86 Va. 256, 9 S. E. 1095.

**(4) Covenants in Deeds.**

**Covenant of Warranty.**—In an action of covenant for breach of warranty, if it appears that a portion of the land conveyed with covenants of general warranty was in the adverse possession of a stranger at the date of the conveyance, and held by a paramount title, the grantee in such deed will be held to be evicted on the day of the execution of said deed, and the statute of limitations will commence to run against the action from that date, and will be barred in ten years thereafter. *Ilsley v. Wilson*, 42 W. Va. 757, 26 S. E. 551. See the title COVENANTS, vol. 3, p. 763.

**Covenant to Maintain Fence or Crossing.**—The statute of limitations will not bar an action against a railroad company upon a covenant in the grant of the right of way to build and maintain a crossing or fence, the action being merely for such failure; but if actual damage results from the failure to build such crossing or fence, the statute will begin to run from the date of such damage, in an action for compensatory damages. *Douglass v. Ohio River R. Co.*, 51 W. Va. 523, 41 S. E. 911. See the titles CROSSINGS, vol. 4, p. 122; FENCES, vol. 6, p. 24.

**(5) Insurance Policy.**

A policy of insurance provides that proof of loss shall be furnished to the company within thirty days from the date of the loss, and that all claims under it shall be barred, unless prosecuted within six months from the same date, and it also provides that the loss shall be paid in sixty days after its approval. The six months' limitation begins to run at the close of the sixty days allowed the company for payment, and not from the actual

loss. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777. See the titles FIRE INSURANCE, vol. 6, p. 60; LIFE INSURANCE.

**(6) Subscription to Corporate Stock.**

**(a) In General.**

The general rule is that the statute of limitations begins to run from the time when each assessment becomes payable, and this follows necessarily from the language of § 2920 of the Code of 1887, which provides that the action shall be brought within the designated number of years "next after the right to bring the same shall have first accrued." *Gold v. Paynter*, 101 Va. 714, 717, 44 S. E. 920.

It was held, in *Lewis v. Glenn*, 94 Va. 947, 6 S. E. 866, under § 3, ch. 57, Va. Code, 1873, that the statute of limitations only began to run against unpaid assessments from the time that such assessments were made.

Where stock in a joint stock company is subscribed for upon the following terms and conditions, as set forth in the prospectus, to wit; "one dollar down at the time of subscription, one dollar per share at the call of the board of directors, and one dollar per share every sixty days thereafter, if needed, until the whole amount is paid," and the prospectus provides for the deferred payments to be made; "one dollar per share upon the call of the board of directors, and one dollar per share every sixty days thereafter until by a sale of lots of the company such payment shall be declared unnecessary by the board of directors," the words "if needed in the contract of subscription are to be read in connection with the prospectus, and when so read they do not render the contract conditional as to the deferred installments, but make them payable automatically every sixty days after the first call by the board of directors, until fully paid, or until the board shall declare that by reason of the sale of lots, further payments are unnecessary,

and the act of limitation begins to run on each installment from the time it becomes due and payable. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

**(b) As between Corporation and Stockholders.**

As between the company and its stockholders, there can be no question that the statute commenced to run from the time when the several assessments which made up the amount due from each stockholder became due and payable under the calls made by the company. Code, 1887, § 1127; 1 Minor's Inst. 580; *Gold v. Paynter*, 101 Va. 714, 717, 44 S. E. 920; *Liberty Savings Bank v. Otterview Land Co.*, 96 Va. 352, 31 S. E. 511.

**(c) As between Creditors and Stockholders.**

**In Absence of Statute.**—"The authorities are in conflict upon this question, some of them holding that the creditors of the corporation will be barred by the statutes from proceeding against the stockholders for unpaid subscriptions whenever the company itself would be barred; others holding that as long as any part of the capital stock of a corporation remains unpaid in a stockholder's hands he is a trustee for the corporate creditors until their claims are satisfied, and that the statute of limitations does not run as to the creditors except from the time of the dissolution of the corporation, or from the time the creditors' claim becomes due and payable or a judgment thereon has been recovered, or a call has been made by the court in a creditor's suit. See 2 Thompson on Corporations, §§ 2003-2009; 3 Thompson, Corp., § 3779; 1 Cook on Stockholders, § 195; Beach on Private Corporations." *Gold v. Paynter*, 101 Va. 714, 718, 44 S. E. 920.

Where the officers of a corporation, which has assigned all of its property, including the unpaid portion of its capital stock, neglect to levy an assessment for such stock, and the levy

is made by a court in a proceeding instituted by the trustee, the statute of limitations begins to run from the date of such levy made by the court. *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 306.

**Under Statute.**—By the act of December 22, 1897, it is provided that in all cases where it is necessary to resort to a court of equity for the purpose of settling and winding up the affairs of insolvent corporations, or to make assessments on unpaid stock subscriptions, the court shall direct the receiver or other representative of the creditors to sue at law when necessary to recover such call or assessment, and that such actions shall be governed in all respects by the provisions of that act; and that "all pleas, defenses, and evidence which would be admissible if the company were solvent shall be equally admissible and shall have the same force and effect in law in any action brought after the insolvency of such company, except where the defense relied upon is an agreement on the part of the corporation not to assess the face value of the stock subscribed, and such agreement was unknown to the creditor at the date of his contract." *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

"The object of that statute, as we construe it, was to enable a stockholder sued by a receiver of the court, or other representative of the creditors, under the provisions of that act, to make the same defenses, including the plea of the statute of limitations, to such action, as if the corporation itself were the plaintiff suing for the demand, except that he can not set up as a defense an agreement on the part of the company not to assess the face value of the stock subscribed, and when such agreement was unknown to the creditor at the date of his contract." *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

**The effect of the act of 1897** was to make the rule as between creditors

and stockholders the same as that which governs as between the corporation and the true stockholder. In both cases the statute begins to run from the time the calls become due and payable pursuant to the company's call. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

"Even if the statute did not apply, the question being doubtful, this court would adopt that view of the situation which accords with the rule established by the legislature on the subject." *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

#### (7) Action against Assignor of Bond or Note.

A suit was brought against the obligor in a bond by the assignee, and it was referred to arbitration. It being proved that the bond had been discharged by payments to the assignor, and by set-offs against him, the arbitrators found for the defendant. Then the assignee sued the assignor, and in this suit upon the plea by the latter that the action against him did not accrue within five years, it was found that the debt originally due from the obligor had been discharged by payments and set-offs against the assignor, yet the assignee did not know until after judgment in his suit against the obligor that nothing was due, and it was also found that five years had not elapsed since the judgment. It was held that the action did not accrue against the assignor until the judgment was rendered. *Scates v. Wilson*, 9 Leigh 473. See the title ASSIGNMENTS, vol. 1, p. 745.

Where a party assigns a non-negotiable instrument he warrants its validity, and if the instrument is invalid there is an immediate breach of warranty, and a right of action accrues at once to the assignee to recover back the consideration paid. The limitation in such case is five years, and it begins to run from the date of the breach of the warranty, of the validity of the

instrument assigned, unless some circumstance appears, which will avoid the commencement of the running of the statute at that time. *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. 681; *Merchants' Nat. Bank v. Williams*, 41 W. Va. 37, 23 S. E. 685.

#### (8) Implied Contracts.

**For Services Performed.**—Where if a daughter had a valid claim to compensation for her services rendered to her mother, it accrued during the lifetime of her mother, the statute of limitations then began to run. *Harshberger v. Alger*, 31 Gratt. 52. See the title IMPLIED CONTRACTS, vol. 7, p. 301.

**Money Had and Received.**—In an action on an implied contract for money had and received, that statute begins to run from the receipt of the money. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Foster v. Rison*, 17 Gratt. 321.

**Implied Contracts for Contribution or Exoneration.**—See post, "Claims by Sureties for Contribution or Exoneration," VII, B, 3, k, (1). And see the title CONTRIBUTION AND EXONERATION, vol. 3, p. 461.

#### b. Action for Tort.

##### (1) Death by Wrongful Act.

An action for damages for death by wrongful act, under § 5, ch. 103, W. Va. Code, 1899, may be maintained within two years after the death of the person, although such death does not occur until more than a year has elapsed from the time of such injury. The statute makes no reference to the bar of the statute of limitations prior to the death of the injured person, and while the negligent injury is the real cause of action, it is not consummated until it results in death, and then the cause of action accrues to the administrator, and not until then. *Hoover v. Chesapeake, etc., R. Co.*, 46 W. Va. 268, 33 S. E. 224. See the title DEATH BY WRONGFUL ACT, vol. 4, p. 226.

##### (2) Injuries to Real Estate.

A railroad company in the construction of its road negligently floods an adjoining lot by the erection of an embankment. The statute of limitations begins to run in such case against the right of the owner to recover, not from the time the embankment was built, but from the time of actual injury to the lot by the invasion of the water. *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863.

So where a railroad bridge changes the current of a stream, and injures land lying lower down the stream by washing it as freshets come, the injury is intermittent, and the statute of limitations runs from the actual damage by washing, not from the erection of the bridge. *Eells v. Chesapeake, etc., R. Co.*, 49 W. Va. 65, 38 S. E. 479.

##### (3) Seduction.

Where a daughter lived away from her father's house at the time of her seduction, but returned and was confined and nursed there, the statute of limitations will only begin to run from that time. *Clem v. Holmes*, 33 Gratt. 722. See also, *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Riddle v. McGinnis*, 22 W. Va. 253; *Allebaugh v. Coakley*, 75 Va. 628.

Section 1, ch. 103, W. Va. Code, does not alter the rule as to the commencement of an action by a father for the seduction of his daughter. *Riddle v. McGinnis*, 22 W. Va. 253. See the title SEDUCTION.

##### (4) Malicious Prosecution.

See the title MALICIOUS PROSECUTION.

#### c. Action with Respect to Realty.

##### (1) Action to Recover Possession or Title.

###### (a) In General.

**Conflicting Grants.**—Where a grantee enters upon land which is subsequently granted to another person, the statute of limitations begins to run in favor of the party taking possession, from the

time of the issuance of the subsequent grant, and if he remains in actual possession long enough to bar the entry under the statute, he will acquire a valid title to the land. *Adams v. Alkire*, 20 W. Va. 480.

**When Statute Commences to Run in Favor of Occupant of Land Granted by State.**—The statute of limitations commences to run in favor of an occupant of land against the grantee of the state from the date of the grant of the land so occupied. *Hall v. Webb*, 21 W. Va. 318.

**Vendee Holding with Consent of Vendor.**—Equity follows the law in holding that time does not run against one who is in possession in the exercise or assertion of a right, and hence a vendee who enters upon land and holds it with the consent and acquiescence of the vendor will not be barred by the lapse of time, until he is put in default by notice to surrender the premises or pay the price. *Abbott v. L'Hommedieu*, 10 W. Va. 677.

**(b) Necessity for Right of Entry.**

It is an axiom of the law of the statute of limitations that to apply it to bar title to land there must be a right of entry. The statute of limitations does not run against any claim which a person may have to real estate until he acquires a right of entry, giving him a right to maintain an action for its recovery. *Merritt v. Hughes*, 36 W. Va. 356, 362, 15 S. E. 56; *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121; *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 622, 44 S. E. 508; *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Effinger v. Hall*, 81 Va. 94, 100; *Pettyjohn v. Woodroof*, 77 Va. 307.

**(c) Action by Heirs.**

Where an attempted conveyance in fee simple by a husband and wife was void as to the wife, and therefore the grantees were only entitled to an estate for the life of the husband, the right of

action of the wife, or any one claiming under her against the grantees, did not accrue until after the husband's death, and the statute of limitations did not run against them until that time. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359.

When a husband by executory contract during coverture sells land owned by him and his wife as joint tenants, and the purchaser takes possession, and then the wife dies, and then the husband conveys to the purchaser the whole tract by deed, the possession is not adverse to the heirs of the wife until the husband's death, as until then they have no right of entry or action, and the statute of limitations does not run against them until then. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 617, 44 S. E. 508.

Husband and wife being seised as joint tenants of land, her interest being separate estate, the husband alone, during coverture, sells the whole tract by executory contract, and the purchaser goes into possession during coverture, and later the wife dies, leaving the husband and children surviving her, and later the husband conveys the whole tract to the purchaser by deed. The possession of the purchaser is not adverse to the wife in her lifetime and right of entry or action does not accrue to her children until the husband's death, and the statute of limitations begins to run against them first at his death. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

**(d) Action by Remaindermen.**

The statute of limitations does not commence to run against a remainderman or reversioner, until termination of the particular estate. *Ball v. Johnson*, 8 Gratt. 281; *Merritt v. Hughes*, 36 W. Va. 326, 15 S. E. 56, 58; *Merritt v. Smith*, 6 Leigh 486; *Hope v. Norfolk*, etc., R. Co., 79 Va. 283, 288; *Effinger*

*v. Hall*, 81 Va. 94, 100; *Davis v. Tebbs*, 81 Va. 600, 606; *Hannon v. Hounihan*, 85 Va. 429, 439, 12 S. E. 157; *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61; *Pettyjohn v. Woodroof*, 77 Va. 507. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS

"The right of entry in the person entitled in remainder can in no case be affected by the statute during the existence of the particular estate, and the laches of a tenant for life will not, as a general rule, affect the party entitled." *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 625, 44 S. E. 508.

A life tenant of a slave sells her interest and dies, and the purchaser continues to hold the slave. He does not hold under but adversely to the remainderman, and the statute begins to run on the death of the life tenant. *Layne v. Norris*, 16 Gratt. 236.

Where a mother is given a life estate in certain slaves with a remainder to her children, the right of the latter to the slaves does not accrue until the death of the mother, and consequently the statute of limitations does not begin to run against them until her death. *Duncan v. Wright*, 11 Leigh 542.

P., dying in 1822, by his will divides his estate between his six children and his grandson, W., giving each one-seventh, and providing that W.'s share should be under management of trustee, for his use until he shall reach twenty-one years of age, or marry, and that in case W. die leaving no issue of his body, his share and its increase shall go to testator's six children, or their representatives. W. never married, but reached twenty-one years of age, received his share, and died in 1875, without issue of his body, leaving a large estate. It was held, that remaindermen's claim is not barred by the statute of limitations. They had no cause of action until W.'s death. That occurred in 1875. Their suit was brought in 1877. *Pettyjohn v. Woodroof*, 77 Va. 507.

### (e) Action between Cotenants.

The statute of limitations does not run in favor of one cotenant against the others until there has been actual ouster of possession, or some act equivalent to a denial of their rights in the property. *Fry v. Payne*, 82 Va. 759, 1 S. E. 197.

From the time that cotenants have knowledge or notice of ouster by another cotenant, the possession of the latter will be adverse, and the statute of limitations will commence to run. *Caperton v. Gregory*, 11 Gratt. 505; *Cooley v. Porter*, 22 W. Va. 120, 124.

After the death of a father one of his sons took possession of his land, claiming that it had been given to him by will for life, with remainder to his two sons. This possession by the son and those claiming under him began in 1823, and having existed continuously until suit was brought by the other coparcener in 1848, such possession was adverse and the statute of limitations commenced to run from the time of such taking possession. *Caperton v. Gregory*, 11 Gratt. 505. See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89.

### (2) Action for Dower.

As a widow is entitled by § 2274 of the Code of 1887, to hold the mansion and curtilage, until dower is assigned to her, the statute of limitations will not begin to run until her possession ends or she publishes her claim and possession to be adverse by actual and open disseizin. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157. See the title DOWER, vol. 4, p. 782.

The statute does not begin to run until the husband's death. *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. 712; *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125; *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019.

Where the widow is in possession and taking rents and profits in common with the heirs, the statute does not run against her dower while so in pos-

session. *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 123.

Where a will devises land to the widow of the testator to hold under her control and management until testator's youngest child attains majority, with direction to apply its rents and profits to the support of minor children until of age, and the widow is in possession under such will, the statute of limitations does not run against her dower right while so in possession. *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 123.

**(3) Claims for Improvements by One of Several Cotenants.**

Where a tenant in common improved the property at his own expense, without the assent of his cotenants, the statute of limitations does not begin to run against the equity for compensation until a partition is asked. *Ballou v. Ballou*, 94 Va. 350, 26 S. E. 840. As between joint tenants, see *Fry v. Payne*, 82 Va. 759. See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 8, p. 89.

**(4) Action to Recover Purchase Money.**

**Where Title Is Retained by Grantor.**

—No time bars the right, either under the statute of limitations or presumption of payment, of a vendor to recover purchase money for land, if he has not parted with the legal title. *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623. See the title **VENDOR AND PURCHASER**.

**Mutual Covenants to Pay and Convey.**—Where there is a sealed agreement between the plaintiff and defendant that the latter shall execute notes at a specified time in payment of land, the statute begins to run against the agreement at that time, although there is a covenant on the part of the former to convey the property at the same time and he fails to do so. *Davis v. McMullen*, 86 Va. 256, 9 S. E. 1095.

**(5) Recovery Back of Purchase Money on Failure of Title.**

Where a deed by a husband and wife

was a nullity as to the wife, in an action by the grantee to recover back the purchase money, it was held that his cause of action did not arise until the decree set aside the deed in favor of the wife, and that the statute of limitations did not begin to run against his claim until that time. *Garber v. Armentrout*, 32 Gratt. 235.

**d. Action for Recovery of Personal Property.**

A life tenant of a slave sells her life interest and dies. The purchaser continuing to hold the slave, does not hold under, but adversely to the remainderman, and the statute commences to run on the death of the life tenant. *Layne v. Norris*, 16 Gratt. 236. See the title **SLAVES**.

**e. Action between Trustee and Cestui Que Trust.**

"Where the relation of parties is that of trustee and cestui que trust, the statute of limitations does not commence to run until there has been an open denial and repudiation of the trust, by the trustee brought home to the cestui que trust in such a manner as will require the latter to act as upon an asserted adverse title." *Beecher v. Foster*, 51 W. Va. 605, 617, 42 S. E. 647; *Key v. Hughes*, 32 W. Va. 184, 9 S. E. 77; *Jones v. Lemon*, 26 W. Va. 629. See ante, "Trusts," VI, E, 2, b.

**f. Action between Principal and Agent.**

**In General.**—In case of a general or continuous agency, as distinguished from a special agency, the statute of limitations runs between the parties to it from its close. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

Where there is an isolated or special agency, one for a particular act or acts, one to collect a specific debt or debts, the statute begins from the act or collection in each particular case. *Rowan v. Chenoweth*, 49 W. Va. 287, 291, 38 S. E. 544.

Where the agency has currency, is continuous, is general, involving many acts, or a course of business involving

many transactions, the statute begins from the termination of the agency. The contract of agency is, a lump, covering several years, covering many items, and the parties reserve them for settlement some day ahead. You can not start the statute at date of each collection or each item of liability, innumerable items in an account which both sides treated as open, and there is a necessity to fix some day. *Rowan v. Chenoweth*, 49 W. Va. 287, 291, 38 S. E. 544.

As a general proposition, where there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run against advances lawfully made by the agent in the prosecution of the undertaking or agency, or against compensation for the services of the agent, until the termination of the undertaking or agency. The law looks upon the employment as an entire contract, and regards the claim for disbursements and compensation as an entire demand to which the right does not accrue until the completion of the service, or the termination of the employment or agency. *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720.

**Accrual of Right of Action before Termination of Agency.**—But, although the employment or agency is a continuing one, yet if the agent had the right to require payment for advances or compensation for services prior to the termination of the agency, or if the advances were repudiated by the principal as unauthorized, or not required to be made by the nature of the employment or agency, the statute begins to run from the time the agent had the right to demand payment for his services, or for advances, or, if the advances were repudiated as unauthorized, from the time of such repudiation. The statute begins to run whenever the right of action accrues, and such right accrues whenever the agent has the right to demand payment of

his principal, and, if refused, to apply to the proper tribunals for relief. So that, although the agency be a continuing one, if the agent has the right prior to the termination of the agency to demand payment of his compensation or for advances, the statute begins to run from the time he had the right to make such demand. *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720.

**Accounting for Collections Made.**—

Where an heir appoints an agent to collect his share of the estate and turn it over to him there is no trust, and the limitation begins to run against his claim for the share so collected from the date of the collection, whether demand is made or not. *Hasher v. Hasher*, 96 Va. 584, 32 S. E. 41.

**Between Sheriff and Deputy.**—A deputy sheriff is the agent of the sheriff, and the statute of limitations applies between them as between principal and agent. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

**g. Action between Merchant and Merchant.**

Where the dealings between merchant and merchant, or merchant and factor, have ceased and the accounts between them have been so adjusted that the party in whose favor the balance appears might bring an action at law thereon, then from the time of such adjustment the statute of limitations will commence to run as against such balances. *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483.

**h. Suit for Settlement of Partnership Accounts.**

**In General.**—In a suit between partners for a settlement of the business, the statute begins to run from the time there is a settlement, or account stated of the partnership business between the partners made several years after the dissolution of the firm, which was then delivered and understood to include and adjust all the assets and liabilities, although it may subsequently appear



that they were mistaken. *Boggs v. Johnson*, 26 W. Va. 821.

The managing partner of a dissolved partnership has authority to insure the firm property if done in good faith, and having such authority he may charge the firm assets to refund premiums paid for such insurance by a third party at his request. The premiums so paid are part of the expenses incurred in managing the property and as such entitled to be paid as preferred claims against the firm assets, and are not affected by the statute of limitations until a settlement of the partnership accounts has been made. *Conrad v. Buck*, 21 W. Va. 396.

**Outstanding Claims Due Firm.**—In a case of a bill by a partner against his copartners for a settlement of partnership accounts, the statute of limitations will not begin while there are debts due to and by the partnership. *Jordan v. Miller*, 75 Va. 442; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Foster v. Rison*, 17 Gratt. 321.

**Partial Settlement.**—Where there has been a partial settlement between partners, and a balance is ascertained in favor of one of the parties against the other, although the settlement is not full and complete, the statute will run as to such balance and the portion of the account embraced in it. *Foster v. Rison*, 17 Gratt. 321; *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483, 491; *Sandy v. Randall*, 20 W. Va. 244; *Boggs v. Johnson*, 26 W. Va. 821.

**Settlement by One Partner.**—One partner, for himself and another, settles the partnership accounts with the acting partner, and receives payments of money for himself and the other. As to the money so received, the statute of limitations will run from the time he received it, although it may be necessary to go into chancery to ascertain the portion which each of the parties is entitled to receive, yet the statute will run against the claim. *Foster v. Rison*, 17 Gratt. 321.

#### i. Claims by or against Decedents' Estates.

**Claims in Favor of Decedent's Estate.**—The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a qualification of an executor or administrator of the decedent. *Hansford v. Elliott*, 9 Leigh 79. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483.

When a cause of action accrues to the estate of a decedent at the time of his death, and not before, and no one qualifies as administrator until more than five years thereafter, the law conclusively presumes that an administrator qualified on the last day of the five years, and the statute of limitation begins to run in favor of the estate of the decedent from that time, whether there is in fact any administrator of the estate or not. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

**Claims against Decedent's Estate.**—Where the widow claims the slaves of the husband as her own property and holds possession of them for more than five years, and then the administration of her husband's estate is committed to the sheriff, in a contest between the widow and the purchaser, it was held, that the statute of limitations did not begin to run until the administrator was appointed. *Clark v. Hardiman*, 2 Leigh 347.

A testator by will requested that a debt which he owed should be paid out of his estate, after the happening of a future event. The right of action did not accrue until the occurrence of that event, and the statute of limitations did not begin to run until then. *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. 64.

#### j. Claims against Fiduciaries.

**In General.**—The act passed March 8, 1826, for the limitation of actions against persons acting in a fiduciary character, only begins to run

from the time when the liability sought to be enforced arises. *Cookus v. Peyton*, 1 Gratt. 431.

**Claim against Executor for Devastavit.**—In an action by a creditor or legatee against an executor for a devastavit, the right accrues ordinarily, and the limitation commences to run when the wrongful act is committed. *Leake v. Leake*, 75 Va. 792.

#### k. Claims by or against Sureties.

##### (1) Claims by Sureties for Contribution or Exoneration.

**Claim by Sureties for Contribution.**—P. and L. were joint indorsers for W., who made to P. an assignment to indemnify him for said indorsement among other liabilities. In 1756, P. took in the protested bill of W. indorsed by him and L. and executed to P.'s own bond for the balance due thereon. In 1768, he sued L. for half of said balance, with interest. L. plead the statute of limitations. P. replied that he was employed many years in settling W.'s affairs, and the suit was within the time since the amount to be contributed had been ascertained. Plea overruled by county court and appeal to H. C. C. The two chancellors being divided, case adjourned to court of appeals, who held that under the particular circumstances the statute should not bar. *Pendleton v. Lomax, Wythe* 4.

As to when statute begins to run against claim for contribution, see *Lomax v. Pendleton*, 3 Call 538.

**Claims by Sureties for Exoneration.**—The statute of limitations begins to run against the right of a surety to claim payment of his principal for reimbursement for the payment of a joint obligation from the time of actual payment of the obligation. *Harper v. McVeigh*, 82 Va. 751, 1 S. E. 193.

##### (2) Claims against Sureties.

##### **Sureties of Personal Representatives.**

—It is provided by §§ 8, 9, ch. 146, of the Virginia Code of 1873, that the statute of limitations shall not begin

to run in favor of the sureties of an administrator until the return day of an execution against him, or from the time the right arises under an order of court acting on his accounts to require payment. Hence the plea of the statute was untenable where there was no order of the court directing payment, until the entry of the decree against which the statute is pleaded. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371.

Where an executor purchases a slave from his testator's estate, and fails to settle his accounts, in a suit brought against him for a settlement the sale is set aside and he is required to account for the hire of the slave, and in 1850 there is a decree against him. In an action against his surety founded upon this decree, it was held that the statute of limitations in favor of the surety, did not begin to run until the decree of 1850, notwithstanding the surety was not a party to the suit in equity. *Franklin v. Depriest*, 13 Gratt. 257.

**Sureties of Deputy Sheriff.**—In an action of debt by a sheriff against his deputy on his bond, conditioned for the faithful performance of his duties, the right of action does not accrue to the sheriff when the deputy made default in collecting, and the statute does not run against the action until the sheriff has paid some part of the debt occasioned by the default. *Adkins v. Fry*, 38 W. Va. 549, 18 S. E. 737; *Adkins v. Stephens*, 38 W. Va. 557, 18 S. E. 740.

Section 46, ch. 49, Va. Code, 1873, provides that a sheriff may proceed against his deputy and his sureties, whenever he becomes liable on account of the default of his deputy, whether a judgment has been recovered against him or not. Section 47 of the same chapter authorizes the sheriff to proceed against the deputy and his sureties only when there has been a recovery against him, and the payment

in whole or in part to the creditor. It was held under these statutes that where a deputy sheriff made default prior to 1869, and a judgment was obtained against the sheriff in 1874, which was paid by him in 1878, and in 1879 he proceeded against the deputy and his sureties for the amount so paid, that the claim was not barred although the default of the deputy occurred more than ten years before. *Allebaugh v. Coakley*, 75 Va. 628.

### **l. Claims for Legacies or Distributive Shares.**

**Dependent on Future Event.**—Where a legacy is limited upon a future event, the statute of limitations will not begin to run against the right to claim it, until the happening of such event. *Effinger v. Hall*, 81 Va. 94.

**Held by Executor.**—The statute of limitations does not run against a legatee's claim for a specific legacy, while it is held by the executor, although he has long before assented to the legacy. *Nelson v. Cornwell*, 11 Gratt. 724.

**Estate Not Administered upon.**—Where a legatee dies shortly after the testatrix and before a qualification upon her estate in this country, and there having been no administration on the estate of the legatee for twelve years, the act of limitations does not bar the claim for the legacy during this period. *Lyon v. Magagnos*, 7 Gratt. 377.

**Claims by Distributees.**—Where the characters of an administrator and distributee unite in the same person, who holds possession of personal property in the former character for more than five years, his right as distributee will not be barred by the statute of limitations. *Vaiden v. Bell*, 3 Rand. 448.

### **m. Claims for Value of Stock upon Withdrawal from Building Association.**

A withdrawing member from a building and loan association can not sue to recover the withdrawal value of his stock until a sufficient sum is accumu-

lated by the society to meet his demand, for until that event has happened he has no right of action. *Andrews v. Roanoke Bldg., etc., Co.*, 98 Va. 445, 36 S. E. 531. See the title BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645.

### **n. Claims for Bounties.**

Where a county by an order of its board of supervisors appropriates money to pay bounties to soldiers, and after such money becomes payable a soldier entitled to such bounty presents his claim to the board for payment, and it refuses to pay him, the statute of limitations begins to run against such claim from the time it was presented and payment thereof was refused, and becomes barred at the expiration of five years from that time. *Shaw v. County Court*, 30 W. Va. 488, 4 S. E. 439. See the title BOUNTIES, vol. 2, p. 612.

### **o. Claim of Wife against Husband for Funds Collected.**

Where a husband collected demands due the wife as her separate estate, the statute of limitations began to run against the wife's right of action to recover the amount so collected from the time she obtained knowledge of the fact of the collection. *Riggan v. Riggan*, 93 Va. 78, 24 S. E. 920. See the titles HUSBAND AND WIFE, vol. 7, p. 178; SEPARATE ESTATE OF MARRIED WOMEN.

### **p. Collection of Fee Bills.**

Previous to 1839, no time was prescribed within which fee bills were to be placed in an officer's hands for collection. By the statute of March, 1839, collection by distress or suit was prohibited after the expiration of five years. Until the claims were placed in the officer's hands and returned, no cause of action existed, and as the statute of limitations relates to the time the cause of action accrued, if such tickets had never been put in the officer's hands for collection and re-

turned, there was no limitation upon them. *Craig v. Lobb*, 12 Leigh 627.

**q. Judgments and Decrees.**

**Judgments Transferred from Virginia to West Virginia.**—The statute of limitations, as to judgments rendered in the courts of Virginia in favor of that state, and by the act of general assembly transferred to the state of West Virginia, did not commence to run against the latter for any purpose by the virtue of her laws as to said judgments until the 1st of April, 1869. See *W. Va. Code*, 1868, ch. 35, § 20; *Calwell v. Prindle*, 19 W. Va. 604.

**Decrees from Which Appeal Taken.**

—Where the decree against an administrator was appealed from, the plaintiffs had no right to have satisfaction until the decree was affirmed, and the act of limitations did not begin to run until then. *Sheldon v. Armstead*, 7 Gratt. 264. See the title JUDGMENTS AND DECREES, vol. 8, p. 161.

## VIII. Period of Limitation.

### A. ACTIONS FOR RECOVERY OF REAL ESTATE.

#### 1. Ejectment.

**In Virginia.**—In Virginia the period of limitation for an action of ejectment for the recovery of real estate is fifteen years for land lying east of the Alleghany Mountains and ten years for land lying west of the Alleghany Mountains. *Va. Code*, 1904, § 2915; *Drumright v. Hite*, 2 Va. Dec. 465; *Birch v. Linton*, 78 Va. 584; *Bolling v. Teel*, 76 Va. 487. See the title EJECTMENT, vol. 4, p. 871.

*Code*, § 2915, limiting an action to recover land to fifteen years next after the right to bring it accrues, will be applied in a suit in equity for land, and an account of the rents and profits. *Drumright v. Hite*, 2 Va. Dec. 465.

A debtor conveyed land in trust primarily for the payment of his debts, and then for the benefit of his wife

and children. A creditor brought suit to enforce the trust, and to him the land was sold under decree. It was held, in an equity suit by the debtor's children against such creditor to recover the land, that defendant was not precluded from setting up the statute of limitations because he acquired the land with actual notice of the trust in favor of plaintiffs. *Drumright v. Hite*, 2 Va. Dec. 465.

**In West Virginia.**—In West Virginia the period of limitation in actions of ejectment for the recovery of real estate is ten years. *W. Va. Code*, ch. 104, § 1; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154; *Warren v. Syme*, 7 W. Va. 474, 476; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Criss v. Criss*, 28 W. Va. 388; *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125.

Actual, open, continuous, exclusive and hostile possession of land, for a period of ten years, under color or claim of title, confers a perfect title, upon which an action may be either defended or prosecuted, and which is not destroyed by mere abandonment of possession after such holding for such period of ten years, unless some other person has obtained title to the land, while such abandonment continued, by like possession for a like period. *Summerfield v. White*, 54 W. Va. 311, 312, 46 S. E. 154. See the titles ADVERSE POSSESSION, vol. 1, p. 199; EJECTMENT, vol. 4, p. 871.

Acts of exclusive ownership by one of two cotenants, such as the open sale, conveyance, and delivery of possession thereunder of the whole subject matter, amounts to a complete ouster of the other cotenant, and unless he brings suit within ten years thereafter his right of recovery will be barred by the statute of limitations. *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580.

**When the defendant is under disability**, the period that will bar ejectment is twenty years. *Warren v. Syme*, 7 W. Va. 474, 476.

## 2. Unlawful Entry and Detainer.

See the title **FORCIBLE ENTRY AND DETAINER**, vol. 6, p. 156.

**In General.**—An action for unlawful entry or detainer is barred within three years from its accrual. Va. Code, 1904, § 2716; W. Va. Code, ch. 89, § 1.

Where in unlawful detainer plaintiff fails to prove that defendant has not unlawfully held possession of the land for three years or more before the commencement of the action, he can not recover. Code, 1873, ch. 130, § 1. *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392; *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180; *Williamson v. Paxton*, 18 Gratt. 475; *Allen v. Paul*, 24 Gratt. 352.

If the plaintiff does not show that his right of action accrued within three years from the commencement of his action, he will be remitted to the action of ejectment. *Billingsley v. Stuttle*, 52 W. Va. 92, 43 S. E. 96; *Voss v. King*, 38 W. Va. 607, 18 S. E. 762; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544.

**West Virginia Rule as to Action in Justice's Court.**—It is provided by ch. 50, § 211, of the West Virginia Code, that if any forcible or unlawful entry be made upon land, or if, when the entry was lawful, the tenant detain possession of land after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of the possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may commence suit to obtain possession of the land and damages for its detention, within two years after the cause of action accrues, before any justice of the county in which such land or the greater part thereof is situated. *Hays v. Altizer*, 24 W. Va. 505; *Duff v. Good*, 24 W. Va. 682.

This statute limits the right to recover in a justice's court to two years after unlawful possession taken. *Duff v. Good*, 24 W. Va. 682; *Hays v. Altizer*, 24 W. Va. 505.

## 3. Action for Dower.

The statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years, from the death of her husband, when her right to sue accrues. *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. 712; *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019; *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125. See ante, "Action for Dower," VII, B, 3, c, (2).

## 4. Action against One in Possession under Oil or Mineral Lease.

Chapter 61, acts of 1872-73, fixing three years as the limitation for suits to recover lands leased for oil or minerals, was repealed by ch. 102, acts, 1882, re-enacting ch. 104 of the Code. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

The period of limitation is now ten years. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508. See the titles **LANDLORD AND TENANT**, ante, p. 112; **MINES AND MINERALS**.

## B. ACTIONS ON CONTRACTS.

### 1. In General.

The act of February 27, 1866, in relation to the statute of limitations, extending the time within which actions of trespass and trespass on the case may be brought in certain counties, does not apply to an action of trespass on the case in assumpsit, nor to actions ex contractu, but only to actions of trespass and trespass on the case. *Gore v. McLaughlin*, 3 W. Va. 489.

### 2. Sealed Contracts.

#### a. In General.

An action upon an indemnifying bond taken under any statute, or upon the bond of an executor, administrator, guardian, curator, committee, sheriff or sergeant, deputy sheriff or sergeant, clerk or deputy clerk, or any other fiduciary or public officer, or upon any other contract by writing under seal, must be brought within ten years. Va. Code, 1904, § 2920; W. Va. Code, ch. 104, § 6.

**b. Bonds.**

See the title **BONDS**, vol. 2, p. 507.

**Limitation Prior to 1850.**—There was no positive limitation of time as to the right of action upon bonds before the passage of a statute which took effect July 1, 1850, and as to bonds payable before that time the statute of limitations began to run that day. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504.

Where a right of action on a bond did not accrue until the 19th of August, 1849, when it fell due, and suit was brought in June, 1867, less than eighteen years after right of action accrued, the action was barred by the statute of limitations. *Coffman v. Shafer*, 29 Gratt. 173, 189.

**Where more than twenty years elapsed** after the accrual of the right of action on a bond, after excepting the period of the stay law, it was held, that an action thereon was barred. *Switzer v. Noffsinger*, 82 Va. 518.

**Bonds of Married Women Binding on Separate Estate.**—Bonds given by a married woman with the intention of binding her separate estate, are valid in equity as evidences of debt against such estate, and therefore are not barred by the statute of limitations as simple contract debts. *Garland v. Pamplin*, 32 Gratt. 305. See the titles **HUSBAND AND WIFE**, vol. 7, p. 178; **SEPARATE ESTATE OF MARRIED WOMEN**.

**Unsealed Assignment of Bond.**—By the terms of an unsealed assignment of a bond, the assignor agreed to remain bound to the assignee without his taking any steps to enforce its payment, and to collect it without charge, giving as a reason that the assignment was for the accommodation of the assignor, in payment of a debt. It was held, that as long as the bond was not barred, and the assignor lived and could perform his agreement, the statute was no bar against the assignee in the assignment. *Lightfoot v. Green*, 91 Va. 509, 22 S. E. 242.

**Bond Given for Purchase of Land**

**at Judicial Sale.**—W., in 1853, at sale made by B., as commissioner under decree of court, purchased house and lot in F., and gave four bonds, each for \$720, payable in one, two, three, and four years thereafter. Payment of all but the second bond is admitted. As far back as 1869, W. insisted he had paid all, and was entitled to his deed. B. insisted that the second was unpaid; but finally, in 1872, executed deed acknowledging receipt of all the purchase money, and conveying the property to W. In 1874, the bond was found in possession of H., a lawyer to whom, in 1855, it had been entrusted for collection. In 1877, B. filed his petition in the suit wherein the decree of sale was rendered, praying for a rule against W. to show cause why he should not pay his bond, etc. It was held, that such proceedings are not barred by the statute of limitations. *Williams v. Blakey*, 76 Va. 254.

**Forthcoming Bond.**—The statute of limitations 1 Rev. Va. Code, ch. 128, § 5, whereby the remedy on a judgment by debt or scire facias is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing. *Lipscomb v. Davis*, 4 Leigh 303. See the title **FORTHCOMING AND DELIVERY BONDS**, vol. 6, p. 411.

**Fiduciary Bond.**—The act of limitations of March 8, 1826, does not apply to suits against fiduciaries for the balance of estates in their hands, but to suits on their official bonds against them and their sureties. *Winston v. Street*, 2 Pat. & H. 169.

By § 9, ch. 146, Code, 1873, an action on a fiduciary's bond is only barred after ten years from the time the cause of action accrued. This is from the return day of the execution against the fiduciary, or from the time of right to require payment or delivery from the fiduciary. *Sharpe v. Rockwood*, 78 Va. 24; *Morrison v. Lavell*, 81 Va. 519; *Robertson v. Gillen-*

waters, 83 Va. 116, 7 S. E. 371. See *McCormick v. Wright*, 79 Va. 524.

**Guardian's Bond.**—The right of action of a ward on an official bond of his guardian, within the meaning of the act, Sup. Rev. Code, 1819, ch. 200, § 1, accrues to the ward immediately on his arrival at age, and if brought therefore more than ten years afterwards, it will be barred by that statute. See Code, 1849, ch. 149, §§ 5, 6, 17; *Magruder v. Goodwyn*, 2 Pat. & H. 561. See the title **GUARDIAN AND WARD**, vol. 6, p. 782.

**Bonds of Executors or Administrators.**—It is provided by § 9, ch. 146, Code 1873, that limitation of an action upon the bond of an executor or administrator is ten years after the accrual of a right of action. There is no other limitation applicable to the sureties upon the official bonds. *Leake v. Leake*, 75 Va. 792.

Where an administrator settles his administration accounts, by giving his bond to the widow for the balance due her, from the moment of its execution and delivery, a right of action accrues thereon, and where more than ten years elapses before she brings suit thereon, his sureties are discharged by the statute of limitations. Sections 8, 9, ch. 149, Code 1873; *Tilson v. Davis*, 32 Gratt. 92. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483.

In a suit on the bond of an administrator against the principal and sureties therein, the bar of the statute of limitations, as to such sureties, is ten years from the return day of an execution issued on the plaintiff's claim; or ten years from the time the administrator shall have been ordered by a court acting upon his account, to pay such claim. *Hoge v. Vintroux*, 21 W. Va. 1.

Where the distributees delay twenty-five years after the last settlement of the administrator before bringing suit against the administrator and his sure-

ties for settlement of his administration, the plea of the statute of limitations as a bar to the demand against the sureties, should be sustained. *Castleman v. Dorsey*, 78 Va. 342.

**Bond of Sheriff Acting as Administrator.**—An action on the bond of a sheriff for devastavit while acting as administrator must be brought within ten years. *Ashby v. Bell*, 80 Va. 811.

**Bond of Cashier of Bank.**—In an action on the bond of a bank cashier, where it appears that the cashier had misapplied an amount equal to the penalty of the bond within ten years next preceding the commencement of the action, it is immaterial whether the limitation in such cases be ten years or more. *Elam v. Commercial Bank*, 83 Va. 92, 9 S. E. 498. See the title **BANKS AND BANKING**, vol. 2, p. 234.

**Bond of County Treasurer.**—The right of the holder of a county warrant drawn on funds in the hands of a county treasurer, and duly registered, to assert his claim against a fund created by the treasurer for the indemnity of his sureties, is never barred as to the treasurer, and as to the sureties is not barred until ten years from the time the right of action thereon accrues. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913.

A county warrant issued against funds in the hands of a county treasurer, and duly registered, operates pro tanto as an equitable assignment of so much of the funds in the hands of the treasurer as is necessary to meet its payment; and the treasurer and his sureties, having notice of the assignment by reason of the registration of warrants, are liable to the holders thereof. Upon this liability there is no limitation as to the treasurer, and, as to the sureties, the limitation is ten years from the time the right of action accrues. *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913. See the title **COUNTIES**, vol. 3, p. 636.

**c. Mortgages and Deeds of Trust.**

The lien of a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. *Bowie v. Poor School Society*, 75 Va. 300, 304; *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129.

The right to enforce the lien of an equitable mortgage is not barred by the statute of limitations until such time has elapsed as would bar relief upon the instrument creating such lien. *Wayt v. Carwithen*, 21 W. Va. 516. See the title MORTGAGES AND DEEDS OF TRUST.

**d. Covenant of Warranty.**

In an action of covenant for breach of warranty, if it appears that a portion of the land conveyed with covenants of general warranty was in the adverse possession of a stranger at the date of the conveyance, and held by a paramount title, the grantee in such deed will be held to be evicted on the day of the execution of such deed, and the statute of limitations will commence to run against the action from that date and will be barred in ten years thereafter. *Ilsley v. Wilson*, 42 W. Va. 757, 26 S. E. 551. See the title COVENANTS, vol. 3, p. 741.

An action on a covenant of warranty as to quality and quantity of trees conveyed by deed may be maintained within ten years. *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

**3. Unsealed Written Contracts.****a. In Virginia.**

**In General.**—In Virginia, an action upon an award or upon a contract in writing signed by the party to be charged thereby or by his agent, but not under seal, must be brought within five years. Va. Code, 1904, § 2920; *Johnson v. Anderson*, 76 Va. 766.

**Action on Notes.**—An action on a promissory note not under seal is barred in five years. *Johnson v. Anderson*, 76 Va. 766; *Watson v. Hurt*, 6 Gratt. 633.

An indorsement of a note payable

on demand, imports a guarantee of the note according to its terms, which can not be altered by parol proof; and if an action on the guarantee is not brought within five years from the date of the note, it is barred by the statute of limitations. *Watson v. Hurt*, 6 Gratt. 633.

A deed of trust executed as collateral security for the payment of a promissory note, does not raise such note to the dignity of a specialty, and the note is barred by the lapse of five years. *Wolf v. Violet*, 78 Va. 57.

A second husband with his wife's money, paid a note to which he was not a party, but on which his wife's first husband, who had left her his estate, was surety, and the administrator of the second husband afterwards brought suit and recovered the amount paid of the principal obligor. It was held, that it was but a simple contract debt and that, therefore, the failure of the wife, having control of her estate by reason of a marriage contract, to lay claim to this fund within five years, bars an action by her administrator to recover it. *Leith v. Carter*, 83 Va. 889, 5 S. E. 584.

**Claim for Services by Agent of County Court.**—Claim of agent appointed by county court in 1863, for an agreed compensation, was presented and allowed in 1871, but not paid, and in 1873 was disallowed. In 1887, a mandamus was applied for to compel its payment. It was held, that the claim was barred by the lapse of five years between its accrual and the filing of the application. *Board of Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999.

"A proceeding like the present is in the nature of an action to recover money founded upon a contract not under seal, and, therefore, as the petition for the writ was not filed within five years after the date of the order of the board first allowing the claim, in December, 1871, the statute applies." *Board of Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999.



**Claim Founded on Resolution of Board of Directors.**—When a resolution of a board of directors of a corporation is relied on as the evidence of a written agreement, it must, like other written contracts, show on its face a complete and concluded agreement between the parties. *Newport News, etc., Co. v. Newport News, etc., R. Co.*, 97 Va. 19, 21, 32 S. E. 789.

**b. In West Virginia.**

**In General.**—In West Virginia it is provided by statute that an action upon an unsealed written contract signed by the party to be charged or his agent may be brought within ten years. *W. Va. Code*, ch. 104, § 6.

**Action on Notes.**—An action on a promissory note was held to be barred under the act of 1882 (acts, 1882, p. 300, ch. 102, § 6) after the lapse of five years from the date of its maturity, after excluding the periods when the statute does not apply. *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437; *Huffman v. Callison*, 6 W. Va. 301.

**4. Parol Contracts.**

**a. In Virginia.**

**In General.**—In Virginia an action on a parol contract must be brought within three years from the time the right of action accrues. *Va. Code*, 1904, § 2920; *Liberty Savings Bank v. Otterview Land Co.*, 96 Va. 352, 31 S. E. 511.

An action of assumpsit upon an oral contract, not having been brought within three years, a plea of the statute of limitations must prevail. *Va. Code*, 1887, § 2920; *Newport News, etc., Co. v. Newport News, etc., R. Co.*, 97 Va. 22, 32 S. E. 789.

**Subscription to Corporate Stock.**—An answer under oath denying that a defendant contracted in writing to take stock in a joint stock company throws the burden of proving such contract on the complainant, and the mere fact that the defendant's name appears on the books of the company as a stockholder, and that he has paid several

calls thereon, is not sufficient to prove that the contract of subscription was in writing. No written contract having been established, the limitation on the right of recovery is three years from the date of the call on the stock. *Liberty Savings Bank v. Otterview Land Co.*, 96 Va. 352, 31 S. E. 511.

**Contract Implied from Acceptance of Deed Containing Covenant to Pay Purchase Money.**—The grantee's contract, by reason of his acceptance of a deed without executing it, containing a covenant on his part to pay notes given for deferred payments of purchase money, is a simple contract, and not a specialty, and is subject to the act of limitations applicable to simple contracts, to wit; three years. *Taylor v. Forbes*, 101 Va. 658, 44 S. E. 888.

**Implied Contract of Assignee of Stock to Pay Unpaid Installments.**—An assignee of stock is bound by an implied contract to pay unpaid installments. He is not bound by the contract of his assignor with the company, but by his own contract, and the statutes which declare the extent of his liability. If his contract is not in writing, the limitation is three years from the time the right to bring action thereon first accrues. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

**Implied Contract for Contribution.**—The right of action which one surety has against his cosurety for contribution is based upon the implied promise arising from the equitable relations which the sureties bear to each other, and not upon the written contract by which they become sureties. Hence the limitation in such case is three years, and not the limitation which is applicable to the bond, note, or other writing which they have been compelled to pay. *Tate v. Winfree*, 99 Va. 255, 37 S. E. 956.

**Recovery from Estate for Services Performed for Decedent.**—A claim for services performed by a daughter for her mother without an express con-

tract for compensation must be sued on in five years. *Harshberger v. Alger*, 31 Gratt. 52. See the title IMPLIED CONTRACTS, vol. 7, p. 301.

Where an action for compensation for services performed was commenced in the lifetime of the employer, and was pending at her death, and the plaintiff qualified as her administrator with the will annexed, it was held, that the statute of limitations would bar so much of the claim as was for services rendered more than five years before the suing out the writ in the action. *Jincey v. Winfield*, 9 Gratt. 708.

Where a son, after his father's death, managed the estate for his mother, his claim for compensation for his services was barred by limitation, except for the five years preceding the death of the widow. *Chancellor v. Ashby*, 2 Pat. & H. 26.

Where a son made improvements on his mother's land more than fifteen years prior to her death, his claim for compensation after she died was barred by the statute of limitations. *Griggsby v. Osborn*, 82 Va. 371.

#### **b. In West Virginia.**

In West Virginia a parol contract is barred by the statute of limitations after the lapse of five years. W. Va. Code, ch. 104, § 6; *Stuart v. Greenbrier*, 16 W. Va. 95.

**Covenant in Unsigned Lease.**—It seems that an action of assumption founded upon the covenants contained in a lease, is barred in five years, against a lessee who has not signed the lease. Opinion of Brannon, J., in *West Virginia, etc., R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696. But see opinion of English, J., in same case.

**Implied Contracts.**—An implied contract to pay one-half the cost of erecting a party wall, is barred in five years. *List v. Hornbrook*, 2 W. Va. 340.

**A demand for money had and received** by one for the use of another is barred in five years and the statute begins to run on receipt of the money.

*Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575.

**An implied warranty of the genuineness of a note**, arising from the indorsement thereof, is a cause of action which will become barred in five years from its accrual and the statute begins to run from the date of the breach of such implied warranty of the validity of the instrument assigned, unless something appears to avoid the commencement of the running of the statute at that date. *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. 681; *Merchants' Nat. Bank v. Williams*, 41 W. Va. 37, 23 S. E. 685.

#### **5. Store Accounts.**

An action upon any oral contract express or implied for articles charged in a store account, although such articles be sold on a written order, must be brought within two years. Va. Code, 1904, § 2920; *Wortham v. Smith*, 15 Gratt. 487; *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

**Wholesale Accounts.**—Section 5, ch. 149, Va. Code, 1849, limiting actions on store accounts to two years, does not embrace wholesale dealings of importing and wholesale merchants, but applies exclusively to the store accounts of retail dealers with their customers. *Wortham v. Smith*, 15 Gratt. 487.

**The act of October, 1779**, "for discouraging extensive credit, and repealing the law prescribing the method of proving book debts," providing that all actions founded on accounts for goods sold and delivered, or for any articles charged in any store account, shall be commenced within six months after the cause of action accrues, applies only to store accounts of retail merchants, and not to an action for wares and merchandise imported for sale by one who kept no retail store, but who sold the same at public auction and delivered them twelve months before the suit was brought. *Tomlin v. Kelly*, 1 Wash. 190.

**Accounts Stated.**—Retail store accounts, though barred by limitations

in two years, when presented to the debtor, and agreed by him to be correct, become accounts stated, and are governed by a different statute. *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817.

#### 6. Accounts between Merchant and Merchant.

See post, "Actions for Settlement of Partnership Accounts," VIII, E.

**In General.**—An action upon accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, where the action of account would lie, may be brought within five years from a cessation of the dealings in which they are interested together, but not afterwards. Va. Code, 1904, § 2920; W. Va. Code, ch. 104, § 6; *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483.

The saving in § 4 of the act of limitations, 1 Rev. Code 488, applies also to § 7 of the same act, by which an action between merchant and merchant is neither barred by one year, nor by five years. *Moore v. Mauro*, 4 Rand. 488.

**Who Are Merchants.**—Persons engaged as partners in the business of farming, distilling, and purchasing and selling cattle, can not properly be considered merchants within the meaning of the exception. *Coalter v. Coalter*, 1 Rob. 79.

**Items All on One Side.**—If the items of the account are all on one side, the claim will not be within the reason or principle of the exception, which intended open, and current accounts, where there were mutual dealings and mutual credits and debits. *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483, 491.

Where the dealings between merchant and merchant or merchant and factor have ceased and the accounts between them have been so adjusted that the party in whose favor the balance appears might bring an action at law thereon, then from the time of

such adjustment the statute of limitations will commence to run as against such balance. *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483.

**The accounts must be a direct concern of trade.** Liquidated demands or bills and notes, which are only traced up to the trade of merchants, are too remote to come within the description and they are not excepted from the bar. *Roots v. Mason City, etc., Mining Co.*, 27 W. Va. 483.

**Effect Where No Item Has Arisen within Five Years.**—*Quære*, whether the exception in the statute of limitations, of accounts which concern the trade of merchandise between merchant and merchant, will apply to accounts, no item of which has arisen within five years. *Watson v. Lyle*, 4 Leigh 236.

**Accounts between Partners.**—The exception made by the statute of limitations, of accounts which concern the trade of merchandise between merchant and merchant, does not, it seems, prevent the statute from barring an action upon partnership accounts, when there has been a cessation of dealings between the parties for five years. *Coalter v. Coalter*, 1 Rob. 79.

#### 7. Judgments and Decrees.

See the title JUDGMENTS AND DECREES, vol. 8, p. 161.

### C. ACTIONS FOR TORT.

#### 1. Death by Wrongful Act.

In Virginia an action for death by wrongful act must be brought within one year of the death of the person injured. Va. Code, 1887, § 2903.

In West Virginia the action must be brought within two years. W. Va. Code, §§ 5, 6, ch. 103; *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431; *Hoover v. Chesapeake, etc., R. Co.*, 46 W. Va. 268, 33 S. E. 224; *Curry v. Mannington*, 23 W. Va. 14. See the title DEATH BY WRONGFUL ACT, vol. 4, p. 231.

#### 2. Personal Injuries.

**In General.**—An action to recover

damages for personal injuries caused by the wrongful act, neglect, or default of any person or corporation must be brought within one year from the time such injury was inflicted. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269; *Birmingham v. Chesapeake, etc., R. Co.*, 98 Va. 548, 37 S. E. 17.

It is declared by § 13, ch. 104, W. Va. Code, 1881, that the limitation of all personal actions, if they be for matters of a nature that in case of the death of a party, they could not be brought by or against his representative, shall be one year from the time the right to bring the same shall have accrued. *Curry v. Mannington*, 23 W. Va. 14.

One year is the bar prescribed by the statute of limitations for the recovery of damages for an injury to the person in all cases, except the right of action given by §§ 5, 6, ch. 103, W. Va. Code, to the personal representative of a decedent against any party, wrongfully causing his death. *Curry v. Mannington*, 23 W. Va. 14.

**Limitation Determined by Substance of Cause of Action.**—A claim for indirect and incidental damages to a plaintiff's estate arising from an injury purely personal in its nature, does not cause the action brought to recover for such injuries, to survive, and hence the limitation is one year. *Birmingham v. Chesapeake, etc., R. Co.*, 98 Va. 548, 37 S. E. 17.

**Limitation Not Determined by Form of Action.**—The limitation of an action is not determined by its form but by its object, hence if the substance of a wrong is an injury to the person, the limitation in an action of trespass on the case in assumpsit is the same as if the action were in form *ex delicto*. *Birmingham v. Chesapeake, etc., R. Co.*, 98 Va. 548, 37 S. E. 17; *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519.

**Malpractice by Physician.**—Action for malpractice is barred in one year

whether assumpsit or case is the form of remedy adopted. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519. See the title PHYSICIANS AND SURGEONS.

**Effect of Act of 1894.**—The act, January 29, 1891, providing that an action for damages for personal injuries shall not be determined by the death of the person injured, does not extend the time for commencing actions caused by negligence from a year, as under the statute, to five years. *Birmingham v. Chesapeake, etc., R. Co.*, 98 Va. 548, 37 S. E. 17.

### 3. Breach of Promise of Marriage.

The statutory bar is one year in an action for damages for the breach of a promise to marry. Section 12, ch. 102, acts, 1882; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33; *Grubb v. Sult*, 32 Gratt. 203. See the title BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613.

### 4. Malicious Prosecution.

See the title MALICIOUS PROSECUTION.

### 5. Action for Obstructing Right of Way.

An action for obstructing a right of way over real estate is a personal action, which may be brought within five years, as provided in § 12, ch. 104, W. Va. Code, 1899, being a matter of such nature that in case a party die it can be brought by or against its personal representatives. It is not barred within one year. *Fleming v. Baltimore, etc., R. Co.*, 51 W. Va. 54, 41 S. E. 168. See the titles PRIVATE WAYS; RAILROADS.

## D. ACTIONS FOR RECOVERY OF PERSONAL PROPERTY.

The period under the statute of limitations for an action for the unlawful conversion of personal property, or for its proceeds if sold, is five years. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

Where a party delayed ten years after his right of action accrued before

he began his action of trover, it was barred by the statute of limitations. *Philips v. Martiney*, 10 Gratt. 333.

Possession of personal property by husband of claimant for five years defeats action for its recovery. *Garland v. Enos*, 4 Munf. 504.

**Where personal property has been assigned by a recorded deed fraudulent on its face**, and subsequently has been purchased by a party for value, and has remained in his actual, undisturbed, and continuous possession for five years, his title thereto is perfect, provided he was not a party to the fraudulent assignment, and has not in any way, nor by any means, direct or indirect, obstructed the creditors of the fraudulent assignor in the prosecution of their rights. *Thornburg v. Bowen*, 37 W. Va. 538, 16 S. E. 825.

**Recovery of Slaves.**—Where a person held possession of slaves for five years, openly claiming them as his own, an action for their recovery is barred. *Owen v. Sharp*, 12 Leigh 427.

A plaintiff in detinue, who, after having had five years peaceable possession of a slave, acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous possession; on the same principle that a defendant may protect himself, on that length of possession, under the act of limitations. *Newby v. Blakey*, 3 Hen. & M. 57.

**Action for Recovery of Slaves Wrongfully Seized under Execution.**—Where slaves conveyed in trust were taken on execution and sold, and the purchaser remained in possession five years thereafter before suit to recover them, it was held, that the action was barred. *Sheppards v. Turpin*, 3 Gratt. 373.

Certain persons having become the sureties of an executor in his executorial bond, a deed was made by him mortgaging slaves to them, upon condition that if he should faithfully perform in all things his office of executor, then the deed should be void. The

deed contained no clause providing that possession should remain with him until default in the performance, but it was recorded. The mortgagor, after the date of the mortgage, was in possession of the slaves for more than five years. Whereupon a creditor of his procured the slaves to be taken under execution and sold. And then, in less than five years after they were so taken, an action of detinue was brought by the mortgagees against a purchaser at the sale under the execution. It was held, that the action was commenced in due time. *Rose v. Burgess*, 10 Leigh 186.

**Recovery of Slaves Loaned.**—A slave lent either before or after the act to prevent frauds and perjuries, having remained since the commencement of that act, more than five years in the loanee's possession, without any demand made on the part of the lender, must be considered the absolute property of the person so remaining in possession, as to creditors of, and purchasers under, him. *Gay v. Moseley*, 2 Munf. 543.

And, proof of notice of the loan, or of a deed of trust, from the lender, recorded in the court of a county wherein neither of the parties lived, is not sufficient to do away the effect of such possession. *Gay v. Moseley*, 2 Munf. 543. See the title LOANS.

## **E. ACTIONS FOR SETTLEMENT OF PARTNERSHIP ACCOUNTS.**

See ante, "Accounts between Merchant and Merchant," VIII, B, 6.

**In General.**—An action by one partner against his copartner for a settlement of the partnership accounts may be brought within five years from a cessation of the dealings in which they are interested together, but not afterwards. Va. Code, 1904, § 2920; W. Va. Code, ch. 104, § 6.

An action of account or a suit in equity by one partner against his copartner for a settlement of the partner-

ship accounts must be commenced within five years next after the cause of action, and unless so commenced will be barred by the statute of limitations, 1 Rev. Va. Code, 1819, ch. 128, § 4, for such accounts do not concern the trade of merchandise between merchant and merchant and therefore are not embraced by the exception to the statute. *Coalter v. Coalter*, 1 Rob. 79.

A suit in equity by one partner against his copartner, for a settlement of the partnership accounts, being a substitute for the action of account, should, like that action, be brought within five years, and if not brought within that time will be barred by the statute of limitations. *Coalter v. Coalter*, 1 Rob. 79.

**What Constitutes "Cessation of Dealings in Which They Are Interested."**

—In § 5, ch. 149, of the Code, 1849, the words, "five years from a cessation of the dealings in which they are interested together," do not refer to the cessation of the active operations of the partnership, but to the time when the affairs of the partnership are wound up. *Foster v. Rison*, 17 Gratt. 321. See *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Sandy v. Randall*, 20 W. Va. 244, 247.

In order to subject a suit brought for the settlement of partnership accounts to the bar of the statute of limitations, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the suit, but that there were no valid claims for or against the firm, paid or received or outstanding, within that time. Any claim outstanding, paid or collected by either partner, would form an item in account between them, and take the case out of the bar of the statute. *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160; *Sandy v. Randall*, 20 W. Va. 244.

Upon a bill filed by surviving part-

ner against the administratrix of a deceased partner, the plea of the statute of limitations can not be sustained, where it appears that there were good debts due to the firm outstanding within five years before the suit was brought. *Marsteller v. Weaver*, 1 Gratt. 391.

**F. ACTIONS FOR DEBTS DUE BY DECEDENT.**

By the express terms of § 2920 of the Code the right of action against the estate of a person dying on or after May 1, 1888, which had accrued during his lifetime, can not in any case continue longer than five years from the qualification of his personal representative. *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

The act of 1792, which directs a court in an action upon open accounts against administrators or executors to strike out all items appearing to have been due five years before the death of the testator or intestate, was construed in *Brooke v. Shelly*, 4 Hen. & M. 266, to relate only to open accounts and not to settlements of assumptions.

**G. ACTIONS TO SET ASIDE FRAUDULENT OR VOLUNTARY CONVEYANCES.**

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 646.

**H. ACTIONS BY OR AGAINST ASSIGNEE IN BANKRUPTCY.**

See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 244.

**I. ACTIONS AGAINST NATIONAL BANK FOR PENALTY FOR EXACTING USURY.**

An action against a national bank for the recovery of the penalty prescribed by § 5198 of the United States Revised Statutes for exacting and receiving usurious interest on loans made by such bank, must be com-

menced within two years from the time the usurious transaction, within the meaning of said section, and the prescribed limitation commences to run from that time, although the debt on which such interest was paid remains unpaid. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520. See the title **BANKS AND BANKING**, vol. 2, p. 254.

### **J. ACTIONS FOR SETTLEMENT OF CLAIMS FOR PROPERTY IMPRESSED FOR PUBLIC SERVICE.**

The act of November, 1781, relative to the adjustment of claims for property impressed for public service, and the subsequent continuing laws, were acts of limitations, and barred claims not asserted before the first of September, 1787. *Com. v. Banks*, 4 Call 338.

### **K. QUO WARRANTO.**

An information in the nature of a writ of quo warranto, though in form a criminal proceeding, yet is in substance a civil proceeding, for the trial of a civil right; and, therefore, the act which limits the prosecution of informations on any penal law to one year, does not apply to such informations. *Com. v. Birchett*, 2 Va. Cas. 51. See the title **QUO WARRANTO**.

## **IX. Postponement, Suspension or Interruption of Statute.**

### **A. IN GENERAL.**

The only way in which the operation of the statute of limitations can be avoided in any case, is by one or the other of the following circumstances: First, by a subsequent written acknowledgment or promise to pay money, signed by the party to be charged or his agent; second, by the existence of certain disabilities on the part of the plaintiff; third, by attempts on the part of the plaintiff to avoid the action, as by departing from the state, or by any other indirect way obstructing the plaintiff in bringing his action; and

fourth, by the failure of a suit commenced in time. *Morris v. Lyon*, 84 Va. 331, 4 S. E. 734.

It has been held, that the exception to the operation of the Code of 1873, ch. 146, § 16, providing for the avoidance of voluntary conveyances by creditors within five years from the date of the conveyance, must be found in the statute itself, "the doctrine of an inherent equity creating an exception where the statute makes none being now universally exploded." *Bickle v. Chrisman*, 76 Va. 678.

### **B. GENERAL RULE AS TO CONTINUOUS RUNNING AFTER COMMENCEMENT.**

When a right of action accrues to a party who is capable of suing, the statute of limitations begins to run, unless this is prevented by the case coming within some exception to the statute, and after the running of the statute has commenced, it can not be stopped by the happening of any subsequent event or disability, such as death, want of personal representation, coverture, infancy, or any other disability. *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604; *Harshberger v. Alger*, 31 Gratt. 52; *Pace v. Ficklin*, 76 Va. 292; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544; *Mynes v. Mynes*, 47 W. Va. 681, 35 S. E. 935; *Caperton v. Gregory*, 11 Gratt. 505; *Jones v. Lemon*, 26 W. Va. 629, 635; *Parsons v. McCracken*, 9 Leigh 495; *Blackwell v. Bragg*, 78 Va. 529; *Fitzhugh v. Anderson*, 2 Hen. & M. 289; *Hudson v. Hudson*, 6 Munf. 352.

Thus it is well settled that when the statute of limitations has begun to run in the lifetime of the ancestor, it will not cease to run against his infant heirs, unless so specially provided by statute. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Wilsons v. Harper*, 25 W. Va. 179, 182; *Caperton v. Gregory*, 11 Gratt. 505.

And if, after the right of action has accrued and the statute of limitations

has begun to run, an ousted cotenant dies, leaving infant heirs, the statute continues to run, and their rights are barred, notwithstanding their disability, in the same number of years as would bar their ancestor. They do not inherit the land, but a mere limited right of action, with days already numbered; and, unless they or their friends take the necessary legal steps to save the same within the period fixed by statute, their right of action is forever lost. *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580.

Unless there is an express saving in the statute of limitations, no person will come within its exceptions, and the prescribed limitations will operate against persons under disabilities as well as others; and the express exceptions refer only to such disabilities as exist at the time the right of action first accrued; for while, if several disabilities exist together at that time, the statute will only begin to run at the cessation of the last of them, yet if a second disability occur after those then existing have ceased, it can not be pleaded; for it is the settled law that when the statute has once begun to run no subsequent event will interrupt it. *Jones v. Lemon*, 26 W. Va. 629. See post, "Obstruction of Prosecution," IX, G.

### C. AGREEMENT OF PARTIES.

A mutual understanding and agreement between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to Europe, and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death. *Holladay v. Littlepage*, 2 Munf. 316.

Shortly after the making and delivery of a promissory note the parties thereto enter into a covenant in which it is agreed, that in consideration of the

fact that the promisor has become the bail of the promisee, the note should be delivered to the former to be held, and only redelivered to the latter, when the former's liability as bail was ended. The effect of the covenant was to suspend the operation of the statute of limitations from the time the covenant was executed until the liability of the promisor as bail had ceased. *Bowles v. Elmore*, 7 Gratt. 385.

**Stipulation in Insurance Policy.**—It is valid for a fire insurance policy to contain a stipulation which limits the period within which suit can be brought thereon, to a shorter time than the period prescribed in the statute. *Virginia, etc., Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349. See *Virginia, etc., Ins. Co. v. Aiken*, 82 Va. 424.

Insurance companies can grant an extension of time for a suit against them, in addition to that allowed by the policy, and after such extension has been given, the company can not withdraw it, nor add conditions to it, without the consent of the party to whom it is given. *Cochran v. London Assur. Corp.*, 93 Va. 553, 25 S. E. 597. See the title FIRE INSURANCE, vol. 6, p. 60.

### D. DISABILITIES OF PLAINTIFF.

#### 1. In General.

Unless there is an express saving in the statute of limitations, no person will come within its exceptions, and the prescribed limitations will operate against persons under disabilities as well as others. *Jones v. Lemon*, 26 W. Va. 629; *Leonard v. Henderson*, 23 Gratt. 331.

#### 2. Infancy.

**In General.**—The suspension of the statute of limitations by the disability of infancy is practically without exception. *Brown v. Lambert*, 33 Gratt. 256; *Magruder v. Goodwyn*, 2 Pat. & H. 561. *Lynch v. Thomas*, 3 Leigh 682; *Baird v. Bland*, 3 Munf. 570; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 600; *Marshall v. Palmer*, 91 Va. 344, 21 S.



E. 672; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345; *McClintic v. Ocheltree*, 4 W. Va. 249; *Toler v. Toler*, 2 Pat. & H. 71; *Hudson v. Hudson*, 6 Munf. 352; *Birch v. Linton*, 78 Va. 584. *Hansford v. Elliott*, 9 Leigh 79. See the title INFANTS, vol. 7, p. 461.

**Claims for Legacy.**—Where a deceased bequeathed a slave to his infant son, the act of limitations could never begin to run against his claim and title to the slave, until he had attained to full age. *Lynch v. Thomas*, 3 Leigh 692.

**Claims under Marriage Settlement.**—Where by a marriage settlement, the children are entitled to an absolute estate in certain slaves on the death of their mother and father, and the latter in their lifetime are deprived of the slaves, and depart this life leaving the children under age, the act of limitations does not begin to run against them until they have maintained their majority. *Baird v. Bland*, 3 Munf. 570.

**Infancy of One Joint Tenant as Suspending Statute as to Others.**—The doctrine that the infancy of one joint tenant prevents the application of the act of limitations to other joint tenants is based on the common-law rule that they must sue and be sued jointly. But that doctrine can have no application in Virginia, where by statute it is provided that undivided interests may be sued for and recovered. See ch. 125, Va. Code, 1887; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630, 7 Va. Law Reg. 851; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. 672; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

But the infancy of one joint tenant does not prevent the application of the act of limitations to other joint tenants not under disability. *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630. See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 8, p. 89.

**Limitations after Removal of Disability.**—Where an infant reaches full

age in 1856, he can not file a bill in 1859, to set aside the probate of a will made in 1840, the disability of infancy having been removed more than one year. Va. Code, 1849, ch. 122, § 35; *McClintic v. Ocheltree*, 4 W. Va. 249.

A testator dies, leaving his estate to his children, one of whom dies shortly afterwards, leaving several children. The estate is administered on, but no accounts thereof are settled. A great many years afterwards, but within five years after arrival at age, the youngest grandchild, together with his brothers and sisters, brings a suit to surcharge the administrator's account, and for a full settlement of the estate. The statute of limitations does not bar the suit. *Toler v. Toler*, 2 Pat. & H. 71.

The provision of the statute of limitations which allows infants to make entry or bring action within ten years after the removal of the disability of infancy, notwithstanding the fifteen years' limitation may have expired, does not curtail the time of the infant for the assertion of his rights in this case from fifteen years to ten years. But the operation of the statute is exactly the reverse. In such cases the time for the assertion of the rights of those under the disability of infancy is enlarged by giving them fifteen years in any event, or ten years, after the removal of the disability, in which to bring the action, and it is immaterial which period shall first expire. *Birch v. Linton*, 78 Va. 584.

The right to file a bill of review is barred by limitation, where more than three years elapse between the arrival of a plaintiff at twenty-one years of age and the filing of the bill of review. *Hancock v. Hutcherson*, 76 Va. 609, 610. See the title BILL OF REVIEW, vol. 2, p. 383.

**Persons claiming rights of personal property**, being under disability of infancy when their rights accrue, may maintain an action therefor within five years after the disability removed. 1

Rev. Code, ch. 128, § 12; *Hansford v. Elliott*, 9 Leigh 79; *Lynch v. Thomas*, 3 Leigh 682; *Hudson v. Hudson*, 6 Munf. 352 (action for recovery of slaves).

The statute of limitations does not begin to run against the claim of infant remaindermen to slaves until they attain their majority, notwithstanding the fact that their parents, who were the owners of the particular estate, were deprived of possession during their lifetime. *Baird v. Bland*, 3 Munf. 570.

**Exception to General Rule as to Time within Which Action May Be Brought after Majority.**—The saving in favor of infants, married women or insane persons in the 36th section of ch. 135 of the Code, in relation to actions of ejectment, does not apply to actions of ejectment, brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under the 16th section of ch. 138 of the Code. *Leonard v. Henderson*, 23 Gratt. 331.

H., the owner of a ground rent in fee secured upon a lot of ground owned in fee by L., brought ejectment against V., the tenant in possession, to recover the lot for the failure of L. to pay the rent; and there was a judgment by default in favor of H., who proved by his own testimony that the rent was due; and there was no sufficient distress upon the premises; and H. was put into possession of the premises. At this time L. was an infant under twenty-one years of age. After one year from the time H. was put into possession, but within five years after L. came of age, he brought ejectment against H. to recover the lot. Held, though L. was not a party to the action of H., yet V., the tenant in possession, was, and that, under § 16 of ch. 138, is sufficient. And the proof by H. was sufficient. *Leonard v. Henderson*, 23 Gratt. 331.

### 3. Coverture.

**In General.**—Before the enactment

of the "Married Women's Acts," the statutes of limitation had no application, as a general rule, to women under the disability of coverture. *Justis v. English*, 30 Gratt. 565. See the titles HUSBAND AND WIFE, vol. 7, p. 234; SEPARATE ESTATE OF MARRIED WOMEN.

#### **When Statute Commences to Run.**

Where by deed land was conveyed directly to a married woman prior to the Code of 1868, such conveyance did not create in her a separate estate, but the husband became entitled to a freehold estate in the land, which would continue at least during joint lives of the husband and wife, with remainder in fee to the wife. In such case, if the husband and wife, by a deed void as to her, for want of a proper certificate of her examination and acknowledgment, convey the land to a party, and put him in possession, such purchaser is entitled to hold that possession until the death of the husband, and the wife or her heirs, or any one claiming under them, have no right of entry until the husband's death, and right of action does not accrue to them, nor does the statute of limitations run against them, until his death. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61. See ante, "Action by Heirs," VII, B, 3, c, (1), (c); "Action by Remaindermen," VII, B, 3, c, (1), (d).

**Time within Which Suit Must Be Brought.**—In *Caperton v. Gregory*, 11 Gratt. 505, it was held, that, where the right of action accrues to a married woman during coverture, after the regular period of the statute has run against husband and wife jointly and the coverture still continues, the husband and wife can not sue between the expiration of the period of limitation and the termination of the coverture, but that on the termination of the coverture, the saving in favor of a married woman operates to revive her right of action.

A wife owning land in fee, not separate estate, makes a deed purporting

to convey the land in fee, but her husband does not join in the deed. The possession of the grantee is adverse to both as the deed is void, and twenty years' possession will by § 4, ch. 104, of the Code of 1891, bar the right of the wife to recover although she remains married during the whole of the twenty years, and suit may be brought during coverture to recover the land, although ten years of such possession have elapsed. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56.

Where a deed by a married woman attempting to convey land in fee simple is void, the possession of the grantee thereby being adverse, if after the lapse of ten years the coverture ceases, under § 3, ch. 104, Code of 1891, suit must be brought within five years thereafter. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56.

Adverse possession of a married woman's land not her separate estate, beginning during coverture and continuing for the term of the statute of limitations, will bar the wife's and husband's right during coverture; but though the right during coverture is barred, the wife or those claiming under her has five years after the coverture ends to sue for the land. *Waldron v. Harvey*, 54 W. Va. 610, 46 S. E. 603.

**Operation of Statute as to Separate Estate.**—Possession under a void deed is sufficient to give color of title as against the grantors, and to set in motion the statute of limitations, and the coverture of the appellant, who was the grantor, does not affect the question, she being excepted from the disabilities mentioned in § 3, ch. 104, Code, as to her sole and separate property. *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231. See the title SEPARATE ESTATE OF MARRIED WOMEN.

**Claim of Wife against Husband.**—The claim of a wife against her husband is not barred by the statute of limitations during coverture, if at all, until twenty years from the original

inception, or written renewal thereof. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357. See the title SEPARATE ESTATE OF MARRIED WOMEN.

**Widow as Administratrix—After Removal Holds Slaves under Father's Will.**—A widow is appointed administratrix of her husband and claims certain slaves under her father's will. She is afterwards removed and continues to hold the slaves. After having them in her possession for more than five years, the statute of limitations will protect her against any claims by the administrator d. b. n. and the next of kin of her husband. The fact of one of the latter being married woman during the whole period, will not prevent the running of the statute against her. *Livesay v. Helms*, 14 Gratt. 440.

#### 4. Coexisting Disabilities.

**Two Disabilities Existing at Time of Accrual of Cause of Action.**—Where there are two or more coexisting disabilities in the same person, when his right of action accrues, he is not obliged to act until the last is removed. *Wilson v. Branch*, 77 Va. 65; *Jones v. Lemon*, 26 W. Va. 629; *Blackwell v. Bragg*, 78 Va. 529; *Parsons v. McCracken*, 9 Leigh 495.

If an infant who is a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after coverture ended. *Wilson v. Branch*, 77 Va. 65. See the titles HUSBAND AND WIFE, vol. 7, p. 178; INFANTS, vol. 7, p. 461.

#### Tacking Disabilities.

**Right to Tack Subsequent Disability Arising to One Existing When Action Accrued.**—Where a disability existing at the time the cause of action accrued is removed, another disability arising subsequently can not be tacked to it, to avoid the bar of the statute of limitations. *Fitzhugh v. Anderson*, 2 Hen. & M. 289, 3 Am. Dec. 625; *Hudson v. Hudson*, 6 Munf. 352; *Parsons v. Mc-*

Cracken, 9 Leigh 495; Hancock v. Hutcherson, 76 Va. 609; Jones v. Lemon, 26 W. Va. 629.

Thus the disability of coverture, arising after a cause of action accrues, can not be tacked to that of infancy, existing previously, so as to prevent the statute of limitations from commencing to run on the expiration of the disability of infancy. *Parsons v. McCracken*, 9 Leigh 495; *Blackwell v. Bragg*, 78 Va. 529; *Hancock v. Hutcherson*, 76 Va. 609; *Jones v. Lemon*, 26 Va. 629. See the titles HUSBAND AND WIFE, vol. 7, p. 178; INFANTS, vol. 7, p. 461.

#### **E. IGNORANCE OF RIGHTS.**

Mere ignorance on the part of a creditor is not sufficient to suspend the operation of the statute of limitations. *Foster v. Rison*, 17 Gratt. 321; *Bickle v. Chrisman*, 76 Va. 678.

**To Be Effective Must Proceed from Fraud.**—Where one partner for himself and another settles the partnership accounts with the acting partner, and receives payments of money for himself and the other, the fact that the other one was ignorant of the existence of the debt due from the partner who collected the money, until within five years before the institution of a suit, is not sufficient to repel the bar of the statute. To have that effect such ignorance must proceed from the fraud of the partner collecting the money. *Foster v. Rison*, 17 Gratt. 321. See *Bickle v. Chrisman*, 76 Va. 678.

**Sale of Land Bound for Bond.**—The assignor of a bond retained it and agreed to remain bound as assignor thereof, and to collect it. The land by which the bond was secured was sold to pay the debt, and was bought by the assignor. In the absence of knowledge on the part of the assignee that the land was sold, the statute of limitations did not begin to run from the day of the sale. *Lightfoot v. Green*, 91 Va. 509, 22 S. E. 242.

**Suit to Set Aside Voluntary Conveyance.**—The rule that a suit to set aside

a voluntary conveyance must be brought within five years from the day of the conveyance, and not from the time of the accrual of the cause of action, is not affected by the fact that the assignment of the title bonds in this case was without the knowledge of the creditor. *Bickle v. Chrisman*, 76 Va. 678.

**Ignorance of Law.**—While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity, a court of conscience. In such court, moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it results from ignorance of law. *Cranmer v. McCswords*, 24 W. Va. 594.

**Effect of Ignorance as to Amount Due.**—P. and L. were joint indorsers for W., who made to P. an assignment to indemnify him for said indorsement among other liabilities. In 1756, P. took in the protested bill of W. indorsed by him and L. and executed P.'s own bond for the balance due thereon. In 1768, he sued L. for half of said balance, with interest. L. pleaded the statute of limitations. P. replied that he was employed many years in settling W.'s affairs, and the suit was within the time since the amount to be contributed had been ascertained. Plea overruled by county court and appeal to H. C. C. The two chancellors being divided, case adjourned to court of appeals, who held that under the particular circumstances the statute should not bar. *Pendleton v. Lomax*, Wythe 4.

**In Case of Fraud and Mistake.**—See ante, "Fraud and Mistake," VII, B. 2. And see the titles FRAUD AND DECEIT, vol. 6, p. 448; MISTAKE AND ACCIDENT.

#### **F. EFFECT OF DEATH OF PARTY TO CAUSE OF ACTION.**

**Action in Favor of Decedent's Estate.**—The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a

qualification of an executor or administrator of the decedent. *Hansford v. Elliott*, 9 Leigh 79; *Bowles v. Elmore*, 7 Gratt. 385, 393.

The statute of limitations does not give title to the widow of an intestate holding possession for five years of a store belonging to her husband's estate, where no administrator of the estate has been appointed. *Clark v. Hardiman*, 2 Leigh 347.

In an action brought by one person for the use of another, the period of one year from the qualification of the representative of the beneficial plaintiff can not be deducted. *Fadeley v. Williams*, 96 Va. 397, 31 S. E. 515.

When a cause of action accrues to the estate of a decedent at the time of his death, and not before, and no one qualifies as administrator until more than five years thereafter, the law conclusively presumes that an administrator qualified on the last day of said five years, and the statute of limitations begins to run in favor of the estate of the decedent from that time, whether or not there is in fact any administrator of the estate. *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740.

**Death of Party Subsequent to Accrual of Cause of Action.**—When a cause of action accrues for or against a party, the statute of limitations does not stop because of his death or until he has a personal representative. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

In no event can a judgment be revived, under our statute (§ 11, ch. 139, Code), after ten years have elapsed from the return day of the last execution issued thereon, and, if more than five years of that period have elapsed during the life of the execution debtor, then the creditor has only the remainder of the ten years within which to revive the judgment against the personal representative of such debtor. *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604.

**Action for Legacy Where No Administration for Twelve Years.**—The legatee having died shortly after the testatrix and before a qualification upon her estate in this country, and there having been no administration on the estate of the legatee for twelve years, the act of limitations of 1826 does not bar the claim for the legacy. *Lyon v. Magagnos*, 7 Gratt. 377.

## G. OBSTRUCTION OF PROSECUTION.

### 1. In General.

Where a person by any direct way or means obstructs the prosecution of a right, the time during which such obstruction continues shall not be computed in the limitation period prescribed by statute. *W. Va. Code*, ch. 104, § 18, Va. Code, 1904, § 2933. *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364; *Morris v. Lyon*, 84 Va. 331, 4 S. E. 734; *Vanbibber v. Beirne*, 6 W. Va. 168.

**Sale of real estate whereon a judgment is previously a lien** is not, of itself, an obstruction of plaintiff. *Brown v. Butler*, 87 Va. 621, 13 S. E. 71.

**The removal of slaves to a distant state**, thus keeping the owner in ignorance of where they were, was held to be an obstruction to the assertion of his rights by the owner and which precluded the defendant from pleading the statute of limitations. *Rankin v. Bradford*, 1 Leigh 163.

To a bill by an heir to recover a slave, her increase and their profits, the statute of limitations was pleaded at the time of the purchase; the defendant had no notice of the plaintiff's title, and the plaintiff replied that the defendant's vendor had removed the slaves to a distance for the purpose of concealing them, and that they could not be found after a diligent search. Under all the circumstances, it was held, that the statute was no bar to the bill. *Farrar v. Jackson*, Wythe 1.

**Where a debtor was taken and detained in close confinement during the**

war, shortly after a judgment was rendered against him, until after the expiration of five years from the date of the judgment, he will not be prevented from appealing by reason of limitations. *Wyatt v. Morris*, 2 W. Va. 575.

**Where a voluntary deed was concealed by the parties and withheld from recordation with intent to prevent the creditors from knowing of its existence, it was held, that the time the creditors were obstructed by such concealment should not be computed.** *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364.

**Promise to Pay Resulting in Postponement of Action.**—It is no ground for relief in equity that plaintiff sold goods to infant children, and by mistake charged them to their deceased father's estate, and that his debtors kept him from suing them by their repeated promises to pay, until his claim was barred by the statute of limitations, his remedy being at law. *Nelson v. Hamner*, 84 Va. 909, 6 S. E. 462.

## 2. Removal or Departure from State.

### a. To What Proceedings Statute Applies.

**Preliminary Suits.**—Section 20, ch. 146, Va. Code, 1873, which suspends the operation of the statute if the defendant leaves the state, or by other indirect ways or means, obstructs the prosecution of the action, does not apply to a case when the obstruction was to suits which were necessary preliminaries to the suit in which the statute was pleaded. *Bickle v. Chrisman*, 76 Va. 678.

### b. Effect of Removal as Amounting to Obstruction.

Where a debtor, who resides in the state, removes after contracting the debt, to another state, the removal is itself an obstruction to the prosecution of a suit by the creditor to recover the debt, and the statute of limitations will not run against the debt while the debtor resides out of the state. *Ficklin v. Carrington*, 31 Gratt. 219; *Abell v.*

*Penn., etc., Ins. Co.*, 18 W. Va. 400; *Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57; *Fisher v. Hartley*, 48 W. Va. 337, 37 S. E. 578; *Hefflebower v. Detrick*, 27 W. Va. 16.

In *Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57, the court said: "It is somewhat insisted upon by appellees that the decision in *Ficklin v. Carrington*, 31 Gratt. 219, has been overruled by this court in *Brown v. Butler*, 87 Va. 621, 13 S. E. 71, and it is so stated by Mr. Barton in a review of the two cases (2 Barton's L. Pr., note, p. 793), but we are unable to take that view of the decision in *Brown v. Butler*, 87 Va. 621, 13 S. E. 71."

Where the maker of a note after giving it, removes from the state and remains away, he has obstructed the plaintiff's right to sue within acts, 1882, ch. 102, § 18, providing that where one leaves the state after a cause of action has accrued against him, the time of his absence shall not be computed, though suit is finally brought and service made by publication. *Hefflebower v. Detrick*, 27 W. Va. 16.

A contract is made out of West Virginia, to be performed within the state, with the plaintiff, who is a resident of the state, by the defendant, who had been a permanent resident of the state, but who was then temporarily absent from it. The time during which the defendant remains out of the state, is not to be computed as any part of the time within which the creditor is required by the statute of limitations to prosecute his suit on such contract. *Abell v. Penn., etc., Ins. Co.*, 18 W. Va. 400.

### c. Residence of Defendant at Time of Accrual of Action.

#### (1) Necessity for Residence within State.

**In General.**—Prior to the amendment of § 2953 of the Virginia Code of 1887 (acts 1897-98, p. 441), in order for a departure from the state to suspend the operation of the statute of limita-

tions, it was necessary that at the time of the accrual of the right of action the defendant should have been a resident of the state and that he should have departed therefrom after such time. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949; *Ficklin v. Carrington*, 31 Gratt. 219, 220; *Dorr v. Rohr*, 82 Va. 359; 361; *Brown v. Butler*, 87 Va. 621, 625, 13 S. E. 71; *Lovett v. Perry*, 98 Va. 604, 37 S. E. 33; *Liskey v. Paul*, 100 Va. 764, 24 S. E. 875; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288.

In West Virginia the statute is similar to § 2933 of the Code of 1887 prior to the amendment, and has been construed to require residence at the time of the accrual of the right of action. *W. Va. Code*, ch. 104, § 18; *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 54; *Hefflebower v. Detrick*, 27 W. Va. 16; *Fisher v. Hartley*, 48 W. Va. 339, 37 S. E. 578; *Embrey v. Jennison*, 131 U. S. 336, 9 Imp. Ct. Rep (construing the Virginia statute).

**Departure of Defendant Prior to Accrual of Cause of Action.**—If before both the birth of the cause of action and the accrual of the right of action a resident of the state removes out of it, his departure and residence abroad will not save the action from the statute of limitations. *Fisher v. Hartley*, 48 W. Va. 339, 37 S. E. 578; *Lovett v. Perry*, 98 Va. 604, 37 S. E. 33; *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288.

If a defendant, once a resident of the state, departs and resides out of it before a personal judgment is rendered against him, the time of his residence abroad will not excuse the judgment from the statute of limitations, though he was a resident when the cause of action on which the judgment rests arose or accrued. *Fisher v. Hartley*, 48 W. Va. 339, 37 S. E. 578.

Section 18, ch. 104, of the West Virginia Code of 1887, in regard to the

suspension of the statute of limitations by the departure of a debtor from the state, does not apply when the defendant, although once a resident of this state, removed therefrom before any right of action accrued against him, and before a transaction occurred out of which the plaintiff's cause of action arose. *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 54.

**Defendant Never Resident within State.**—The continued nonresidence of the maker of note, who was never a resident of this state, does not prevent the running of the act of limitations on the note. Such nonresident is not within the provisions of § 2933 of the Code, as it existed prior to the amendment of acts 1897-98, p. 441. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949, distinguishing *Wilkinson v. Holloway*, 7 Leigh 277.

Where there is no evidence that the defendant was ever a resident of this state, nor that she in departing therefrom intended to obstruct or did obstruct the prosecution of any suit against her, the effect of the statute of limitations was not avoided by § 2933 of the Code, which provides that where a person by leaving the state or by any other indirect way obstructs the prosecution of a right, the time of such obstruction shall not be computed in considering the effect of the statute of limitations. *Lovett v. Perry*, 98 Va. 604, 37 S. E. 33.

## (2) What Constitutes Residence.

Residence, within the meaning of the act of limitation, is the permanent abiding or dwelling in a place for a length of time, as contradistinguished from a mere temporary locality of existence. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949.

Mr. Barton gives the following definition: "He is a resident who, though absent in person, has here his home and permanent abiding place; and he is a nonresident who, though present, has his home and permanent abiding

place in some other state or country." *Griffin v. Woolford*, 100 Va. 473, 479, 41 S. E. 949.

"Residence or inhabitancy (for they seem to have the same meaning) is defined to be the place of abode, dwelling, or habitation for some continuance of time. To reside in a place is to abide or dwell there permanently for a length of time, as contradistinguished from a mere temporary locality of existence." *Griffin v. Woolford*, 100 Va. 473, 479, 41 S. E. 949.

If a person residing in another state, makes his home in this state, and thereafter departs from, and continues to reside out of the state, he will be considered as a person, "who before the action accrued, resided in this state," and who by his departure and residence out of it, has obstructed the payee in the prosecution of his right of action on such note, during such absence from this state. *Hefflebower v. Detrick*, 27 W. Va. 16.

**d. Necessity of Intention to Change Residence.**

The removal of a debtor from the state with the intention of changing his residence, will bar the statute while he remains without the state. But the question of residence is one of intention, and the old one will not be regarded as lost as long as the animus revertendi remains. *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437.

A judgment debtor at the date of the judgment resided in the state, and was a carpenter by trade, and for several years after the judgment went from place to place in different states working at his trade, leaving his family all the time in the place where the judgment was obtained. His wife testified that only three months before her deposition he wrote that he was coming home, and that his family were expecting him home had he not died. It was held that these facts established no such obstruction as was contemplated by § 2933 of the Virginia Code of 1857, as

the judgment debtor had not left the state with the purpose of changing his residence. *Brown v. Butler*, 87 Va. 621, 13 S. E. 71.

**e. Failure of Foreign Insurance Company to Maintain Agent within State.**

Where a fire insurance company is allowed to do business in a state on condition of having an agent there, on which service of process may be had, when there ceases to be an agent in the state, it is a departure of the company from the state, within the meaning of the limitation law. *Abell v. Penn, etc., Ins. Co.*, 18 W. Va. 400.

**f. Effect of Debtor's Death While a Nonresident.**

If a nonresident, owning effects in this state, makes a simple contract to be performed in this state, and then dies outside of the state, and more than six years elapse after his death and after the accrual of the cause of action, which was after his death, before action is brought on the contract, the right of action is barred by the statute of limitations. The debtor, having died before the plaintiff's cause of action accrued, did not and could not obstruct its prosecution. Neither he nor his estate are within the spirit or letter of § 2933 of the Code, as amended, making savings as to the classes of persons therein mentioned as long as they obstructed the prosecution of any such right of action as is mentioned in ch. 140 of the Code. After the lapse of two months from the debtor's death the plaintiff could have had his estate in Virginia committed to the sheriff of the county where it was, and have instituted his action as soon as his cause of action accrued. *Templeman v. Pugh*, 102 Va. 441, 46 S. E. 474.

In *Markle v. Burch*, 11 Gratt. 26, a simple contract debt was made in 1819, when the debtor lived in Virginia, and shortly afterwards he moved out of the state, remaining absent until his



death in 1826, and in 1840, a proceeding by a foreign attachment was instituted to recover the debt. The proceeding was barred by the statute of limitations.

### 3. Promise to Pay Balance Due on Settlement.

A promise to settle and pay the balance found due on the settlement is not an obstruction of the plaintiff's right within the meaning of § 2933 of the Code. *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875.

### 4. Obstruction of Action by Fraudulent Concealment of Facts.

See ante, "Obstruction of Action by Fraudulent Concealment of Facts," VII, B, 2, a, (2).

## H. MERGER OF CAUSE OF ACTION.

A personal judgment upon any cause of action merges and ends that cause of action, and thereafter the statute of limitations runs against the judgment. *Fisher v. Hartley*, 48 W. Va. 339, 37 S. E. 578.

A decree against an absent debtor merges the original cause of action and repels the statute of limitations, except so far as the statute may apply to a judgment or decree. *Rootes v. Tompkins*, 3 Gratt. 98.

"No matter what the cause of action on which that judgment rested, as the law is well settled that whatever that cause of action was, it is merged, closed and drowned in that personal judgment; for when a personal judgment is rendered upon any cause of action, that cause can not be again made the subject of a suit, and the judgment is thereafter the sole test of the rights of the parties, constitutes a new debt of the highest dignity, closing the statute of limitation on the original cause of action. Such is the general law. 15 Am. & Eng. Ency. L. 336; *Freeman on Judgments*, §§ 215, 216, 217. By the judgment the debt is 'changed into a matter of record and

merged in the judgment, and the plaintiff's remedy is upon the latter security while it remains in force.' 'The original claim has by being sued upon and merged in the judgment, lost its vitality and expended its force and effect.' *Black on Judgments*, § 674." *Fisher v. Hartley*, 48 W. Va. 339, 340, 37 S. E. 578.

## I. SUSPENSION OF REMEDIES BY LEGAL PROCESS.

**Injunction.**—The statute of limitations to judgments does not run while an injunction to the judgment is pending. *Hutsonpiller v. Stover*, 12 Gratt 579.

The pendency of an injunction suit which prevents the enforcement of a right of action, will suspend the running of the statute of limitations against the claim. *Braxton v. Harrison*, 11 Gratt. 30.

An injunction against a receiver to prevent him from prosecuting an action against one stockholder does not stop the running of the statute of limitations against another stockholder. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

Before ten years had expired from the date of a decree against an executor, an injunction was awarded against the sale of the executor's place, but the decree was not assailed, nor the issuance of an execution thereon affected. This was held to be no such suspension as would permit revival after the lapse of ten years under § 13. ch. 182, Va. Code, 1873. *Serles v. Cromer*, 88 Va. 426, 13 S. E. 859.

**Suit to Enforce Contract for Sale of Land Not Process to Suspend Executions.**—A suit to enforce a contract for the sale of a judgment debtor's land, is not such legal process, as under Code of 1873, ch. 182, § 13, suspends the right of the judgment creditor to sue out executions, and stops the statute of limitations against such judgments. *Straus v. Bodeker*, 96 Va. 543, 10 S. E. 570.

## J. ORDER OF REFERENCE IN CREDITOR'S SUIT.

**In General.**—In general, from the time of the entry of an order of reference in a creditors' suit, the statute of limitations will cease to run against all lien creditors who assert their demand in the suit, whether their claims be against a living debtor, or the estate of a dead debtor. *Callaway v. Saunders*, 99 Va. 350, 353, 38 S. E. 182; *Robinet v. Mitchell*, 101 Va. 764, 45 S. E. 287; *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340; *Smith v. Moore*, 102 Va. 260, 46 S. E. 326; *Ewing v. Ferguson*, 33 Gratt. 548; *Bell v. Wood*, 94 Va. 677, 27 S. E. 504; *Craufurd v. Smith*, 93 Va. 623, 630, 23 S. E. 235; *Norvell v. Little*, 79 Va. 141; *Stephenson v. Taverners*, 9 Gratt. 398; *Kent v. Cloyd*, 30 Gratt. 555; *Harvey v. Steptoe*, 17 Gratt. 289; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508; *Bank v. Allen*, 76 Va. 200; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531; *Houck v. Dunham*, 92 Va. 211, 23 S. E. 238; *Covington v. Griffin*, 98 Va. 124, 34 S. E. 974; *Repass v. Moore*, 96 Va. 147, 30 S. E. 458; *Laidley v. Kline*, 23 W. Va. 565; *Marling v. Robrecht*, 13 W. Va. 440; *Neely v. Jones*, 16 W. Va. 625; *Arnold v. Casner*, 22 W. Va. 444; *Woodyard v. Polsley*, 14 W. Va. 211; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

An order for reference for an account of liens suspends the running of the statute of limitations as to all creditors who come in under the order, and prove their liens in the suit. It also suspends the statute as to such lien creditors as for good cause have not proved their debts, but thereafter come in by petition and assert their liens, without unreasonable delay, and while the fund sought to be subjected is still under the control of the court. *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340.

It is generally broadly stated that an order for an account of liens in a creditor's suit suspends the running of the

statute against all lien creditors. But it is believed that there is no case which holds that the order for an account will prevent the running of the statute against the demand of a creditor who did not assert his demand in the suit. On the contrary the authorities show that the rule is only applied to such creditors as come in under the decree, or otherwise become parties to the suit, and that as to all others the statute continues to run. *Callaway v. Saunders*, 99 Va. 350, 38 S. E. 182. See this position approved in editorial note appended to the case in 7 Va. Law Reg. 42. See also, *Paxton v. Rich*, 85 Va. 378, 381, 7 S. E. 531, and *Barton's Ch. Pr.* (2d Ed.) 188.

**Extent and Limitation of Rule in General.**—The general rule is that the pendency of a suit operates to suspend the statute as to parties thereto so far as the subject matter of that suit is concerned, and the suspension only exists as to that particular suit, and not as to the cause of action involved therein. *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340, citing *Dabney v. Shelton*, 82 Va. 349, 351, 4 S. E. 605; *Straus v. Bodeker*, 86 Va. 543, 10 S. E. 570.

It may well be doubted whether a general creditor's suit suspends the running of the statute of limitations or prevents its being relied on as a defense when it is sought to enforce the judgments in any proceeding other than the general creditor's suit in which the judgments had been asserted. *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340.

Where one lien creditor files his petition by leave of court in a suit brought by another lien creditor against their common debtor, the statute of limitations ceases to run against the debt of such petitioner at the time he files his petition, and not at the time when the process to answer it is served on the defendant. *Jackson v. Hull*, 21 W. Va. 601.

A bill to have a deed declared a mortgage filed by the grantor against the

grantee's personal representative and heirs which results in a decree for an account of the liens which the grantee had undertaken to pay as a consideration for the conveyance, and of the lien against the land at the time of the conveyance, is not a creditor's bill which will stop the running of the statute of limitations on judgments against the grantor. *Gunnell v. Dixon*, 101 Va. 174, 43 S. E. 340.

**Suit by Single Creditor against Decedent's Estate.**—A decree for account of debts against a decedent's estate rendered in a suit brought by a single creditor stops the running of the act of limitations against the claims of all creditors who subsequently assert them in that suit. *Robinett v. Mitchell*, 101 Va. 764, 45 S. E. 287.

A suit brought by a single creditor to establish a debt against a decedent's estate becomes a creditor's suit by the entry therein of a decree for an account of debts against the decedent's estate, and the statute of limitations ceases to run from the date of the decree against all creditors of the decedent who come in under the decree. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

**When one creditor sues expressly for all creditors**, the statute stops at date of suit. *Rowan v. Chenoweth*, 49 W. Va. 287, 290, 38 S. E. 544, citing *Jackson v. Hull*, 21 W. Va. 601, 612; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

**Suit by Personal Representative to Convene Creditors of Estate.**—When an administrator or executor sues in equity to convene the creditors of the estate and administer its assets for the benefit of all the creditors, the statute of limitations stops running against their debts at the commencement of the suit for the purposes of that case. *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544.

**Effect of Decree Dependent upon Validity of Consent of Parties.**—Where the consent of a guardian of infants to

the making of an order of reference to ascertain the liens against the lands of such infants for the debts of their father, is invalid, such order will not stop the statute of limitations as to debts against the father of the infants. But as to the parties who are sui juris, their consent to such order will stop the statute as to liens against them, from the date of such reference. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

## K. WAR OR STAY LAWS.

### 1. Effect of War.

War suspends the operation of the statute of limitations where the plaintiff is a resident within the territory of one of the belligerents and the defendant is resident within the boundary of the other. *Brewis v. Lawson*, 76 Va. 36, 45, citing *Small v. Lumpkin*, 28 Gratt. 832.

### 2. Effect of Inability to Take Test Oath.

**Constitutionality of Statute.**—The act of 1872-73, providing for a suspension of the statute as to persons who could not make the required affidavit, was held constitutional. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263.

**Statute Not Repealed by General Law.**—The general limitation act, ch. 102, acts, 1882, does not repeal by implication ch. 28, acts, 1872-73, providing for a suspension of the statute of limitations as to persons who could not make the affidavit prescribed in § 27, ch. 106, of the West Virginia Code. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263.

A corporation could not be required to take the suitor's test oath, and hence could not plead its inability to take such oath as excuse for delay in suing. *Bank v. Handley*, 14 W. Va. 823; *Stuart v. Greenbrier County*, 16 W. Va. 95.

**Joint Actions.**—In an action against the maker and surety on a joint and several note, brought by the administrator of the payee, it appeared that

the payee could have taken the suitors' test oath, prescribed by acts, 1868, ch. 136, § 27, and that the maker could take the oath, but the surety could not, it was held that as to the surety in such joint action the acts of 1872, p. 76, extended the five-year limitation. *Keller v. McHuffman*, 15 W. Va. 64.

**Action for Rents and Profits.**—If the act applies, a person suing for rents and profits may go back more than five years before suit brought. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263.

### 3. Effect of Stay Laws.

**Object of Stay Law.**—By the 7th section of the act of March 2, 1866, entitled "An act to stay the collection of debts for a limited period," it was enacted that "the period during which this act shall remain in force shall be excluded from the computation of time within which, by the operation of any statute or rule of law, it may be necessary to commence any proceeding to preserve, or prevent the loss of any right or remedy." This act remained in force until January 1, 1869. The object of the act was the relief of the debtor class in the then condition of the country by staying the immediate enforcement of debts for a limited period, without prejudice to the rights of creditors. This was the evident purpose of the legislature. *Norvell v. Little*, 79 Va. 141; *Johnston v. Gill*, 27 Gratt. 587; *Connecticut, etc., Ins. Co. v. Duerson*, 28 Gratt. 630.

**Constitutionality of Statutes.**—The stay laws were held constitutional. *Johnson v. Gill*, 27 Gratt. 587; *Huffman v. Alderson*, 9 W. Va. 616; *Keller v. McHuffman*, 15 W. Va. 64. See the title CONSTITUTIONAL LAW, vol. 3, p. 223.

**To What Proceedings Applicable.**—Section 7 of the act of March 2, 1866, known as the stay law and the act amending it, do not apply to appeals, writs of error, or supersedeas, and therefore an appeal from a final decree made on the 1st of November, 1867,

can not be allowed on the 20th of June, 1871. *Rogers v. Strother*, 27 Gratt. 417. See the title APPEAL AND ERROR, vol. 1, p. 590.

### Length of War and Stay Law Period.

—By virtue of several different acts of the legislature the operation of the statutes of limitation was suspended between April 17th, 1861, to January 1st, 1869. *Davis v. Tebbs*, 81 Va. 600; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283; *Updike v. Lane*, 78 Va. 132; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577; *Brewis v. Lawson*, 76 Va. 36; *Norvell v. Little*, 79 Va. 141; *Kerlin v. Kerlin*, 85 Va. 475, 7 S. E. 849; *Danville Bank v. Waddill*, 27 Gratt. 448; *Connecticut, etc., Ins. Co. v. Duerson*, 28 Gratt. 630; *Bank v. Handley*, 14 W. Va. 823; *Gore v. McLaughlin*, 3 W. Va. 489; *Hale v. Pack*, 10 W. Va. 145; *M'Allister v. Bodkin*, 76 Va. 809; *Justis v. English*, 30 Gratt. 565; *Pitzer v. Burns*, 7 W. Va. 63; *Hurst v. Hite*, 20 W. Va. 183; *Shields v. Farmers' Bank*, 5 W. Va. 259; *Caperton v. Martin*, 4 W. Va. 138. 6 Am. Rep. 270; *Maslin v. Hiatt*, 37 W. Va. 15, 16 S. E. 437; *Bolling v. Teel*, 76 Va. 487; *Coles v. Ballard*, 78 Va. 139; *Johnston v. Wilson*, 29 Gratt. 379; *Shipley v. Pew*, 23 W. Va. 487; *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180 (action of assumpsit); *Virginia, etc., Co. v. Hoover*, 82 Va. 449, 4 S. E. 689 (action of ejectment); *Johnston v. Gill*, 27 Gratt. 587 (suit to set aside voluntary conveyance). *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Morrison v. Householder*, 79 Va. 627 (demand against fiduciaries).

Section 3577 of the Virginia Code of 1887, which prescribes the limitation of the right to issue executions on a judgment, and to bring scire facias or action thereon, provides that "in computing time under this section there shall, as to writs of fieri facias, be omitted from such computation the time elapsed between the 1st day of January, 1869, and the 29th day of March, 1871." This section as to the quoted clause was construed in *Fade-*

ley v. Williams, 96 Va. 397, 31 S. E. 515, not to apply to writs of *scire facias*.

In West Virginia the time between April 17, 1861, and March 1, 1865, was excluded from the computation. Baltimore, etc., R. Co. v. Faulkner, 4 W. Va. 180; Pitzer v. Burns, 7 W. Va. 63; Hale v. Pack, 10 W. Va. 145; Shields v. Farmers' Bank, 5 W. Va. 259.

By 1 Rev. Code, ch. 76, § 11, three different periods are excepted from the statute of limitations, from April 12, 1774, to October 20th, 1873, amounting to five years and one hundred and seventy-four days. Clay v. Ransome, 1 Munf. 454.

It is provided by § 3577 of the Virginia Code, of 1887, that in computing time as to writs of *fi. fa.*, that the period between the 1st of January, 1869, and the 29th of March, 1871, shall be omitted. James v. Life, 92 Va. 702, 24 S. E. 275; Saunders v. Prunty, 89 Va. 921, 17 S. E. 231.

#### **Military Orders Staying Executions.**

—Military orders extending the time for a stay of execution on judgments, related only to the stay of execution and the forced sales of property, and did not operate to suspend the running of the statute of limitations. Johnston v. Wilson, 29 Gratt. 379.

**Constitutionality of Stay Law or Laws Changing Statute of Limitations.**—See the title CONSTITUTIONAL LAW, vol. 3, p. 223.

#### **L. CONTINUOUS CLAIM.**

In ejectment the fact that the plaintiff had always claimed the land in controversy, and had not brought suit therefor because of his poverty, does not operate to suspend the operation of the statute. Section 2916 of the Virginia Code says: "No continual or other claim upon or near any land shall preserve any right of making an entry or bringing an action." Voight v. Raby, 90 Va. 799, 20 S. E. 824. See the title ADVERSE POSSESSION, vol. 1, p. 199.

### **X. What Stops Running of Statute.**

#### **A. AS TO ORIGINAL CAUSE OF ACTION.**

##### **1. Commencement of Action.**

##### **a. Effect.**

In **General**.—As a general rule, the pendency of a suit operates to suspend the statute of limitations as to the parties thereto so far as the subject matter of that suit is concerned. But the suspension only exists as to that particular suit, and not as to the cause of action involved therein. Gunnell v. Dixon, 101 Va. 174, 43 S. E. 340.

The statute of limitations does not run to bar an order of restitution in a cause which has been pending from the beginning of the transaction to the entering of the decree complained of. Keck v. Allender, 42 W. Va. 420, 26 S. E. 437.

An executor having delivered certain slaves to legatees as their property under the will, a subsequent action of detinue against him, for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favor of the legatees. Spotswood v. Dandridge, 4 Hen. & M. 139.

The fact that one debtor is a party defendant to a suit for the enforcement of liens against the realty of another joint debtor does not prevent the running of the statute of limitations as to judgments against the other. Woods v. Douglass, 52 W. Va. 517, 44 S. E. 234.

##### **Unsuccessful Action of Ejectment.**

An unsuccessful action of ejectment makes no change in the possession of land, and consequently does not stop the running of the statute of limitations. Nelson v. Triplett, 99 Va. 421, 39 S. E. 150.

**Action in Another State.**—Pendency of action in another state is no bar to a suit in this state for the same

cause of action. *Conrad v. Buck*, 21 W. Va. 396.

A suit by an administrator and widow of a decedent, brought in Virginia against his heirs, to sell lands to pay debts and satisfy the widow's dower, wherein the debts are decreed against the decedent's estate and subjecting its assets, will not save such debts from the statute of limitations for the purposes of a suit prosecuted in West Virginia against lands there. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. 49.

**Claim Pending before Supervisors.**—Where a party presents his claim against a county to the board of supervisors within the time limited by statute, and they decline to take it up and adjourn, and no entry is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim. *Dinwiddie County v. Stuart*, 28 Gratt. 526.

**Confirmation of Committee's Accounts.**—After the confirmation of the report of settlement of accounts of the committee of a lunatic, the statute of limitation does not run against an item embraced in the account which was for a debt due the committee in his individual capacity. *Carter v. Edmonds*, 80 Va. 58.

**Ward Delayed by Suit against Representative of Guardian.**—The statute of limitations does not apply to a suit by a ward after becoming of age against the surety of his guardian, where the ward was delayed for more than ten years by the pendency of a suit against the administratrix of the guardian. *Roberts v. Colvin*, 3 Gratt. 358.

**Suit to Enforce Mechanic's Lien.**—Where a subcontractor brings suit to enforce a duly recorded mechanic's lien, and makes the general contractor a defendant, and properly alleges the recorded lien in the bill, the act of limitation is stopped, not only as to the lien of the plaintiff, but also as to the general contractor's lien, and all

claiming as contractors under him, and also suspends any suit by subcontractors, instituted during the pendency of his suit. *Spiller v. Wells*, 96 Va. 598, 32 S. E. 46.

**Action against Personal Representative as Stopping Statute as to Claims against Heirs.**—A judgment against a personal representative of a decedent is not even prima facie evidence of the debts against the heirs of such decedent. And in a suit brought by the plaintiff in such judgment against the heirs to subject the real assets descended, such judgment against the personal representative will not prevent the heirs from relying upon the statute of limitations as a bar to the original cause of action in such suit. *Saddler v. Kennedy*, 26 W. Va. 636.

**Effect of Void Proceedings.**—An attachment in equity was instituted in Virginia in July, 1861, against a non-resident debtor in the state of New York, and a garnishee, resident in Virginia. Service of process was made on the latter, and an order of publication was made against the former. The subject of the action was within the five-year limitation of the Virginia statute. The nonresident debtor was brought in the case by an amendment in 1879, and interposed the plea of the statute of limitations. It was held, that proceedings against him being void did not suspend the running of the statute. *Dorr v. Rohr*, 82 Va. 359.

Where a final decree in a cause is made, the jurisdiction of the court ends, and if a subsequent decree is entered without notice to the defendant, it can not be relied on as showing a suspension of the statute of limitations during the time from the rendition of the first until the rendition of the second decree. *Johnson v. Anderson*, 76 Va. 766.

**Effect of Dismissal or Nonsuit.**—The operation of the statute to bar a judgment obtained against a testator in his lifetime, will not be prevented by scire facias sued out within five years from

the qualification of the personal representative on which the latter suffered a nonsuit. *Peyton v. Carr*, 1 Rand. 436.

It is no answer to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality. *Calis v. Waddy*, 2 Munf. 511.

**Suit Dismissed with Leave to Reinstatement.**—Where a suit is brought and decided in 1858, but retained on the docket until 1867, because there was no hand to receive the fund, when it is dismissed with leave to reinstate it on motion of any person interested, and it is reinstated in 1878, and a supplementary suit is brought, the latter is deemed a continuation of the former as to questions arising under the statute of limitations. *Sharpe v. Rockwood*, 78 Va. 24.

**Issuance of Execution.**—The issuance of an execution on a judgment contrary to an agreement of the parties entered of record, is voidable and not void, and is effectual to prolong the life of the judgment and protect it from the operation of the statute of limitations. *Fulkerson v. Taylor*, 100 Va. 426, 41 S. E. 863, 9 Va. Law Reg. 255.

As to the effect of issuance of execution on judgments, see the title JUDGMENTS AND DECREES, vol. 8, p. 161.

**Petition for Rehearing.**—The mere filing of a petition to rehear a decree does not suspend the operation of the statute of limitations. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

## b. What Constitutes.

### (1) In General.

**General Rule—Date of Summons.**—An action begins with the issuance of the summons to answer the declarations, and therefore the statute of limitations ceases to run at the date of the

issuance of the summons. *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925; *Jincey v. Winfield*, 9 Gratt. 708; *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342; *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431.

But it seems that the date of the writ is only prima facie evidence of the commencement of the action. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431.

**A suit to enforce a mechanic's lien**, in which summons was issued, but not served within six months from the recordation of the lien, is not barred by the statute, as the suit begins from the date of the summons, not from its service. *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

**Original Writ Quashed.**—The suing out of a writ is the commencement of an action, and where the original writ is quashed and a new writ is ordered, the commencement of the action, so far as the act of limitations is concerned, begins with the issuing of the new writ. *Noell v. Noell*, 93 Va. 433, 25 S. E. 242.

**Proceedings in Error.**—The order of a judge of the court of appeals for a writ of supersedeas, is the true commencement for the proceedings in that court, and therefore if it be within five years from the date of the judgment complained of, although the writ is not taken out until five years have elapsed, it will be in time. *Overstreet v. Marshall*, 3 Call 192.

**Distress Warrant Unexecuted.**—The contention that the issuing of a distress warrant fifteen years prior to the institution of the suit, which warrant was returned unexecuted, and which remained filed in the clerk's office, without vitality or effect until suit was instituted would operate to suspend the running of the statute, was held unsupported by principle or authority in *Ashby v. Bell*, 80 Va. 811.

**(2) As to Parties Brought in by Amendment.**

Where a party is brought into a suit by amended bill, the suit must be deemed to have commenced as to him at the time that he was so brought in. *Dorr v. Rohr*, 82 Va. 359.

**(3) As to Parties Coming in by Intervention.**

Where a suit is brought by a lien creditor against his debtor to subject the lands of the latter to the payment of his debts, and during the pendency of such suit another lien creditor of such debtor, by leave of the court, files that petition in said suit and is made a party thereto, and process is ordered against the defendant to answer such petition, which is not issued at once but is subsequently issued and duly served on the defendant; it was held, that in such case the statute of limitations ceases to run against the debt of such petitioner at the time he files his petition and not at the time when the process to answer it is served on the defendant. *Jackson v. Hull*, 21 W. Va. 601.

**2. Effect of Amendment after Expiration of Statute.**

**General Rule.**—When an amendment to a bill or declaration is properly allowed, so far as regards the statute of limitations, it will have the same effect as if it had been originally filed in the amended form at the commencement of the suit or action, and a cause not then barred will not be treated as barred at the time of the amendment by reason of such amendment. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519; *Lamb v. Cecil*, 28 W. Va. 653; *Morrison v. Householder*, 79 Va. 627.

**Action on Insurance Policy.**—In an action on a policy of fire insurance, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy by the same fire. Where such amendment is made, the time as to the larger claim made by the amendment, whether

under the statute of limitations or under a clause of the policy fixing a limitation for action under it, will stop running at the commencement of the suit, and not continue to the filing of the amended declaration. *Bently v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

**Action on Penal Statute.**—The plaintiff in an action on a penal statute more than a year after the cause of action accrued, was allowed to amend his declaration, whereupon the defendant pleaded that the plaintiff ought not to maintain his action because it did not accrue within one year, or before he filed his amended declaration. It was held that under the law in force in West Virginia on the 9th of March, 1869, in such case the statute of limitations did not run in favor of the defendant up to the time of the filing of the amended declaration, but only until the commencement of the suit, that is the issuing of the original writ. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

**B. AS TO SET-OFF.**

Formerly it was held, that where an action is brought upon a claim and the defendant is entitled to the benefit of a set-off, which accrued prior to the institution of the action, the period of the statute of limitations is five years before the commencement of the action. But where the set-off accrued subsequent to the institution of the action, the period of limitation is five years before the plea of set-off is pleaded, or the account of off-sets is filed. *Trimyer v. Pollard*, 5 Gratt 460.

The present rule is that the statute of limitations did not cease to run against the offsets of the defendant until the time the defendant's answer and account of offsets are filed in the cause. Va. Code, § 3303; W. Va. Code, ch. 126, § 9; *Hurst v. Hite*, 20 W. Va. 183; *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544; *Moore v. Luckess*,



23 Gratt. 160. See the title SET-OFF, RECOUPMENT AND COUNTER-CLAIM.

L.'s executor sued M. upon his bonds executed to L. and M. pleads payment, and files an account of set-off, consisting of charges for services rendered to L., running through fourteen years. Pending the suits, the executor and M. agree to refer the matters in dispute to arbitration, the submission to be entered of record in said causes. The arbitrators return their award, by which they, 1st, ascertain that M. is indebted to the executor in the amount of the bonds; and 2d, that M. is entitled to the credits he claims for the five years before suit brought, specifying the amount in each year. The executor declining to oppose the confirmation of the award, the next of kin of the residuary legatee of L. file their bill to set it aside, on the ground that the arbitrators intended to decide the case according to law, and had mistaken it. The arbitrators say in their testimony that they intended to decide the case according to law, and apply the statute of limitations to the account of M.; and they had before them the papers in the causes, the account of M. and the depositions filed, and returned them with their award to the court. It was held, that though the award does not refer to the papers, yet they are so identified that the court will consider them in connection with the award; and it being apparent that the arbitrators took the institution of the actions, instead of the filing of the plea, as the date from which the statute would cease to run, the court will correct the error. *Moore v. Luckess*, 23 Gratt. 160.

Where plaintiff's claims as to simple contracts sued on in connection with bond debts are disallowed, defendant's simple contracts of same date, pleaded by way of set-off should also be disallowed. *White v. Turner*, 2 Gratt. 302.

## **XI. Effect of Failure of Action or Suit Commenced in Time.**

**In General.**—Statutes provide that where certain proceedings, brought in time, fail for certain reasons therein specified, a new proceeding may be brought within one year of such failure. The statutes all contemplate that the failure shall be otherwise than upon the merits. Va. Code, 1904, § 2934; W. Va. Code, ch. 104, § 19; *Morris v. Lyon*, 84 Va. 331, 4 S. E. 734.

**Dismissal of Action for Failure to File Declaration.**—A suit begun by the issuance of a summons, and dismissed at rules for the mere failure of the plaintiff to file his declaration, will not save his second suit for the same cause of action, brought within one year after such dismissal, from the statute of limitations. Section 19, ch. 104, W. Va. Code, 1891; *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925.

**Dismissal of Action for Void Process.**—A summons commencing a suit, which is void because it has a wrong return day, is nevertheless effective to bring into being a suit such that its dismissal by the court for that cause will give one year after its dismissal for a new suit, under the statute of limitations. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

It is no answer to the bar set up by the plea of the act of limitations, that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality. *Calhis v. Waddy*, 2 Munf. 511.

**Dismissal by Federal Court for Want of Jurisdiction.**—Where, in an action brought in the United States district court, a judgment is recovered, which is reversed by the court of appeals, which directs the dismissal of the cause for want of jurisdiction, another suit may be brought within one year

after the dismissal. *Tompkins v. Pacific, etc., Ins. Co.*, 53 W. Va. 479, 44 S. E. 439, distinguishing *Lawrence v. Winifrede Coal Co.*, 48 W. Va. 139, 35 S. E. 925.

**Nonsuit on Plaintiff's Motion.—**

Where an action is brought within the statutory period, and after the expiration of that period, the plaintiff is nonsuited upon his own motion, the statute of limitations is a bar to another action for the same cause. *Manuel v. Norfolk, etc., R. Co.*, 99 Va. 188, 37 S. E. 957, citing *Braxton v. Wood*, 4 Gratt. 25.

Neither the provisions of Code, § 2919, as amended, nor of § 2934, as amended, are applicable to a second action for death by wrongful act, where the first action was brought in due time, but resulted in a voluntary nonsuit. *Manuel v. Norfolk, etc., R. Co.*, 96 Va. 188, 37 S. E. 957.

A suit brought by a judgment creditor to enforce satisfaction of his judgment, suspends the operation of the statute of limitations during its pendency. But if it is dismissed without satisfaction of the judgment, it will not prevent the bar of the statute to another suit brought after its dismissal. *Braxton v. Wood*, 4 Gratt. 25.

**Loss or Destruction of Papers or Record in Former "Suit" or "Action."**

—“The provision of § 2934, which authorizes a new suit to be brought within one year in consequence of the loss or destruction of any of the papers or records in a former suit which was in due time, includes both suits at law and suits in equity. This manifestly appears from the act of January 13, 1842, above referred to, from which this particular provision was taken by the revisors of the Code of 1849. Hence the use of both words, ‘action’ and ‘suits,’ in the concluding clause of the section. They are there used, not interchangeably, but distributively—the one applying only to actions at law, and the other to suits both at law

and in equity.” *Dawes v. New York, etc., R. Co.*, 96 Va. 733, 736, 32 S. E. 778.

**Dismissal of Suit in Equity for Want of Jurisdiction.**—The word “action” in § 2934 of the Code is used in a technical sense, and applies to actions at law only, and not to suits in equity. A party who has first brought a suit in equity which has been dismissed, and then, within one year from such dismissal, instituted his action at law for the same matter, is not entitled to the benefit of said section. *Dawes v. New York, etc., R. Co.*, 96 Va. 733, 32 S. E. 778.

If a bill in chancery be dismissed, on the ground that the plaintiff's claim is exclusively cognizable at law, he can not plead the pendency of such suit in chancery, to prevent the act of limitations from being a bar to his subsequent recovery at law. *Gray v. Berryman*, 4 Munf. 181; *Catlett v. Russell*, 6 Leigh 344, 372; *Elam v. Bass*, 4 Munf. 301.

“In *Gray v. Berryman*, 4 Munf. 181, and in *Elam v. Bass*, 4 Munf. 301, which were decided under the statute of December 19, 1792, the language whereof is exactly the same as it is in the Code of 1819, it was held, that a party who had brought his suit in equity, which was dismissed for want of jurisdiction, and then renewed his suit at law for the same matter within one year from the dismissal of the suit in equity, was not entitled to the benefit of the statute. It would, however, be otherwise now, under § 2934 of the present Code as amended by the act of March 5, 1894 (acts, 1893-94, p. 789), and by the acts of February 8, 1898 (acts, 1897-98, p. 252), where the plaintiff had proceeded in the wrong forum, or brought the wrong form of action.” *Dawes v. New York, etc., R. Co.*, 96 Va. 733, 735, 32 S. E. 778.

**Time within Which Second Action Must Be Brought.**—If the plaintiff commence his action within the time

prescribed by the statute of limitations and then the suit is abated, he is within the equity of the proviso in such statute if he recommence his action within a year after the abatement. *Catlett v. Russell*, 6 Leigh 344, 373; *Brown v. Putney*, 1 Wash. 302.

## **XII. Effect of Expiration of Statute.**

**In General.**—Where a claim is barred by limitations, even though the court has jurisdiction of such a case, the suit should be dismissed. *Johnston v. Virginia, etc., Co.*, 96 Va. 158, 31 S. E. 85.

**As Evidence of Bad Faith of Conveyance to Secure Debt.**—The fact that the account for labor sought to be charged as a part of the consideration for the tract of land was barred by the statute of limitations at the date of the deed is a circumstance which may be weighed in determining the bona fides of the transaction. *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451, 452.

If, at the date of said deed of trust, the claim thereby sought to be secured is barred by the statute of limitations, that fact has a strong tendency to defeat said trust deed as a lien in favor of the wife against bona fide creditors of her husband. *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 540.

**Perfection of Vendee's Title Preventing Injunction against Collection of Purchase Money.**—A vendee who enters under a title bond and holds the land under that title till the statute of limitations bars a recovery against him by an adverse title, can not set up defect of title in his vendor, existing at the date of the sale to him, as grounds of injunction to a judgment for the purchase money. *Amick v. Bowyer*, 3 W. Va. 7; *Edwards v. Chilton*, 4 W. Va. 352. See the titles **INJUNCTIONS**, vol. 7, p. 512; **VENDOR AND PURCHASER**.

**As Conferring Title to Property.**—See the title **ADVERSE POSSESSION**, vol. 1, p. 199. And see ante, "Action for Recovery of Personal Property," VII, B, 3, d.

## **XIII. New Promise, Acknowledgment or Part Payment.**

### **A. NEW PROMISE OR ACKNOWLEDGMENT.**

#### **1. Operation and Effect.**

##### **a. Promise to Pay or Acknowledgment of Money Due.**

It is provided by statute that if any person against whom a right of action shall have accrued on an award, or contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise, as it might be maintained under section twenty-nine hundred and twenty, if such promise were the original cause of action. Va. Code, 1904, § 2922; W. Va. Code, ch. 104, § 8; *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 33 S. E. 986; *Jackson v. Hull*, 21 W. Va. 601; *Abrahams v. Swann*, 18 W. Va. 274; *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, 156; *Stansbury v. Stansbury*, 20 W. Va. 23; *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440, 442; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Sutton v. Burruss*, 9 Leigh 381; *Switzer v. Noffsinger*, 82 Va. 518, 523; *Coles v. Martin*, 99 Va. 223, 37 S. E. 907; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288; *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

It is now a well-settled doctrine that if a person makes a promise that he will pay a debt he justly owes, for the recovery of which all legal and equitable remedies are barred by the statute of limitations, such promise renders

him liable to an action; the promise being founded upon the same legal consideration of an obligation existing in foro conscientia. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440, 442; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 600.

A new assumpsit, for a store account barred by the six months' act of limitation, binds the debtor. *Beall v. Edmondson*, 3 Call 514.

#### **b. Acknowledgment as to Title to Property.**

It seems that the promise must be to pay money or the acknowledgment must be of money due. *Morris v. Lyon*, 84 Va. 331, 4 S. E. 734.

Thus in an action of detinue brought for the recovery of a diamond pin, the act of limitations was pleaded, and the plaintiff replied that the defendant within five years next before the action was brought acknowledged the pin to be the property of the plaintiff. On demurrer to the replication, it was held that the acknowledgment was not sufficient to repel the effect of the statute, and that the five-year limitation could not be enlarged by any acknowledgment. *Morris v. Lyon*, 84 Va. 331, 4 S. E. 734.

Whenever the possessor of land acknowledges a right in the claimant, the statute of limitations does not operate, because it negatives the idea of adverse possession. *Erschine v. North*, 14 Gratt. 60.

### **2. Who May Make.**

#### **a. In General.**

A promise to repel the plea of the statute of limitations, must be made by the person against whom the right to maintain an action has accrued. See Va. Code, 1873, ch. 146, § 10; *Switzer v. Noffsinger*, 82 Va. 518; *Bell v. Crawford*, 8 Gratt. 110.

#### **b. Partners.**

One partner can not as against his copartner revive an old obligation, which is barred by the statute of limitations. *Davis v. Poland*, 92 Va. 225, 23 S. E. 292. See *Woodson v. Wood*,

84 Va. 478, 5 S. E. 277. See the title PARTNERSHIP.

Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away with the bar of the act of limitations in an action brought against the firm, the existence of the debt being first proved by other testimony, or admitted by the pleadings, yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners. *Shelton v. Cocke*, 3 Munf. 191.

#### **c. Executors and Administrators.**

It is provided by statute that no acknowledgment or promise by any personal representative of a decedent, shall charge the estate of such decedent in any case in which, but for such acknowledgment or promise, the decedent's estate would have been protected by reason of the statute of limitations. Va. Code, 1904, § 2923; W. Va. Code, ch. 104, § 9; *Seig v. Acord*, 21 Gratt. 365; *Brown v. Rice*, 26 Gratt. 467, 473; *Brown v. Rice*, 76 Va. 629, 659; *Smith v. Pattie*, 81 Va. 654, 663; *Switzer v. Noffsinger*, 82 Va. 518, 524; *Fisher v. Duncan*, 1 Hen. & M. 563; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472; *Stiles v. Laurel, etc., Coal Co.*, 47 W. Va. 838, 35 S. E. 986. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 716.

#### **Debts Barred at Time of Decedent's**

**Death.**—Where a debt is barred by the statute of limitations at the death of the debtor, it can not be revived by the promise of the personal representative to pay it. *Seig v. Acord*, 21 Gratt. 365; *Brown v. Rice*, 26 Gratt. 467, 473; *Brown v. Rice*, 76 Va. 629; *Smith v. Pattie*, 81 Va. 654, 663; *Switzer v. Noffsinger*, 82 Va. 518, 524; *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472; *Fisher v. Duncan*, 1 Hen. & M. 563.

An administrator can not, by the acknowledgment in the pleading of a debt against his decedent, which is barred by the statute of limitations, or in any other way, remove the bar of the statute. *Stiles v. Laurel, etc., Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

Where an administrator is sole heir and distributee of his intestate, and there are judgments against him individually which attached to the intestate's estate as soon as it descended upon such heir and distributee, and there are debts against the intestate which are barred by the statute of limitations, the administrator can not revive those debts and repel the bar by any promise in writing or otherwise, but is bound to plead the statute against such debts; and if he refuses or fails to do so, it is the right of the judgment creditor, by reason of his interest in the funds, to interpose the plea. *Smith v. Pattie*, 81 Va. 654.

**Prolonging Vitality of Debt against Which Statute Has Not Run.**—In West Virginia the administrator by his verbal promise can no more prolong the vitality of a debt of his decedent, not yet barred, beyond the limit of the statutory bar, than he can revive a debt already barred; neither has he any option about protecting the estate by interposing the statute of limitations when applicable. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

Prior to 1841 the law in Virginia was that an executor could, by a promise to pay, give a new term to a debt not barred. *Braxton v. Harrison*, 2 Leigh 532. To restrain this power to a limited extent, that is, as to realty of a decedent, in 1841, the Virginia legislature passed an act containing the provision, "No debt shall be protected against the operation of the statute of limitations by this act, nor by any assumpsit of the executor or administrator, so as to charge the real estate in the possession of the heirs or devisees with the payment thereof."

*Findley v. Cunningham*, 53 W. Va. 1, 3, 44 S. E. 472.

**Admission by One of Two Representatives of Indebtedness of Decedent to Other.**—Where there are two joint executors or administrators, to one of whom the deceased was indebted in his lifetime for money loaned so long before his death, that when he died it was barred by the statute, the debt can not be revived by the admission of the other administrator or executor that the money had been loaned and was due. *Seig v. Acord*, 21 Gratt. 365.

#### d. Insolvents.

An insolvent debtor may make a new promise to pay one of his creditors a debt barred by the act of limitations, and may give a specific lien on his property to secure the same; and in the absence of fraud, other creditors can not object. The new promise is not per se such a fraudulent act as will entitle other creditors to set up the statute of limitations against the debt, or the security given for it. The only condition imposed on the creditor by § 2922 of the Code is that the new promise shall be in writing and signed by the debtor or his agent. *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

### 3. Form, Requisites and Sufficiency.

#### a. In General.

An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of promise or attempt at settlement. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 986; *Jackson v. Hull*, 21 W. Va. 601; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Abrahams v. Swann*, 18 W. Va. 274; *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, 156; *Sutton v. Burruss*, 9 Leigh 381; *Switzer v. Noffsinger*, 82 Va. 523;

*Coles v. Martin*, 99 Va. 223, 37 S. E. 907; *Stansbury v. Stansbury*, 20 W. Va. 23; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288; *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995; *Pendleton v. Whiting*, Wythe 38.

"The new promise may be either express or implied." *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 195.

"The acknowledgment must go to the fact that it is still due." *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995.

**Loose conversations** of an executor are not sufficient to repel the statute of limitations, even if a new promise by an executor would repel the statute. *Henderson v. Foote*, 3 Call 248.

#### b. Necessity of Writing.

The new promise must be in writing, and signed by the party or his agent against whom the right shall have accrued. Va. Code, 1904, § 2922; W. Va. Code, ch. 104, § 8; *Walker v. Henry*, 36 W. Va. 190, 14 S. E. 440, 442; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288; *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

#### c. Certainty as to Amount.

A new promise, in order to remove the bar of the statute of limitations, must not be uncertain, but it must acknowledge a fixed sum or balance, which admits of ready and certain ascertainment. *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154.

A promise to pay the "agreed balance on your judgment," is not good as a new promise, the amount of such agreed balance not appearing. If such balance refer to one thereafter agreed upon, and it does not appear that any balance was agreed, the promise is inoperative. *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154.

Where there is a promise to pay, not specifying any amount, but which can be made certain as to the amount, it is sufficient. *Coles v. Martin*, 99 Va. 223, 37 S. E. 907.

If an acknowledgment of a debt or

promise to pay is contained in a letter, it is not necessary that the amount of the debt or its date should be specified therein, but the particular debt, to which the letter refers, may be identified by extrinsic evidence; and if so identified clearly, and the promise is unequivocal, or the acknowledgment is of a subsisting debt, for which the defendant is liable and willing to pay, the bar of the statute is thereby removed. *Abrahams v. Swann*, 18 W. Va. 274.

The plaintiff, as a member of a partnership, which ended in 1880, and alone from 1880 to 1888, was the physician of the testatrix, but during this time rendered no bills. From 1888 to 1895, when the plaintiff removed to another locality, annual bills were rendered and paid, with the exception of the latter year. When he removed the testatrix wrote the plaintiff that it was a shame that the failure of herself and his other patients to pay him had caused his departure, and that if he would send her his bill she would pay it in a short time. This letter was held not to remove the bar of the statute as to the accounts prior to 1888. *Coles v. Martin*, 99 Va. 223, 37 S. E. 907.

#### d. Conditional Promise.

If the acknowledgment or new promise be coupled with any terms or conditions, they must be proven to have been performed, or else no recovery can be had. *Stansbury v. Stansbury*, 20 W. Va. 23; *Jackson v. Hull*, 21 W. Va. 601; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Farmers' Bank v. Clarke*, 4 Leigh 603.

In an action of debt on a promissory note negotiable at a bank by the holders against the indorser, the latter pleads the general issue with leave to give the statute the limitations in evidence. At the trial the plaintiffs prove a conditional promise by the indorser to pay the debt within the period of limitations. Such conditional promise does not suffice to take the case out of

the statute, unless performance of the condition be shown. *Farmers' Bank v. Clarke*, 4 Leigh 603.

#### **e. Undelivered Writing.**

An undelivered writing or due bill, found among a supposed debtor's papers after his death, is not a sufficient acknowledgment to prevent the bar of the statute of limitations. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910.

#### **f. Account Stated.**

A stated account not signed by the parties will not operate as an acknowledgment to take the demand out of the statute of limitations. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

No statement of account can have the effect of stopping the running of the statute of limitations upon the items of account which are included in the account stated, and which will otherwise be barred, unless there be a writing signed by the party to be charged, or his agent, expressly promising to pay the balance thus ascertained to be due, or in which there is such an acknowledgment of the liability that a promise of payment may be inferred therefrom. *Magarity v. Shipman*, 93 Va. 64, 24 S. E. 466; *Tazewell v. Whittle*, 13 Gratt. 329.

#### **g. Promise to Settle.**

**In General.**—It requires a promise to pay, or such an acknowledgment in writing that a promise to pay may be implied from it, to take a debt out of the statute of limitations, and it is well settled that a promise merely "to settle" is not sufficient. *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174; *Aylett v. Robinson*, 9 Leigh 45; *Bell v. Crawford*, 8 Gratt. 110; *Sutton v. Burruss*, 9 Leigh 381; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875.

An acknowledgment by the defendant that the items in the plaintiff's account are just, but that he had some offsets thereto, and a subsequent promise "to settle" all differences and ac-

counts fairly, and not to take advantage of the statute of limitations, is not sufficient to remove the bar of the statute. *Sutton v. Burruss*, 9 Leigh 381, 33 Am. Dec. 246.

Where a testator said, "I am too unwell to do business now, but when I am better I will settle your accounts," these words were held not to import such promise to pay or acknowledgment of the debt as would take the case out of the statute of limitations. *Aylett v. Robinson*, 9 Leigh 45.

A promise to settle and pay the balance found due on the settlement will not stop the running of the statute of limitations during the time such settlement is delayed. It is at most only a promise to pay an unascertained balance which is not sufficient. Nor is such a promise an obstruction of the plaintiff's right within the meaning of § 2933 of the Code; nor does the mere failure to comply with such promise amount to a fraud on the plaintiff, even if fraud could be relied on in a court of law to repel the bar of the statute of limitations. *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875.

The fact that the defendants had in writing referred to a "settlement," and one had written to one of the plaintiffs desiring and proposing a settlement, does not amount to such a promise as to prevent the bar of the statute. *Pendleton v. Whiting*, Wythe 38.

#### **h. Promise to Pay Stated Balance.**

A promise within five years to pay a stated balance due on an account stops the running of the statute. *Brooke v. Shelby*, 4 Hen. & M. 266.

#### **i. Depositions.**

A deposition of a maker of a note given and signed by him, in a case in which the obligee was not a party, for the purpose of obtaining a credit for it as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgment of the debt by him as will defeat the plea of

the statute of limitations in an action on the note by the obligee against him. *Dinguid v. Schoolfield*, 32 Gratt. 803.

**j. Entries by Debtor on His Own Books.**

Mere entries by a party in his own book of accounts will not operate as an acknowledgment, to take a demand out of the statute of limitations. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

**k. Implied Promise.**

**In General.**—An acknowledgment in writing from which a promise of payment may be implied is sufficient. Va. Code, 1904, § 2922; *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995, 997; *Dinguid v. Schoolfield*, 32 Gratt. 807.

"A distinct and unqualified acknowledgment would have the same effect as a promise, because from such an acknowledgment the law implied a promise to pay." *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995.

If there be an unequivocal admission that the debt is still due and unpaid, unaccompanied by any expression, declaration, or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the party is bound by it. *Rowe v. Marchant*, 86 Va. 177, 182, 9 S. E. 995.

**Acknowledgment Must Be Unqualified.**—If the new promise is to be raised by implication of law from such acknowledgment, there must be an unqualified acknowledgment of a subsisting debt, which the party is liable and willing to pay. *Abrahams v. Swann*, 18 W. Va. 274; *Jackson v. Hull*, 21 W. Va. 601; *Bell v. Crawford*, 8 Gratt. 110; *Aylett v. Robinson*, 9 Leigh 45; *Coles v. Martin*, 99 Va. 223, 37 S. E. 907; *Sutton v. Burruss*, 9 Leigh 381; *Switzer v. Noffsinger*, 82 Va. 518, 523; *Dinguid v. Schoolfield*, 32 Gratt. 803, 807; *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288.

**Implied Promise to Pay Bonds Destroyed by Obligor.**—R. and M. reside together. M. held bonds on R. which were barred by the statute of limitations. R., supposing M. to be in extremis, took and destroyed the bonds. M. recovering, R. wrote under a written statement of the date and amount of the bonds a statement that the above entries of the "amounts due by me" to plaintiff were correct, and that the bonds "were never paid by me." It was held, to be a sufficient acknowledgment of the debt to take it from under the statute, under Va. Code, 1873, ch. 146, § 10, providing that the promise to pay the debt must be in writing, and that an acknowledgment in writing of the debts from which a "promise of payment may be implied shall be deemed to be such promise." *Rowe v. Marchant*, 86 Va. 177, 9 S. E. 995.

"This was such an acknowledgment as implies a promise to pay. There could have been no other object in the writing. It is a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor. As was said by Judge Parker in *Aylett v. Robinson*, 9 Leigh 45: 'The promise or acknowledgment, to take the case out of the statute, must be an express promise, or such an acknowledgment of a balance due, unaccompanied by reservations or conditions.'" *Rowe v. Marchant*, 86 Va. 177, 181, 9 S. E. 995.

**l. Provision in Will Charging Property with Payment of Debts.**

It is provided by statute that no provision in the will of any testator, devising real estate or any part thereof subject to the payments of his debts, or charging the same therewith, shall prevent the statute of limitations from operating against such debts, unless it plainly appears to be the testator's intent that it shall not so operate. Va. Code, 1904, § 2924; W. Va. Code, ch. 104, § 10.



A charge in a will for payment of debts will not revive a debt barred by the statute at the death of the testator. *Jackson v. Hull*, 21 W. Va. 601; *Braxton v. Wood*, 4 Gratt. 25.

A provision in a will that the money arising from the sale of the testator's personal property, after the payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of debts, nor take any debt out of the operation of the act of limitations. *Brown v. Griffiths*, 6 Munf. 450.

Although specific direction be given in a will, the executors can not pay debts which are barred by the statute of limitations when relied on by the debtors. *Dunn v. Renick*, 33 W. Va. 476, 10 S. E. 810. \*

A devise of real estate for the payment of debts will not affect the operation of the statute of limitation upon such debts, whether they be barred at the testator's death or not, unless the contrary intention on his part plainly appears. *Johnston v. Wilson*, 29 Gratt. 379.

"In some of the earlier cases it was held, that a devise for the payment of debts had the effect of reviving debts already barred by limitation; but this doctrine has been long since exploded, and it is now held, that such a devise does not take a debt out of the operation of the statute." *Johnston v. Wilson*, 29 Gratt. 379, 384, citing *Taze-well v. Whittle*, 13 Gratt. 329; *Baylor v. Dejarnette*, 13 Gratt. 152.

## B. PART PAYMENT.

In order for part payment to take the case out of the statute of limitations, it must be a payment upon a specified debt, and not a payment upon account. *Bell v. Crawford*, 8 Gratt. 110.

It was held, in *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174, that a part payment of a note made after it had become barred by limitation was not sufficient to remove the bar of the statute.

**Part Payment as Defeating Presumption of Payment.**—Prior to July 1, 1850, there was no positive limitation as to the time within which an action must have been brought on a bond. And, although after that time a limit of twenty years was prescribed, an order for an account of debts in the case at bar, which was a suit to settle the estate of a deceased obligor, stopped the running of the statute. The presumption of payment after the lapse of twenty years is repelled by a payment within that time. *Bell v. Wood*, 94 Va. 677, 27 S. E. 504.

## XIV. Waiver of Statute.

**In General.**—"The doctrine is familiar that no man is compellable to stand on a right which the law gives him. He can always waive it, if he chooses; and the rule applies equally to a right conferred by the common law, by statute, and by a written constitution. Therefore, \* \* \* if the right to sue upon a violated contract is barred by the statute of limitations, the defendant may waive this defense. One method of waiver is to neglect to plead the statute when sued," etc. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440, 442.

**Allowance of Claim by Supervisors No Waiver of Statute.**—Powers and duties of a board of supervisors are not judicial in their character, but executive, and their allowance of a claim against the county is not an adjudication of the merits of the claim, so as to estop them, on application for a mandamus to compel its payment, from pleading the statute of limitations. *Board of Supervisors v. Catlett*, 86 Va. 158, 9 S. E. 999.

**Direction by Court to Commissioner as to Ascertainment of Rents and Profits.**—A direction by the court to a commissioner to ascertain rents and profits for a period of time greater than five years prior to the commencement of the suit, does not preclude the de-

fendant from relying upon the statute of limitations before the commissioner. *Ogle v. Adams*, 12 W. Va. 213.

**Enforcement of Payment in Equity after Waiver.**—Where corporation's property, including unpaid subscriptions, are conveyed to secure its debts which, though barred by limitation, are not extinguished, equity will aid in enforcing their payment. *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129.

**Effect of Waiver as Rendering Executor Collecting Debt Liable on Bond.**—When evidence shows that administrator collected, or assumed to pay debts due decedent, he and his sureties are liable, though the debts may have been barred by statute of limitations when he qualified. *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349. See the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483.

## **XV. Pleading and Practice.**

### **A. ANTICIPATING DEFENSE IN DECLARATION.**

In an action of assumpsit against an administrator de bonis non, counts upon promises made by an executor or former administrator of the deceased debtor may be joined with counts on promises by the deceased debtor himself in order to save the statute of limitations. *Bishop v. Harrison*, 2 Leigh 332. See post, "Pleading New Promise or Acknowledgment," XV, B.

The answer of one coparcener to a bill to set up a demand against the estate of the father of the coparcener and charging that in making a new promise he acted as agent for his coparceners, which answer denies such agency, operates as a denial of the charge of agency by the other parceners, though they have not appeared. *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472.

### **B. PLEADING NEW PROMISE OR ACKNOWLEDGMENT.**

Where the plaintiff relies on a new promise, evidence of such new prom-

ise can not be received in the absence of a pleading setting it up or of the notice required. *Noell v. Noell*, 93 Va. 433, 25 S. E. 242; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288. See post, "Replication," XV, D.

If, in any case of an action of debt on simple contract, the plaintiff would rely on a subsequent acknowledgment to take the case out of the statute of limitations, it seems he must count on such subsequent acknowledgment in his declaration. The rule is otherwise in an action of assumpsit. *Butcher v. Hixton*, 4 Leigh 519.

It is competent for any party interested in a fund to take advantage of the statute of limitations, notwithstanding the executor of the deceased party refused to do so. *Jackson v. Hull*, 21 W. Va. 601; *Woodyard v. Polsley*, 14 W. Va. 211; *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419; *Smith v. Pattie*, 81 Va. 654, 666; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487.

### **C. RAISING DEFENSE.**

#### **1. Who May Raise Objection.**

##### **a. In General—Parties.**

As a general rule the plea of the statute of limitations is a personal defense to be made only by the party against whom the demand is asserted, and can only be waived by him if he desires to do so. *Clayton v. Henley*, 32 Gratt. 65; *Smith v. Hutchinson*, 78 Va. 683; *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419; *Welton v. Boggs*, 43 W. Va. 620, 32 S. E. 232; *Clarke v. Hogeman*, 13 W. Va. 718, 730; *Baltimore, etc., R. Co. v. Vanderwerker*, 44 W. Va. 229, 28 S. E. 829; *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Woods v. Douglass*, 52 W. Va. 517, 44 S. E. 234.

The statute of limitations is a personal defense, and where a suit is instituted by a creditor to recover a debt, the debtor alone can successfully plead said suit. *Baltimore, etc., R. Co.*

*v. Vanderwerker*, 44 W. Va. 229, 28 S. E. 829.

#### **b. Privies in Estate.**

Privies in estate, such as heirs, devisees, vendees, or mortgagees of property, may use it to defend their property. *McClagherty v. Croft* 43 W. Va. 270, 27 S. E. 246; *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487; *Woods v. Douglass*, 52 W. Va. 517, 44 S. E. 234.

If a legatee relies on statute in his answer to a suit against him and the executor, it protects the estate. *Tazewell v. Whittle*, 13 Gratt. 329.

#### **c. Strangers.**

A mere stranger to a claim, as a creditor, although he may be injuriously affected by the failure of the debtor to plead the statute, can not either set it up himself, or compel his debtor to do so, as the privilege is personal. *Welton v. Boggs*, 45 W. Va. 620, 32 S. E. 232.

#### **d. One of Several Joint Defendants.**

It is undoubtedly a general rule that the defense of the statute is a personal privilege, and must be pleaded by the party who would take advantage of it, but when the interest of the defendants is joint, and the plea of the statute by one is not purely personal as to him, it ensures to the benefit of all. *Ashby v. Bell*, 80 Va. 811.

#### **e. Creditors.**

**In General.**—While the right to plead the statute of limitations as a defense is generally personal to the debtor, yet where equity has taken possession of his estate for the purpose of distributing it among the creditors, any one of them interested in the fund may interpose the defense to the claim of another creditor. *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419; *Tazewell v. Whittle*, 13 Gratt. 329, 345; *Woodyard v. Polsley*, 14 W. Va. 211; *Werdenbaugh v. Reid*, 20 W. Va. 588.

It was said in *Elliot v. Trahern*, 35 W. Va. 634, 14 S. E. 223, that it was

settled law in West Virginia that in marshaling assets, unless it be in a proceeding to subject the real estate of a decedent to the payment of his debts, the statute of limitations could not be set up by one creditor of an estate against another creditor to give his claim precedence.

**Debtor Not Relying on It.**—It is settled law that one creditor may set up the statute of limitations in a creditors' suit against the demand of another, although the debtor himself did not rely upon it. *Callaway v. Saunders*, 99 Va. 350, 38 S. E. 182.

**Creditors of Partnership.**—Where there is a contest between the creditors of a partnership in a suit brought for the purpose of settling the partnership, one creditor should be allowed to plead the bar of the statute of limitations against the claims of the other creditors in any proper way, as by exceptions to the report of a commissioner made in the cause. *Conrad v. Buck*, 21 W. Va. 396.

**Creditors of Deceased.**—The creditors of a deceased may appear before a commissioner appointed in a creditors' suit to ascertain the debts, etc., and contest the claims of each other on the ground that they are barred by the statute of limitations, and it is the duty of the commissioner to report whether the claims are barred or not. *Woodyard v. Polsley*, 14 W. Va. 211.

**Judgment Creditors.**—If an executor or administrator refuses to plead the statute of limitations against a claim against his decedent's estate, a judgment creditor of the estate may file the plea. *Smith v. Pattie*, 81 Va. 654.

Where a suit was brought by a judgment creditor to subject the lands of a debtor to the satisfaction of his judgment, and the plaintiff alleges the fact that there is another judgment against the same defendant, older in point of time, but which has not been kept alive by issuing execution as is required by statute, but the defendant

being alive and not pleading the statute as to the older judgment, the plaintiff in the suit has no right to file or to rely on the plea. *Welton v. Boggs*, 45 W. Va. 620, 32 S. E. 232.

The question as to whether one judgment lienor can plead the statute of limitations against other lienors of a common living debtor is apparently an undecided question in West Virginia. It was brought up but not finally passed upon in several cases, so may be considered as an open question. *McClagherty v. Croft*, 43 W. Va. 270, 27 S. E. 246; *Woodyard v. Polsley*, 14 W. Va. 211; *Lee v. Feamster*, 21 W. Va. 108, 111; *Conrad v. Buck*, 21 W. Va. 396, 411.

#### f. Purchasers.

If one creditor may plead the statute against another, as where they are contesting the claims of each other against the estate of a deceased debtor, a fortiori, a purchaser, who stands in no less favorable position, may rely upon the bar of the statute to protect his land from the claims of creditors of his deceased vendor. *Werdenbaugh v. Reid*, 20 W. Va. 588.

**Pendente Lite Purchasers.**—The statute of limitations does not run in favor of a pendente lite purchaser, and, being in possession of land so purchased, he will not be regarded as holding it adverse to the parties to the suit during the litigation. *Lynch v. Andrews*, 25 W. Va. 751.

**When Contract Is Repudiated.**—Where the owner of land repudiated a contract for its conveyance because of the failure of the purchaser to comply with the terms of the contract, he must restore the amount of the purchase money which has been paid him under the contract. Where he fails to refund this payment he keeps the contract open and can not be permitted to rely upon the statute of limitations to protect himself from a decree for the repayment thereof. *Bowles v. Woodson*, 6 Gratt. 78.

**Where Conveyance Attacked as Fraudulent.**—Where the conveyance of land by a debtor in his lifetime is assailed by his creditors after his death on the ground of being fraudulent, the vendee may plead that the debts are barred by the statute of limitations. *Werdenbaugh v. Reid*, 20 W. Va. 588.

**g. Assignees.**

Where the assignee sues upon a note, he may plead the statute of limitations against a set-off based upon a demand against the assignor. *Walker v. Burgess*, 44 W. Va. 399, 30 S. E. 99. See the title ASSIGNMENTS, vol. 1, p. 745.

One of two assignees claiming the same judgment can not plead the statute of limitations as against each other. *Clarke v. Hogenan*, 13 W. Va. 718.

#### h. Escheators.

An escheator who is defendant to a petition under 1 Rev. Code, ch. 82, § 14, by a creditor of a purchaser whose lands have been escheated, has the same right to plead the statute of limitations in bar of the petition that a representative of the debtor would have to plead the statute in bar of an action. *Watson v. Lyle*, 4 Leigh 236.

#### i. Executors and Administrators.

As to right and duty of executors and administrators to plead the statute of limitations in an action against decedent's estate, see the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 718.

### 2. Mode and Sufficiency of Objection.

#### a. Necessity of Pleading.

##### (1) Defense to Original Cause of Action.

**In General.**—Nothing is better settled than the rule that in order for the statute of limitations to be of avail to a party it must be relied on in the pleadings. *Gibson v. Green*, 89 Va. 524, 16 S. E. 661; *Hickman v. Stout*, 2 Leigh 6; *Smith v. Hutchinson*, 78 Va. 683; *Colvert v. Millstead*, 5 Leigh 88; *Trimyer v. Pollard*, 5 Gratt. 460; *Seborn v. Beckwith*, 30 W. Va. 774, 5 S.

E. 450; *Humphreys v. Spencer*, 36 W. Va. 11, 14 S. E. 410; *Hudson v. Hudson*, 6 Munf. 352; *Major v. Gibson*, 1 Pat. & H. 48; *Taylor v. Richards*, 3 Munf. 8; *Eubank v. Ralls*, 4 Leigh 308; *Jackson v. Cutright*, 5 Munf. 308; *Herrington v. Harkins*, 1 Rob. 591; *Virginia, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838; *Tazewell v. Whittle*, 13 Gratt. 329, 344; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671; *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160; *Riddle v. McGinnis*, 22 W. Va. 253; *Ogle v. Adams*, 12 W. Va. 213.

The defense of the statute of limitations is not admissible under the general issues of nonassumpsit and nil debet. *Virginia, etc., Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838.

Before a party can have the benefit of the bar created by the statute of limitations, he must plead the statute, or in some manner indicate his intention to claim the benefit of it, otherwise, it will be considered by the court to be waived. *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160.

The statute of limitations can not be insisted on in equity, without being pleaded, or in some form relied on as a defense, in the pleadings. *Hickman v. Stout*, 2 Leigh 6; *Gibson v. Green*, 89 Va. 524, 526, 16 S. E. 661; *Hubble v. Poff*, 98 Va. 646, 647, 37 S. E. 277; *Woodyard v. Polsley*, 14 W. Va. 211, 220.

**It is no error to refuse to instruct as to effect of statute of limitations**, where a plea setting up the defense has been rejected. *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

**Failure to File Plea Due to Mistake of Counsel.**—A mistake of the defendant's counsel in advising him that he could avail himself of the defense of limitation without pleading it, is sufficient grounds for leave to file the pleas in addition to the answer. *Jackson v. Cutright*, 5 Munf. 308.

**Action for Seduction.**—In an action by a father for damages for the seduction of his daughter, if the defendant would rely on the statute of limitations of one year, he must plead it before or at the trial. It can not be relied upon by instructions to the jury. *Riddle v. McGinnis*, 22 W. Va. 253; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

**Action on Store Account.**—A defendant can not take advantage of the act imposing a limitation of one year on actions on store accounts without pleading it, the court not being directed to cause such items as have been of more than one year's standing in such accounts to be expunged, or to instruct the jury to disregard them, and the jury not being required to disallow and reject them without a plea. *Taylor v. Richards*, 3 Munf. 8.

**Appellate Court.**—Where the statute of limitations is not pleaded nor relied upon in the lower court, the appellate court will consider that the statute is out of the case. *Ogle v. Adams*, 12 W. Va. 213.

## (2) Defense to Set-Off.

In Virginia a defendant may make the defense of set-off, other than the equitable set-off under the Code, § 3299, either by a formal plea or by a notice of the set-off, accompanied by an account of set-offs. If the defense be by plea, the plaintiffs must reply the statute specially. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838; *Trimyer v. Pollard*, 5 Gratt. 460.

If a defendant in an action of debt does not plead a set-off, but gives notice of it, and files an account of set-off, the plaintiff has no opportunity to reply to the statute of limitations, and may avail himself of the statute upon the trial. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838; *Trimyer v. Pollard*, 5 Gratt. 460; *Smith v. Pattie*, 81 Va. 654, 664; 4 Min. Inst. (1st Ed.) 660.

Where a plaintiff has a right to the defense of limitation without pleading it, an instruction that the same if be-

lieved would be a defense, is not erroneous as operating as a surprise to the defendant. *Sexton v. Aultman*, 92 Va. 20, 22 S. E. 838.

**(3) Delay in Applying for Writ of Error or Bill of Review.**

**Writs of Error.**—The statute of limitations of writs of error, if it applies to writs of error coram nobis, can not be relied on without being pleaded. *Eubank v. Ralls*, 4 Leigh 308. See the title APPEAL AND ERROR, vol. 1, p. 418.

**Bill of Review.**—It is not necessary to plead the act of limitations against a bill of review, for it ought to appear in the bill itself that it is exhibited within the time prescribed by law, or that the complainant is protected by some of the savings in the act, otherwise it ought not to be received. *Shepherd v. Larue*, 6 Munf. 529. See the title BILL OF REVIEW, vol. 2, p. 383.

**b. Plea.**

**Necessity of Stating Facts Constituting Bar.**—The defense of the statute of limitations is an affirmative one, and a plea of the statute which merely avers the pleader's conclusions of law, is bad. The plea must as a general rule set up the facts constituting the bar, as for instance, that the alleged cause of action did not accrue within certain designated years previous to the institution of the suit. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. 834.

A plea of the act of limitations should state on what act defendant relies. *Wortham v. Smith*, 15 Gratt. 487.

**In Action of Assumpsit.**—In an action of assumpsit for the use and occupation of land, where the cause of action arises upon the breach of the contract, and not at the time of making the same, the plea that the defendant did not assume, as in the declaration set forth, within five years prior to the commencement of this suit, is not a proper plea. It should be that

the action did not accrue within five years, etc. *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. 834.

The plea of non assumpsit within five years, if general, will refer to the time of the plea pleaded, whereas it ought to refer to the institution of the suit, and should conclude with an averment. *Smith v. Walker*, 1 Wash. 134.

**In Action of Covenant.**—A plea to an action of covenant that the defendant "did not, within twenty years next before the bringing of this suit, break his covenant as the plaintiff hath alleged," is a good plea of the statute of limitations, as it is equivalent to saying that the cause of action did not accrue within that time. *Davis v. McMullen*, 86 Va. 256, 9 S. E. 1095.

**In Action for Trespass to Real Estate.**—In an action of trespass on the case for damages for removing and mining coal, a plea of limitations that more than three years before the commencement of the suit, the defendants were in peaceful possession of the land, claiming title under lease, and that they have continuously remained in possession more than three years before the commencement of the action, was bad for want of certainty, and for the reason it did not state under whom the lease mentioned was claimed. *Perdue v. Caswell Creek Coal, etc., Co.*, 40 W. Va. 372, 21 S. E. 870.

**In Proceedings by Motion.**—The pleadings on a motion for a judgment for money, after notice, are intended to be of an informal nature, except where statutes require otherwise, as under § 3299 of the Code; and where a plea of the statute of limitations in form applies to only two out of three claims sued on, but it is clear that both parties and the court treated it as applicable to all the claims sued on, and all were in fact barred by the statute, and the trial court so held, its judgment will not be reversed, though technically erroneous. The effect of a reversal would be to order a new trial.

when the pleadings could be so amended as to make the plea applicable to all the demands and hence the error is harmless. *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875.

**Conclusion of Plea.**—The plea should conclude with a verification. *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180.

**Verdict as Curing Defective Plea.**—When the plea of the statute is defective, but is not demurred to, it is cured after verdict by § 3, ch. 177, Code, 1873. *Davis v. McMullen*, 86 Va. 256, 9 S. E. 1095.

#### c. Answer.

##### (1) In General.

In a bill by a creditor of a testator against the executor of a legatee, where the latter relies upon the statute of limitations in his answer, it is sufficient to protect the estate from a decree against the executor. *Jackson v. Hull*, 21 W. Va. 601.

The same strictness of pleading is not required in equity as at law. It is not common to plead the statute specially or formally in equity, but only to rely upon it in general terms in the answer. The only reason for requiring the defense to be made by a plea or answer is that the plaintiff may have an opportunity to take the case out of the operation of the statute if he can. *Tazewell v. Whittle*, 13 Gratt. 329; *Smith v. Pattie*, 81 Va. 654.

Anything in an answer which apprises the plaintiff that the defendant relies on the statute of limitations, is sufficient, if such facts are stated as are necessary to show that the statute is applicable. *Tazewell v. Whittle*, 13 Gratt. 329.

**The answer of an administrator** pleading the statute of limitations to a demand against the estate of his decedent goes to the defense of both the personal and real assets. *Findley v. Cunningham*, 53 W. Va. 1, 44 S. E. 472.

##### (2) Amendment Setting up Statute.

After issue has been joined and the

cause set for hearing, the defendant in chancery may be permitted for good cause shown to amend his answer and plead the statute of limitations. *Jackson v. Cutright*, 5 Munf. 308.

In *White v. Turner*, 2 Gratt. 502, a defendant in equity was allowed to amend his answer for the purpose of setting up the statute of limitations in bar of the plaintiff's claim.

In an action of detinue, the replication to the defendant's plea of the statute of limitations being insufficient, a demurrer was sustained, and the action was dismissed. The declaration contained the averments for the lack of which the replication was defective. It was erroneous to dismiss the action, as the plaintiff should have been given leave to amend the replication. *Morris v. Lyon*, 1 Va. Dec. 615.

#### d. Demurrer.

**General Rule in Virginia.**—In Virginia it has been held, that the statute of limitations can not be taken advantage of in a court of equity upon a demurrer to the bill. *Hubble v. Poff*, 99 Va. 646, 37 S. E. 277. That case dealt with a pure statute of limitation—one which affected the remedy only, and which did not touch the right. *Savings Bank v. Powhatan Clay Mfg. Co.*, 102 Va. 274, 46 S. E. 294.

Where an action of debt is brought on a judgment after ten years from the date thereof, and the defendant wishes to avail himself of the statute of limitations, it is necessary that he should do so by plea. A demurrer to the declaration is not the proper mode to take advantage of the statute. *Herrington v. Harkins*, 1 Rob. 591.

A note on which suit is brought may be barred by the statute of limitations, and the fact may be apparent upon the face of the declaration, yet the court would not, upon demurrer, dismiss the plaintiff's action. The barred note would be regarded as a good consideration for the new promise, and, if the defendant wished to interpose the

defense, he would be required to do so by special plea; and this view is borne out by the statute, which only requires the new promise to be in writing, recognizing the old consideration as sufficient, and the plaintiff may either sue on such new promise or on the original cause of action. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440, 442.

**General Rule in West Virginia.**—In West Virginia it has been held, in numerous cases, that when a bill in equity discloses that the cause of action is within the statute of limitations, the bill for that reason is demurrable, unless sufficient facts are set forth in it to avoid laches or take the case out of the statute. *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 623; *Jarvis v. Martin*, 45 W. Va. 347, 31 S. E. 957; *Jackson v. Hull*, 21 W. Va. 601; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795; *Woods v. Douglass*, 52 W. Va. 517, 44 S. E. 234; *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26; *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507; *Paxton v. Paxton*, 38 W. Va. 616, 617, 18 S. E. 765; *Humphrey v. Spencer*, 36 W. Va. 11, 17, 14 S. E. 410, 412; *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. 450; *Laidley v. Laidley*, 25 W. Va. 525, 530; *Crumlish v. Shenandoah Val. R. Co.*, 28 W. Va. 623, 637.

In a chancery cause for the enforcement of a legal claim where a court of law and a court of equity have concurrent jurisdiction, the statute of limitation will be given effect upon demurrer when it plainly appears on the face of the bill that the statute applies in the case. *Maxwell v. Wilson*, 54 W. Va. 495, 46 S. E. 349.

To sustain a demurrer to a bill on the defense of the statute of limitations, the facts to warrant that defense must distinctly appear on the face of the bill. *Braggs v. Wiseman*, 55 W. Va. 330, 47 S. E. 90.

**Rule in Action to Enforce New Statutory Rights.**—Where a statute creates

a right which did not exist at common law, and fixes a time within which that right may be enforced, the limitation is of the essence of the right and not merely of the remedy, and a bill seeking to enforce such right must affirmatively show that the suit is brought within the time limited by the statute, else it will be bad on demurrer. *Savings Bank v. Powhatan Clay Mfg. Co.*, 102 Va. 274, 46 S. E. 294.

Although the rule is that a defendant at law must plead the statute of limitations and can not raise the defense by demurrer, yet where a cause of action which did not exist at law is given by statute, and the bringing of the suit within a certain period is made an essential element of the right to sue, and there is no saving or qualification, objection may be taken by demurrer. Such a statute is not strictly a statute of limitations, and the right to sue must be accepted in all respects as the statute gives it. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431.

**Where in an action for death by wrongful act** the declaration showed on its face that the action was instituted more than twelve months after the injury occurred, a demurrer to the declaration was properly sustained. *Manuel v. Norfolk, etc., R. Co.*, 99 Va. 188, 37 S. E. 957.

**A bill to enforce a mechanic's lien** which does not show on its face that the suit was brought within the time prescribed by statute is bad on demurrer. *Savings Bank v. Powhatan Clay Mfg. Co.*, 102 Va. 274, 46 S. E. 294, citing *Hubble v. Poff*, 98 Va. 646, 37 S. E. 277.

#### **e. Exceptions to Commissioner's Report.**

The bar of the statute may be set up in equity by excepting to the report of the commissioner. *Jackson v. Hull*, 21 W. Va. 601; *Woodyard v. Polsley*, 14 W. Va. 211; *Smith v. Pattie*, 81 Va. 654; *Johnston v. Wilson*, 29 Gratt. 379,



384; *Jincey v. Winfield*, 9 Gratt. 708, 721; *Leith v. Carter*, 83 Va. 889, 5 S. E. 584; *Ayre v. Burke*, 82 Va. 338, 4 S. E. 618; *Blair v. Carter*, 78 Va. 621; *Tazewell v. Whittle*, 13 Gratt. 329; *Conrad v. Buck*, 21 W. Va. 396.

If a creditor fail to contest a claim, which on the face of the commissioner's report appears to be barred, he may except, and it is the duty of the court to sustain the exception, unless it appear that the bar of the statute had been removed, or he may for good cause recommit the report. *Woodyard v. Polsley*, 14 W. Va. 211.

The statute of limitations may be relied on before a commissioner, even where it has not been pleaded before the court prior to the order of reference. *Woodyard v. Polsley*, 14 W. Va. 211.

In a suit by a creditor against an expired corporation, where the corporation in its answer pleads a set-off against the plaintiff's demand, the plaintiff may file a plea of the statute of limitations before the commissioner, or in any other manner make that defense before the commissioner taking an account in the case. *Stiles v. Laurel Fork Oil, etc., Co.*, 47 W. Va. 838, 35 S. E. 986.

#### f. Motion to Quash Process.

Whether or not a plaintiff's remedy for a negligent injury is barred by statute of limitations can not be raised by a motion to quash the process in the case. *Lane v. Bauserman*, 103 Va. 146, 48 S. E. 857.

#### 3. Time of Raising Objection.

**After Joinder of Issue on Another Plea.**—A plea of the act of limitation ought not to be received after issue has been joined on another plea, unless some good reason be assigned why the plea of the act was not sooner tendered. *Martin v. Anderson* 6 Rand. 19.

It is not error in the circuit court to reject a plea of the statute of limitations and not guilty jointly pleaded in

an action of trespass, the latter having been previously entered and the court permitting the former to be entered separately in lieu of the double plea. *Lively v. Ballard*, 2 W. Va. 496.

**At Trial.**—In *assumpsit*, defendant pleaded the general issue at the September term, 1818, his death was suggested in October, 1823, and the cause was revived against his administrator at the March term, 1824. The administrator obtained leave, at the October term, 1825, to plead the statute of limitations, but by mistake, as it appeared, the plea was not then filed. At the March term, 1826, the cause was called for trial, and the administrator asked leave to put in his plea. Held, that it could not then be received. *Clopton v. Clarke*, 7 Leigh 325.

**After New Trial Granted.**—The statute of limitations may be pleaded after a new trial has been granted, the jury having found against the presumption of payment, which prevented its being pleaded on the former trial. *Tomlin v. How, Gilmer* 1.

**Office Judgment Set Aside.**—A defendant can not plead the act of limitations upon setting aside an office judgment after the next succeeding term, without good cause shown. *Backhouse v. Jones*, 5 Call 462.

**Raising Question on Appeal.**—Limitation is no defense, unless pleaded or otherwise relied on in the lower court. *Seborn v. Beckwith*, 30 W. Va. 774, 5 S. E. 450.

In a creditors' suit, if the statute of limitation has not been specially pleaded, nor relied on before the commissioner, and he failed to recognize the statute, and therefore endorsed no exception on the report, the appellate court will consider the statute of limitations out of the case, although the report upon its face shows that some of the claims allowed by the commissioner were barred by the statute. *Woodyard v. Polsley*, 14 W. Va. 211. See *Ogle v. Adams*, 12 W. Va. 213.

Where, in an action to enjoin a sale under a trust deed on the ground that it has been merged in a judgment on the bond secured by it, the bill not only fails to plead the statute of limitations as to the judgment, but prays that the parties entitled to it be required to enforce it in the usual way, the statute is not available on appeal. *Gibson v. Green*, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888.

## D. REPLICATION.

### 1. Necessity.

**Pleading Exceptions to Statute.**—If the defendant in equity plead the statute of limitations, and the plaintiff comes within any of the exceptions in the act, he will not be entitled to the benefit thereof, unless he sets it forth by a replication. *Lewis v. Bacon*, 3 Hen. & M. 89; *Switzer v. Noffsinger*, 82 Va. 518; *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. 809.

Where the bar is pleaded, plaintiff, to bring himself within its savings, must set forth the facts relied on either by replication or by amending his bill. *Switzer v. Noffsinger*, 82 Va. 518.

On the 16th day of June, 1865, in the chancery cause of *Ruffner & Long v. Donally* and others, pending in the circuit court of Kanawha county, a decree was entered directing the receiver to lend out certain money in his hands to the credit of said suit. In pursuance of said order, W., the receiver, loaned to S. \$125, and took a promissory note therefor, payable on demand to W., receiver of the circuit court of said county, with interest from date (the 5th day of January, 1866), showing on the face of said note that it was borrowed from the chancery cause of R. & L. versus D. et als. W. died, and L. was appointed general receiver of said court in his stead, June 2, 1877. G. S. L., as special receiver, was directed on the 10th April, 1884 (he having been appointed such)

to collect said fund, and in pursuance of said direction instituted this suit against S., and filed his declaration in the month of November, 1885. The defendant interposed the plea of the statute of limitations, to which the plaintiff objected, and replied generally, but filed no special replication. It was held, that the claim upon which said suit was predicated was barred by the statute of limitations, and if the plaintiff relied upon any of the statutory or other exceptions to take said claim out of the operation of said statute it should have been set forth in a replication to said plea. *Laidley v. Smith*, 32 W. Va. 387, 9 S. E. 809.

**Want of Replication Not Cured by Verdict.**—A plea of the statute of limitations concludes with a verification, and should be replied to before trial, and a want of replication is not cured by verdict. *Baltimore, etc., R. Co. v. Faulkner*, 4 W. Va. 180.

A verdict and judgment for plaintiff will be reversed, where there is no replication to a properly verified plea of the statute, unless the plea is immaterial. *Curry v. Mannington*, 23 W. Va. 14, 15.

### 2. Contents and Sufficiency.

**Pleading Acknowledgment or New Promise.**—Where in an action of detinue the defendant pleaded the statute of limitations, and the plaintiff replied that within five years, etc., defendant acknowledged the article detained to be plaintiff's property, it was held, insufficient in not averring a promise to deliver the possession. *Morris v. Lyon*, 1 Va. Dec. 615. See *Morris v. Lyon*, 84 Va. 331, 4 S. E. 734.

A plea of the act of limitations in bar of a scire facias to revive a judgment can not be repelled by a replication that the defendant within five years next before the suing out of the scire facias promised to pay the amount of the judgment. *Day v. Pickett*, 4 Munf. 104.

**Statement as to Obstruction of Action by Defendant by Absence from State.**—A replication to a plea of the statute of limitations under the eighteenth section of the chapter one hundred and four of Code of West Virginia need not allege, that the defendant removed from this state with intent to obstruct the plaintiff in the prosecution of his action, as the removal itself is such an obstruction. *Abell v. Penn, etc., Ins. Co.*, 18 W. Va. 400.

**Statement as to Fraudulent Assurances or Practices by Defendant.**—A replication, which in general language states, that the defendant by assurances of settlement and adjustment and renewal of a policy made with intent to deceive, mislead and defeat the plaintiff's right of action, is a good replication under the eighteenth section of chapter one hundred and four of the Code of West Virginia, though the particular assurances or terms of proposed adjustment are not stated in the replication. *Abell v. Penn, etc., Co.*, 18 W. Va. 400.

**Statement as to Fraud of Defendant.**—If fraud is not discovered until some time after it was practiced, and within the time of limitation, this would suffice to take the case out of the statute. To enable the plaintiff to avail himself of such matter he must plead it specially in his replication. *Rice v. White*, 4 Leigh 474.

In an action on the case for a deceit, if the defendant pleaded that the cause of action did not accrue within five years next before suing out the writ, a replication that the fraud came to the plaintiff's knowledge within that time is not good, and issue joined upon it should be set aside by the court as immaterial. *Callis v. Waddy*, 2 Munf. 511.

**Statement as to Suspension of Remedy by War.**—A special replication to the plea of the statute of limitations, which does not allege the exact period of the war, or exactly how long the

courts were closed, when these facts are relied upon as an avoidance, is bad, for that period only could be excepted from the computation of time which might otherwise prove a bar; for it should appear upon the face of the pleading that, after taking out the excepted time, five years have not elapsed since the action accrued. The replication by not stating the period, but leaving it wholly in blank, does not present a certain issue. *Huffman v. Callison*, 6 W. Va. 301.

To an action brought upon a bond or promissory note after the Code of West Virginia went into operation on the 1st day of April, 1869, § 5, ch. 104, applies; and consequently a special replication to the plea of the statute of limitations, that said statute was suspended in any county during the whole of the late war between the so-called confederate states and the United States, presents an immaterial issue and should be rejected. *Huffman v. Callison*, 6 W. Va. 301.

In an action against a county, where the statute of limitations is pleaded, it was held, that the plaintiff could not reply that he could not truly make the test oath required by the Code of West Virginia, 1868, ch. 106, § 27, and that therefore his remedy was obstructed, as no plaintiff could do so when he sued a corporation. *Stuart v. Greenbrier County*, 16 W. Va. 95.

**Commencement of Former Suit in Time.**—If in assumpsit the defendant plead the act of limitations, and the plaintiff would avoid the plea by a former suit having been brought in time he must reply the former suit specially; he can not give it in evidence under general replication to the plea. *Bogle v. Conway*, 3 Call 1.

**Statement That Plaintiff Sued within Statutory Period after Notice of Right to Sue.**—Where to an answer setting up the statute of limitations, the plaintiff files his replication, alleging that he did bring and prosecute his suit in his behalf, within five years from the

time of the defendant's liability to be sued, and notice to the plaintiff of the matter complained of in the bill, the replication will not avoid the statute of limitations. *Vanbibber v. Beirne*, 6 W. Va. 168.

**Recovery of Property Transferred to Plaintiff in Payment of Debt.**—In an action of assumpsit against an administrator, he pleaded the statute of limitations. The special replications to the plea averred that the defendant's intestate sold to the plaintiff slaves in payment of the debt declared on, and that the defendant since the death of his intestate had, as administrator, sued for and recovered upon the title alone, without regard to the intestate's indebtedness to the plaintiff, the slaves from the plaintiff within five years before the action was brought. It was held, that the replication did not afford a good answer to the plea. "They do not show on what ground the supposed vendor recovered the property, after it was sold and delivered for valuable consideration, as averred in the replications. If the contract of sale was void, it could not have barred or suspended the right of action, for the original debt; and certainly it could not, if rendered void by the fraud or illegal conduct of the vendee." *Johnson v. Jennings*, 10 Gratt. 1, 6.

**Effect Where Both Plea and Replication Are Demurrable.**—If a replication be insufficient and demurred to as such, yet if the plea be also insufficient, the court will go up to the first fault and give judgment for the plaintiff. *Day v. Pickett*, 4 Munf. 104. See *Baird v. Mattox*, 1 Call 257, 251; *Kirtley v. Deck*, 3 Hen. & M. 388; *Callis v. Waddy*, 2 Munf. 511.

**Conclusion.**—A replication setting up that the plaintiff was unable to make the suitor's test oath required by statute, as an excuse for delay in suing, should conclude with a verification. *Huffman v. Alderson*, 9 W. Va. 616.

### 3. Amendment.

Where in an action of detinue, the

replication to defendant's plea of the statute of limitations being insufficient, a demurrer thereto was sustained, and the action dismissed, although the declaration contained the averments for the lack of which the replication was defective, it was held, that the judgment dismissing the action was erroneous; that plaintiff should have had leave to amend his replication. *Morris v. Lyon*, 1 Va. Dec. 615.

## E. EVIDENCE.

### 1. Presumption and Burden of Proof.

**Presumption of Payment.**—The presumption of payment of a debt does not, as a matter of law, arise within the statutory period of limitations, though the lapse of time may be relied on in connection with other circumstances as evidence of payment. *Parsons v. McCracken*, 9 Leigh 495; *Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57. See the title PRESUMPTIONS AND BURDEN OF PROOF.

**Presumption as to Demand.**—If a demand be necessary before suit, the period of limitation does not commence to run until demand; but demand must be made within a reasonable time, which is the term fixed by the statute of limitations; and where no demand is shown, it is presumed to have been made within that period. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. 795.

**Where Executor Fails to Pay Himself in Statutory Period.**—Where an executor, having power to retain and appropriate so much of his testator's estate as is equal to a demand due to himself, neglects so to do within the period of time limited by law, he will be presumed to have abandoned the same or to have received satisfaction therefor; and when it appears that such executor kept no accounts, and a bill brought by his representatives long after his death, praying the payment of a balance which was due to him from his testator, the statute of limitations may be pleaded in bar. *Pendleton v. Whiting*, Wythe 38.

**Presumption That Claim Evidenced by Judgment Was Not Barred.**—It must be presumed that an action was not barred by the statute of limitations when a judgment thereon was recovered. *Pugh v. Russell*, 27 Gratt. 789; *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

After verdict for the plaintiff, on the plea of nil debet, it is no ground for arresting judgment, that the claim, as shown by the declaration, was barred by the act of limitations; for it will be intended that, if the act were given in evidence, the plaintiff rebutted it by some other evidence, which avoided its operation. *Murdock v. Herndon*, 4 Hen. & M. 200.

Where a recovery by a creditor against the administratrix of a sheriff for the defaults of his deputy was barred by the act of limitations, it is for the deputy and his sureties to show that fact in the motion against them. *Cox v. Thomas*, 9 Gratt. 323. See the title SHERIFFS AND CONSTABLES.

**Burden on Party Pleading Statute.**—The burden of proving that his case comes within the statute of limitations lies upon the one pleading it. *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529. So where suit is brought in August, 1889, for lumber delivered in 1884, and does not allege in what month it was delivered and the defendant fails to show it was delivered prior to August, a verdict for the plaintiff is proper. *Goodell v. Gibbons*, 91 Va. 608, 22 S. E. 504.

The burden of showing that a conveyance attacked as voluntary was made more than five years before the institution of the suit, is upon the party who pleads the statute. *Vashon v. Barrett*, 99 Va. 344, 38 S. E. 200. See *Stansbury v. Stansbury*, 20 W. Va. 23.

But the defendant in detinue may protect himself under the general issue without pleading the act of limitations, by proving that he and those

under whom he claimed had possession of the property in controversy more than five years before the issuing of the writ. *Elam v. Bass*, 4 Munf. 301.

In an action by the administratrix of a sheriff, against a deputy and his sureties, for default of the deputy in not paying over money collected by him on an execution, where the defense is that the claim of the creditor against the administratrix is barred by the statute of limitations, the burden of proof is on the defendant to show such fact. *Cox v. Thomas*, 9 Gratt. 323.

An instruction to the jury that the burden of proving the cause of action to be barred by the statute of limitations is upon the defendant, and further charging as to the time when the said statute begins to run, is insufficient and misleading, if not erroneous, where it does not go further and state that the cause of action would be barred and the plaintiff entitled to recover, if the suit was not instituted in the time limited by law. *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.

In an action for trespass for cutting timber, and a plea of statute of limitation, the defendant must show the date of the trespass where part of the cutting of trees was more and part less than five years before the institution of the suit and what part of the claim is barred. *Buck v. Newberry*, 55 W. Va. 681, 42 S. E. 683, 889.

**Burden of Proof as to New Promise.**—The burden of removing the bar of the statute of limitations by a new promise rests upon the plaintiff, and an acknowledgment or admission to have that effect, must not only be unqualified in itself, but there must be nothing in the attendant acts or declaration, to modify or rebut the inference of willingness to pay. If the acknowledgment be coupled with terms or conditions of any kind, a recovery can not be had, unless they are ful-

filled. *Stansbury v. Stansbury*, 20 W. Va. 23.

## 2. Admissibility.

See the title EVIDENCE, vol. 5, p. 295.

### Deed Fixing Date of Transaction.—

Upon an issue joined on the plea of the statute of limitations, the court did not err to the prejudice of the plaintiff by admitting in evidence a deed, which tended to fix the date of the transaction, out of which the action arose. *Kyger v. Roberts*, 27 W. Va. 418.

### Agreement Suspending Operation of Statute.—

A mutual understanding and agreement between the debtor and creditor, that suit shall not be brought on an account until the debtor shall have gone to Europe and returned, may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death. *Holladay v. Littlepage*, 2 Munf. 316. See ante, "Agreement of Parties," IX, C.

**Evidence of New Promise.**—Under Va. Code, § 2922, providing that a new promise may be shown in evidence by a plaintiff without pleading it to repel a bar of the statute of limitations, pleaded by the defendant, on reasonable notice to the defendant before trial, it is not error to reject such evidence where no notice has been given. *Noell v. Noell*, 93 Va. 433, 25 S. E. 242; *Kesterson v. Hill*, 101 Va. 739, 45 S. E. 288.

**New Promise by Executor.**—On the trial of an issue on the assumpsit of the testator within five years, an assumpsit of his executor can not be given in evidence to prevent the operation of the act of limitations. *Fisher v. Duncan*, 1 Hen. & M. 563.

**Assumption by Partner of Partnership Debt.**—If one of several partners after the partnership is dissolved, assumes a partnership debt, but afterwards pleads the act of limitations, jointly with the other partners, the assumpsit may be given in evidence, for

the plea of nonassumpsit admits that the defendants did once assume. *Brockenbrough v. Hackley*, 6 Call 51.

**Order Setting Aside Judgment Rendered Void by Constitution.**—The right of action to recover back money paid on a war-trespass judgment, accrues as soon as the constitution was adopted, which declares such judgment void. And an order thereafter made setting aside a judgment under the provisions of § 3, ch. 58, act, 1872-73, upon the only issue in the case, which was on the plea of the statute of limitations, would be immaterial evidence, and the court would not err in refusing to admit it in evidence. *Kyger v. Roberts*, 27 W. Va. 418.

**Parol Gift of Slaves.**—Although under the act of 1758, evidence of a parol gift of slaves can not be given, yet such testimony may be received in order to prove five years' possession, so as to bar the plaintiff's demand. *Jordan v. Murray*, 3 Call 85.

## 3. Weight and Sufficiency.

See the title EVIDENCE, vol. 5, p. 295.

**Evidence as to New Promise.**—In an action of debt upon a promissory note against principal and surety, the surety pleaded the statute of limitations, to which the plaintiff replied generally. It was held, that proof of the acknowledgment of the debt by the principal, within five years next before the action was brought, did not sustain the issue on the part of the plaintiff. *Butcher v. Hixton*, 4 Leigh 519.

In order for a replication to the plea of the statute of limitations to take the case out of its operation, its essential allegations must be established by the evidence. *Ragland v. Owen*, 84 Va. 227, 5 S. E. 91.

Although a debtor is insolvent when he makes a new promise, while such fact is a circumstance to be considered in determining whether there is collusion between the debtor and creditor, it is not proof of the same. *Robinson v. Bass*, 100 Va. 190, 40 S. E. 660.

**A decree in favor of legatees** against an executor and his sureties, in a proper suit for that purpose, is conclusive as to the amount decreed, and also that the claim of the legatees is not barred by the statute of limitations. Such a decree so long as it remains unreversed, is binding on all of the parties to the suit in which it was rendered, and can not be collaterally assailed. *Smith v. Moore*, 102 Va. 260, 46 S. E. 326. See also, *Pugh v. Russell*, 27 Gratt. 789; *Murdock v. Hernon*, 4 Hen. & M. 200.

**Trade between Merchants.**—Where a replication was filed to the plea of the statute of limitations that the accounts concerned the trade of merchandise between merchant and merchant but no evidence was adduced to prove that either party was a merchant during the time of their dealings, nor any evidence of the character of the dealings between them, it was held, that the replication was not supported by the evidence and the demand was therefore barred by the statute. *Watson v. Lyle*, 4 Leigh 236.

#### **F. PROVINCE OF COURT AND JURY.**

The sufficiency of the evidence ought to be left wholly to the consideration of the jury; and, in this case the county court having instructed the jury, that, "from the whole testimony before them the demand of the plaintiffs was not barred by the act of limitations," it was determined that the said opinion of the county court was erroneous. *Fisher v. Duncan*, 1 Hen. & M. 563.

#### **G. RIGHT OF PLAINTIFF TO DISCOVERY AS TO NEW PROMISE BY DEFENDANT.**

Where an action of assumpsit is

brought at law, and the statute of limitations is pleaded, the plaintiff may file a bill of discovery in equity calling on the defendant to answer whether he has not made a new promise within the time of limitation, in order to use this matter on the trial of the action at law, in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath. *Baker v. Morris*, 10 Leigh 284.

#### **H. HEARING AND DECISION WHERE STATUTE IS PLEADED.**

**Procedure in Action on Account, Some of the Items of Which Are Barred.**—Where, in an action brought against an executor or administrator on an account, the statute of limitations is pleaded, it is not necessary that the court should actually expunge items which bear date more than five years before the death of the decedent but it is sufficient to direct the jury to disregard them. *Hoskins v. Wright*, 1 Hen. & M. 377.

**Finality of Decree Sustaining Plea or Dismissing Bill.**—In a suit by a vendor against one of two joint vendees and the personal representative and heirs of the other vendee, a decree sustaining a plea of the statute of limitations filed by such personal representative and heirs, and dismissing the bill as to them, is not a final decree as to the other vendee. *Taylor v. Forbes*, 101 Va. 658, 44 S. E. 888.

**Verdict.**—If the act of limitations be pleaded, the jury ought to find that the defendant assumed within five years next before the suit was commenced; or the whole issue is not found, and a new trial will be awarded. *Calvert v. Bowdoin*, 4 Call 217. See the title VERDICT.

### **Limited Inheritances.**

See the title ESTATES, vol. 5, p. 167.

### **Limited Partnership.**

See the title PARTNERSHIP.

## **Limiting Liability.**

See the title **ILLEGAL CONTRACTS**, vol. 7, p. 250, and references given.

**LINEAL DESCENDENTS.**—See *Mitchell v. Johnson*, 6 Leigh 461, 472. And see **DESCENDENTS**, vol. 4, p. 588.

## **Lines and Corners.**

See the title **BOUNDARIES**, vol. 2, p. 536.

## **Liquidated Damages.**

See the title **DAMAGES**, vol. 4, p. 169.

## **Liquidated Demands.**

See the titles **INTEREST**, vol. 7, p. 825; **SET-OFF, RECOUPMENT AND COUNTERCLAIM**.

**LIQUIDATION.**—See **IN**, vol. 7, p. 342.

**LIQUORS.**—See the title **INTOXICATING LIQUORS**, vol. 8, p. 1. And see *State v. Haymond*, 20 W. Va. 18, 21.

## **Liquor Selling.**

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## **LIS PENDENS.**

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**I. Statement of Rule.****A. IN GENERAL.**

One who purchases from a party to a pending suit, the subject thereof, is held bound by the decree that may be

made against the party from whom he derives title. The litigating parties are exempt from taking any notice of the title so acquired, and such purchaser need not be made a party. This rule, however, is modified to a considerable

extent in some cases by the statutes in relation to the recordation of the lis pendens. *Zane v. Fink*, 18 W. Va. 693; *Sharitz v. Moyers*, 99 Va. 519, 526, 39 S. E. 166.

Where bill was filed to subject real estate, all rights acquired from or under the defendant, to the subject in controversy, pending the suit, are subject to any decree which may be made in the suit, except so far as a purchaser without actual notice is protected by the Code, ch. 186, § 5. (Pollard's Code, 1904, § 3566.) In all other respects the maxim, *pendente lite nihil innovetur*, applies. *Cirode v. Buchanan*, 22 Gratt. 205.

### B. POSITIVE RULE OF LAW.

The rule as to notice arising from lis pendens is a positive rule of law, made to prevent purchases of litigated titles. *French v. Loyal Co.*, 5 Leigh 627, citing *Hiern v. Mills*, 13 Ves. 120, per Lord Erskine.

### C. LIMITATION OF RULE.

The effect of the lis pendens, in any case, is to subject the purchaser to the decree which may be rendered in that suit, in favor of that plaintiff, and not to subject him in another suit to another plaintiff. *Bank v. Craig*, 6 Leigh 399; *Osborn v. Glasscock*, 39 W. Va. 749, 760, 20 S. E. 702, 706; *Virginia Iron Co. v. Roberts*, 103 Va. 661, 49 S. E. 984. See also, *Briscoe v. Ashby*, 24 Gratt. 454; *Woods v. Douglass*, 52 W. Va. 517; 44 S. E. 234. And see post, "Property Subject to Lien," VIII.

It is the general rule that to constitute an action or suit lis pendens the property involved must be the identical property transferred *pendente lite*, of a kind subject to the rule and sufficiently described in the pleadings to identify it, and the court must have jurisdiction at the time of the transfer over the subject matter and the party from whom the interest is acquired. *Davis v. Christian*, 15 Gratt. 11; *Briscoe v. Ashby*, 24 Gratt. 454; *French v. Loyal Co.*, 5 Leigh 627, 684.

In a suit to ascertain title to a lot of land, there being nothing in the amended bill or any other part of the proceedings having special reference to the part of the lot bought of R. by C., the decree does not ascertain that C. was a purchaser of the lot *pendente lite*; and the defendant is not thereby estopped from setting up an adversary possession anterior to its date. *Early v. Garland*, 13 Gratt. 1.

## II. Foundation of Rule.

It has been said that the rule of lis pendens proceeds upon the theory that the purchaser is presumed to have notice of the pending suit. But in a leading case upon this subject this view was repudiated, the court saying that the rule was founded upon necessity and public policy. "This necessity," said the court, "is so obvious that there was no occasion to resort to the presumption that the purchaser really had, or by enquiry might have had, notice of the pendency of the suit to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit." *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766. And this view has been approved in numerous cases. *French v. Loyal Co.*, 5 Leigh 627; *Sharitz v. Moyers*, 99 Va. 519, 39 S. E. 166; *White v. Perry*, 14 W. Va. 66; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Price v. Thrash*, 30 Gratt. 515; *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276; *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702; *Briscoe v. Ashby*, 24 Gratt. 454, 471.

"Its whole object is to keep the subjects in controversy within the power of the court until the decree is entered, and to prevent further suits for the same subjects. Judge Brooke, in *French v. Loyal Co.*, 5 Leigh 627, 671. It enables the court to hold in its hand

the corpus or subject of controversy, and prevent its alienation until it can be disposed of, and it can only affect a purchaser of the subject in controversy from a party to the suit. *French v. Loyal Co.*, 5 Leigh 627." *Briscoe v. Ashby*, 24 Gratt. 454, 471.

### III. Statutory Modifications of Rule.

#### A. GENERAL SCOPE OF STATUTES.

The common-law rule of lis pendens, is that a pendente lite purchaser from a party to the suit, of the subject matter thereof, takes it subject to any decree rendered against his vendor in that suit. Because of the harsh operation of this rule upon bona fide purchasers, statutes have been enacted in most of the states with a view to protect purchasers who purchase in good faith. These statutes, which have been enacted in Virginia and West Virginia, provide, in substance, that the lien of the lis pendens shall not bind or affect a purchaser of real estate without notice unless a memorandum setting forth the title of the cause, the court in which it is pending, the general object of the suit, the location and quantity of the land, and the name of the person whose estate is intended to be affected, is filed with the clerk of the county court of the county in which the land is situated. Section 13, ch. 139, W. Va. Code; § 3566, Va. Code; *Hurn v. Keller*, 79 Va. 415; *Easley v. Barksdale*, 75 Va. 274, 280; *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702; *Harmon v. Byram*, 11 W. Va. 511; *Beckwith v. Thompson*, 18 W. Va. 103; *Cammack v. Soran*, 30 Gratt. 292; *DeCamp v. Carnahan*, 26 W. Va. 839.

For a discussion and comparison of the Virginia statutes relating to lis pendens, see 1 Va. Law Register 295.

#### B. STATUTES ARE MANDATORY.

Where the lis pendens is not docketed as provided by these statutes, it is well settled that a purchaser without

notice of the pendency of the suit takes a good title. *DeCamp v. Carnahan*, 26 W. Va. 839; *Cammack v. Soran*, 30 Gratt. 292; *Easley v. Barksdale*, 75 Va. 274; *Beckwith v. Thompson*, 18 W. Va. 103.

But see *Hurn v. Keller*, 79 Va. 415, as to effect of actual notice where lis pendens unrecorded. And see post, "Where Lis Pendens Unrecorded," VII, F, 3.

#### C. WHEN STATUTES NOT APPLICABLE.

##### 1. Suits to Recover Specific Property.

Notwithstanding these statutes, the doctrine of notice arising from the mere pendency of the suit to recover specific property, real or personal, is still the law of the state of West Virginia. The statute of that state requiring the recording of a lis pendens applies only to suits to charge real estate with debt, not to suits to recover it. *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Bowlby v. DeWitt*, 47 W. Va. 323, 34 S. E. 919.

##### 2. Suits to Recover or Charge Personalty.

###### a. In General.

The statute of West Virginia requiring the recording of a lis pendens applies neither to suits to recover nor suits to charge personalty. *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702; *Bowlby v. DeWitt*, 47 W. Va. 323, 34 S. E. 919; *Harmon v. Byram*, 11 W. Va. 511.

###### b. Portable Sawmill.

Thus, § 13, ch. 139, of the Code of West Virginia, requiring a memorandum of a lis pendens to be filed for record before it can bind or affect a purchaser of real estate for valuable consideration, without notice, has no application to personal property, and therefore none to a portable steam sawmill. *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702.

###### c. Negotiable Securities.

And negotiable securities seem not

to be subject to the rule of lis pendens. *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702.

### 3. Purchaser after Docketing of Judgment or Recording of Deed of Trust.

Where judgments are docketed or deeds of trust recorded, or liens otherwise acquired, and a chancery suit to enforce the same is pending, there need be no notice of the pending of such suit, under § 13, ch. 139, W. Va. Code, to bind purchasers purchasing after the docketing of such judgment or recordation of such deeds of trust or other lien, as they are pendente lite purchasers under the common-law rule. *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. 240. See also, *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276.

### D. LIS PENDENS OF PETITIONING CREDITOR IN SUIT TO SET ASIDE FRAUDULENT CONVEYANCE.

A creditor at large who successfully sues to set aside a deed conveying property in fraud of creditors, has a lien on the property from the time the suit is brought; and a petitioning creditor, who comes into the suit, has a like lien from the filing of his petition, but, as against creditors with or without notice, and purchasers for value without notice, he has a lien only from the time of filing his memorandum of lis pendens. Section 2460, Code, 1887; *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229. See also, *Richardson v. Ralph-snyder*, 40 W. Va. 15, 20 S. E. 834. And see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, pp. 540, 648.

#### On What Property Lien Effective.—

The lien thus conferred is only upon the property conveyed, and not, like the lien of a judgment, on all of the debtor's estate. *Davis v. Bonney*, 89 Va. 755, 17 S. E. 229. See also, post, "Property Subject to Lien," VIII.

### E. CORPUS OF LIS PENDENS AS SUBJECT OF CONTROVERSY.

The fifth section of ch. 186, Va.

Code, 1860, requiring a lis pendens to be recorded, does not apply to a case where the corpus of the lis pendens was not the subject of controversy. *Briscoe v. Ashby*, 24 Gratt. 454.

The doctrine of lis pendens affects the pendente lite purchaser of the corpus or subject of the suit. *Bank v. Craig*, 6 Leigh 399. See also, ante, "Limitation of Rule," I, C.

### F. RELEASE OF NOTICE OF LIS PENDENS.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 722.

## IV. General Nature and Effect.

### A. COMMENCEMENT OF LIEN.

At common law the lien of a lis pendens commenced on the day that the writ bore teste, while in chancery it did not exist until the subpoena was actually served. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766; *Lyne v. Jackson*, 1 Rand. 114.

**Filing of Bill Relates Back to Service of Process.**—Where the bill is not filed at the date of the issuance of the subpoena, the lien of the lis pendens commences at the time the subpoena is served, though the bill is not filed until some time thereafter. The filing of the bill relates back to the date of the service of the writ, but not to the date of its issuance. *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878; *Harmon v. Byram*, 11 W. Va. 511; *Jackson v. Hull*, 21 W. Va. 601. Hence where a person purchases after the service of the summons, but before the bill is filed, he is a pendente lite purchaser. *Harmon v. Byram*, 11 W. Va. 511.

Thus, on the 5th day of August, 1893, a suit in equity was instituted to set aside a deed as fraudulent and void by P., making J. P. and O. C. W. parties defendant. After process in said suit had been served, but before the bill had been filed, O. C. W. executed a deed for said land to the R. C. C. & C. Co. Said company thereby became a pendente lite purchaser, and took

said land subject to the equities in litigation in said bill, and was bound to abide by its result. *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276.

But in *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342, it was said by the court, per Brannon, J.: "I doubt the correctness of *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. 878, in its holding that lis pendens dates from the service of subpoena only.

The court in *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342, says further: "In an action at law the suit dates from the writ issued. *Newman v. Chapman*, 2 Rand. 93. Authorities there shown date it, in a chancery suit, from service. This ruling is based on the English chancery practice, from the fact that never till bill filed did writ issue, and the mere filing of a bill before writ was no suit, but now our Code (ch. 124, § 5) says that 'process to commence a suit shall be a writ;' applying to both chancery and actions at law. A suit exists at its date. *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431. And I must assert that upon a review of authorities, the issuance of the writ, generally speaking, is the beginning of the suit, if no statute controls. *Jackson v. Hull*, 21 W. Va. 601. There should be no difference, under our statute, between law and chancery, as to this."

## B. EFFECT ON PENDENTE LITE PURCHASER.

Although the maxim is *pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void at all times and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it, but with regard to them the title is to be taken, as if it had never existed. *Zane v. Fink*, 18 W. Va. 603.

Thus, if a deed from a party in a suit conveying the land in dispute be executed after the commencement of the suit, it would have no effect upon the suit, as the purchaser would then be a lis pendens purchaser; and the suit ought then to be prosecuted precisely as if he had not purchased. *Gillespie v. Bailey*, 12 W. Va. 70.

**Where the Purchase Made in Pursuance of Previous Contract.**—But a transfer of real property made after the commencement of a suit concerning it, is not affected by the lis pendens, when it is made in pursuance of contracts made long anterior, and of a decree of court ordering the deeds to be made. *Bowyer v. Hughart*, 9 Gratt. 336.

**Pendente Lite Purchaser Stands in His Vendor's Shoes.**—For reasons of public policy, a pendente lite purchaser, in the absence of statute, is placed in the shoes of his vendor, and, upon becoming a party to the litigation, will be substituted to the possession and rights of his vendor. *Sharitz v. Moyers*, 99 Va. 519, 39 S. E. 166.

**Where Pendente Lite Purchaser Causes Land to Be Sold.**—Where a pendente lite purchaser of an interest in land causes the land to be sold, and receives the proceeds, she will be estopped to take advantage of the invalidity of the sale. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436.

**Pendente Lite Purchaser Does Not Hold Adversely to Party to Suit.**—A pendente lite purchaser from a debtor, against whom a creditor is seeking to enforce a judgment by suit, does not hold adversely to the party seeking to enforce the lien, and will not be protected by the statute of limitations, by reason of open, exclusive, and notorious possession for the prescribed period. *Parker v. Clarkson*, 39 W. Va. 184, 19 S. E. 431; *Lynch v. Andrews*, 25 W. Va. 751.

**Effect of Conveyance of Land Pendente Lite by Plaintiff.**—See the title EJECTMENT, vol. 5, p. 903.

**Conveyance Pendente Lite by Debtor.**—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 565.

**Sale Pendente Lite by Owner Where Court Has Enjoined Sale by Trustee.**—See the title INJUNCTIONS, vol. 7, p. 542.

**Notice to Vendor Need Not Be Plead Nor Proved.**—An action of covenant by the vendee of a slave, upon a covenant of warranty binding the vendor and his heirs (not naming the executors), will be against the executors—and the declaration need not state, nor is it incumbent on the plaintiff to prove, notice to the vendor, of the pendency of the suit, to recover the negro. If the recovery was obtained by fraud, the defendant may, by plea, put that matter in issue. *Daniel v. Cooke*, 1 Wash. 306.

**Effect of Proof That Grant Obtained by Caveatee Pendente Lite.**—In a caveat case, if it be found by the jury, or agreed by the parties, that since the institution of the caveat, a grant from the commonwealth of the land in controversy has been obtained by the caveatee; judgment ought to be entered dismissing the caveat; but such judgment to be no prejudice to any suit in chancery which the caveator may be advised to bring to vacate the said grant, or any grant that may issue to the caveatee in consequence of such judgment of dismissal; the judgment of the caveat being, in that event, not pronounced on a comparison of the respective rights of the parties. *Guerant v. Bagby*, 6 Munf. 160.

## V. To What Proceedings Applicable.

**Common-Law and Chancery Proceedings.**—It seems to be settled that the doctrine of lis pendens exists at law as well as in chancery. In one case upon this subject the court said: "It is not true, that this rule of lis pendens was unknown to the common law and was a rule applicable only in

chancery causes. By the common law the lis pendens existed from the first moment of the day the writ issued and bore teste, and of necessity the courts of chancery adopted the general doctrine of lis pendens but relaxed in some degree the severity of the common-law rule, and held that no lis pendens existed until the service of the subpoena and bill filed." *White v. Perry*, 14 W. Va. 66; *Newman v. Chapman*, 2 Rand. 93, 102; *Harmon v. Byram*, 11 W. Va. 511; *Smith v. Browne*, 9 Leigh 293, 294.

**Foreclosure Suit Where Mortgage Is Not Recorded.**—Where a mortgage is not recorded, a subsequent purchaser, without actual notice, is not bound by the pendency of the foreclosure suit; the doctrine of lis pendens being inapplicable to such case. *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766.

**Action of Debt to Recover Personal Judgment.**—This doctrine has no application to a case where the action was debt to recover a personal judgment against the defendant. *White v. Perry*, 14 W. Va. 66.

## VI. Of What Lis Pendens Is Notice.

### A. FACTS APPARENT FROM RECORD.

A purchaser having constructive or actual notice of a pending suit, can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. If these facts inform him that the vendor is committing a fraud in making the sale, he becomes a party to the fraud. But he can not be charged with the knowledge of facts afterwards brought into the case. *Davis v. Christian*, 15 Gratt. 11; *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 345, 23 S. E. 571, 573; *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661, 49 S. E. 984.

**Purchaser with Notice Chargeable with Fraud.**—Where the facts in the

record tell a pendente lite purchaser that his vendor has committed a fraud, this rule applies so as to render such purchaser a party to that fraud. Hence, if he purchases under a deed of trust, pending a suit to set it aside for fraud, he becomes a participant in such fraud, so far as the complainants in that suit main issue. *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

#### **B. PURCHASER NOT AFFECTED WITH NOTICE OF COLLATERAL MATTERS.**

By the *lis pendens* the purchaser pendente lite is not affected with notice of matters merely collateral to the main issue. *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

Thus, a pendente lite purchaser of land from one defendant is not charged with implied notice of equity between the codefendants, which are not the subject of litigation between the complainant and defendants, and which do not in any manner affect that litigation, but appear only incidentally. *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661, 49 S. E. 984.

### **VII. Persons Affected.**

#### **A. IN GENERAL.**

Every person purchasing pendente lite is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in priority, and it makes no difference whether the purchaser pendente lite be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiffs or defendants. *Harmon v. Byram*, 11 W. Va. 511; *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760; *Zane v. Fink*, 18 W. Va. 693; *Sharitz v. Moyers*, 99 Va. 519, 526, 39 S. E. 166; *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702; *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; *Goff v. McLain*, 48 W. Va. 445, 37 S. E. 566; *Wilfong v. John-*

*son*, 41 W. Va. 283, 23 S. E. 730; *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639; *Lynch v. Andrews*, 25 W. Va. 751, *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. 607.

#### **B. PENDENTE LITE PURCHASER MUST AWAIT FINAL DECREE.**

A pendente lite purchaser, who pays the subject matter of litigation over to the debtor by virtue of a decree of the circuit court releasing a *lis pendens*, which decree is afterwards appealed from and reversed by this court, is not protected by such erroneous decree. *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639.

#### **C. PENDENTE LITE PURCHASERS NEED NOT BE MADE PARTIES.**

##### **1. In General.**

Generally, a purchaser pendente lite need not be made a party to the bill, nor need he be brought before the court. *Harmon v. Byram*, 11 W. Va. 511; *Lynch v. Andrews*, 25 W. Va. 751; *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *O'Conner v. O'Conner*, 45 W. Va. 354, 32 S. E. 276; *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. 240; *McGee v. Johnson*, 85 Va. 161, 7 S. E. 374; *George v. Cooper*, 15 W. Va. 666; *Parker v. Clarkson*, 39 W. Va. 184, 19 S. E. 431; *August v. Gilmer*, 53 W. Va. 65, 44 S. E. 143; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220. But see *Kanawha, etc., Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768.

**No Right of Appeal Except to Formal Parties.**—And one not a formal party can not appeal, though affected as a pendente lite purchaser. *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571.

##### **2. Examples.**

###### **a. Trustees.**

Thus, after bill filed, one of the

alienees of P. conveys a part of the land conveyed to him by P. in trust to secure a debt. This was a conveyance pendente lite, and it is not necessary that the plaintiff should amend his bill and make the trustee and creditor parties, in order to dispose of the subject. *Price v. Thrash*, 30 Gratt. 515. But see *Fisher v. Dickenson*, 84 Va. 318, 4 S. E. 737. And see generally, the title TRUSTS AND TRUSTEES.

**b. Cestui Que Trustent.**

Whilst suit is pending, the purchaser conveys the property in trust to secure a debt. The cestuis que trust are pendente lite purchasers, and are not necessary parties. *Goddin v. Vaughn*, 14 Gratt. 102.

**c. Assignees.**

**(1) Where Plaintiff Assigns Interest.**

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 52.

**(2) Where Defendant Assigns Interest.**

**Voluntarily.**—"If a defendant voluntarily assigns his interest in the subject of the suit pendente lite, the complainant is not bound to make the assignee a party, unless he thinks proper to do so." *Zane v. Fink*, 18 W. Va. 693, 730, citing *Sedgwick v. Cleveland*, 7 Paige 287.

**Involuntarily.**—"Aliter where the assignment is by operation of law; as in cases of bankruptcy or assignments under the insolvent acts." *Zane v. Fink*, 18 W. Va. 693, 730, citing *Sedgwick v. Cleveland*, 7 Paige 287.

**3. Necessary Parties Where Relief by Sale Is Sought.**

When a party purchases land with notice of an equity in a third party, in a suit by such third party to enforce his equity, brought after such purchase, such purchaser is a necessary party, if relief by way of sale of the land is given, unless it appear either that he had notice of the suit pending at the time of his purchase, or that notice of lis pendens had been recorded under

§ 13, ch. 139, Code, 1887, before such purchase. *Barret v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Arnold v. Casner*, 22 W. Va. 444; *Zane v. Fink*, 18 W. Va. 693; *Lynch v. Andrews*, 25 W. Va. 751.

**D. PURCHASERS WHO HAVE ACQUIRED NOT ALLOWED TO BE MADE PARTIES.**

A pendente lite purchaser, who waits seven years after obtaining a conveyance of land, before asking to be made a party to the suit, will not, after such delay, be permitted to be made a party to the suit in order that he may reopen questions settled therein, where, before the date of the conveyance to him, a report of the debts had been made by the commissioner and confirmed by the court, of which he had notice and in which he acquiesced, by applying a greater part of the purchase money to the payment of the debts. *Arnold v. Casner*, 22 W. Va. 444.

**E. PURCHASERS FROM PENDENTE LITE PURCHASER.**

In an early Virginia case, it was intimated that the doctrine of lis pendens applied only to purchasers from the parties to the suit, and that if one of such purchasers should in turn make another conveyance, that his vendee would not be bound by the rule, for the reason that he did not obtain his title pendente lite from a party to the suit. *French v. Loyal Co.*, 5 Leigh 627.

It seems that a derivative purchaser with notice is protected by the want of notice in him under whom he claims. *Curtis v. Lunn*, 6 Munf. 42.

**F. PURCHASER WITH ACTUAL NOTICE.**

**1. In General.**

A purchaser pendente lite, and with actual notice, is not a purchaser at all, in the eye of the law. *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. 607.

Statute changing the common-law rule of lis pendens as to bona fide pur-



chasers for value, does not apply to those who have actual notice. *Bowlby v. DeWitt*, 47 W. Va. 323, 34 S. E. 919.

## 2. Purchase Regarded as Fraudulent.

In cases where the purchaser has actual notice of litigation, involving the title to the property purchased, his purchase will be regarded as fraudulent. *Lynch v. Andrews*, 25 W. Va. 751; *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843. See generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540.

**Necessity of Special Notice to Constitute Fraud.**—But in *Zane v. Fink*, 18 W. Va. 693, it was said: "A *lis pendens* being only a general notice of an equity to all the world, it does not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit."

## 3. Where *Lis Pendens* Unrecorded.

Where one purchases with actual notice of the *lis pendens*, although it has not been recorded, he is bound by the decree in the case. *Hurn v. Keller*, 79 Va. 415. See ante, "Statutes Are Mandatory," III, B.

## 4. Notice Inferred from Circumstances.

The fact that a subsequent purchaser had notice of a prior undocketed judgment may be inferred from circumstances, as well as proved by direct evidence. *Farley v. Bateman*, 40 W. Va. 540, 22 S. E. 72; *Newman v. Chapman*, 2 Rand. 93; *French v. Loyal Co.*, 5 Leigh 627, 635.

## G. PURCHASER OF WIFE'S SEPARATE ESTATE PENDING SUIT TO SUBJECT IT TO WIFE'S DEBTS.

In a suit brought to subject the separate personal estate of a wife to the payment of her debts, until the plaintiff takes the property out of possession of the wife, or acquires a lien upon it in some of the modes recognized by law, the purchaser thereof, for value

and without fraud, will not be liable to the plaintiff for the property so purchased, whether he had or had not notice of the pendency of the suit at the time of his purchase. *Bruff v. Thompson*, 31 W. Va. 16, 6 S. E. 352. But see *Hughes v. Hamilton*, 19 W. Va. 366.

## II. PURCHASER PENDING SUIT TO SPECIFICALLY ENFORCE CONTRACT FOR EXCHANGE OF LAND.

Where a party, who has notice of a pendency of a suit, to specifically enforce a contract for the exchange of land, purchases one of the tracts of land from one of the parties to the contract, he will be perpetually enjoined from obtaining any advantage of his deed, and will be decreed to convey the legal title to the party to whom it belongs. *Parrill v. McKinley*, 6 W. Va. 67; *Philips v. Williams*, 5 Gratt. 259.

## I. PURCHASER OF LAND CHARGED WITH ANNUITY.

Lands charged with an annuity, having been sold, pending a suit to enforce the annuity, will be ordered sold to satisfy the arrears of the annuity without noticing the pendente lite purchasers. *Philips v. Williams*, 5 Gratt. 259.

## J. PARTIES IN REPRESENTATIVE CAPACITY ACTING UNDER ORDER OF COURT.

A commissioner, though a party as administrator of the debtor to a creditor's suit, having no knowledge of the object of the suit, who pays money to the heirs under an order of the court, is not affected by the *lis pendens* of the creditor's suit so as to be held liable to pay it over again to the creditor. *Carrington v. Didier*, 8 Gratt. 260.

## K. PURCHASER DURING INTERVAL BETWEEN SUITS.

A suit in equity was brought by the nominal surety against the cosureties on a note, one of whom was an ab-

sent defendant owning land in the commonwealth. The suit was resisted on the ground that no payment had been made by the plaintiff. Subsequently, by an amendment of the bill, the surety who paid was united in the suit as a co-plaintiff. In the interval between the commencement of the suit and the amendment of the bill, the absent defendant returned to the commonwealth, and conveyed the land to a purchaser for valuable consideration. Held, no lien is created upon the land in the hands of the purchaser by these proceedings; not by the proceedings in the name of the nominal surety, because, no payment having been made by him, no decree could be rendered in his favor; and not by the proceedings in the name of the surety who paid, because the conveyance to the purchaser was before those proceedings. *Stout v. Vause*, 1 Rob. 169.

#### **L. TRANSFER OF STOCK BY BANK ON ITS BOOKS.**

In a case, where a bank had transferred bank stock on its books, the court, in discussing its liability, said: "As to the liability of the bank on the principle of a *lis pendens*, that is in this case wholly inadmissible. That doctrine affects the purchaser pendente lite of the corpus or subject of the suit. But the bank here is no purchaser. It has merely opened its books to receive the transfer." *Bank v. Craig*, 6 Leigh 399.

### **VIII. Property Subject to Lien.**

#### **Property Must Be Directly Affected.**

—The doctrine of *lis pendens*, however necessary, is harsh in its effect upon bona fide purchasers, and has always been confined in its operation to the extent of the policy on which it was founded; that is, to give full effect to the judgment or decree, which might be rendered in the suit pending at the time of the purchase and it therefore applies only to proceedings directly relating to the thing or property in question. *White v. Perry*, 14

W. Va. 66; *French v. Loyal Co.*, 5 Leigh 627, 681; *Newman v. Chapman*, 2 Rand. 93, 102; *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276. See ante, Limitation of Rule, I, C.

As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a nonsuit, or if a suit in chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if, at law or in chancery, a suit abated; although, in all these cases, the plaintiff, or his proper representative, might bring a new suit for the same cause, he must make the one who purchased pending the former suit, a party; and, in this new suit, such purchaser would not be at all affected by the pendency of the former suit, at the time of his purchase. *French v. Loyal Co.*, 5 Leigh 627, 682; *Newman v. Chapman*, 2 Rand. 93, 102.

**Property Not Affected without Decree of Court.**—The doctrine of *lis pendens* only applies where there is a suit to affect the property purchased, and can have no effect upon it unless a decree may be made in the suit to affect it, nor until such decree is made. *Davis v. Christian*, 15 Gratt. 11; *Smith v. Browne*, 9 Leigh 293, 294.

#### **Rule Should Be Applied to Personal Property.**

—In many jurisdictions it seems that the rule of *lis pendens* applies only to real property; but in *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702, it is said: "The reason and necessity of the application of the rule of *lis pendens* to personal property, with certain exceptions, such as negotiable securities, would seem to be at least as great as its application to real property."

**Rents of Real Estate.**—Purchasers of real estate, pending a suit, are liable for the rents thereof, if their purchase was made for the purpose of hindering, delaying, or defrauding creditors. *Stout v. Phillippi, etc., Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

In *Simpson v. Dugger*, 88 Va. 963, 14 S. E. 760, the vendee of property sold under a decree in a creditors' suit had notice of a suit setting up the claims of the debtor's children to the right of their deceased mother. Pending the suit the vendee sold the property to an insolvent, and the children being adjudged entitled to the property, were held also entitled to recover the rents from the vendee.

### **IX. How Pendente Lite Purchaser May Prosecute Claim.**

The pendente lite purchaser of a judgment rendered by a justice may continue to prosecute the claim in the circuit court in the name of his assignor, the plaintiff, when appealed to that court by the defendant. *Garber v. Blatchley*, 51 W. Va. 147, 41 S. E. 222.

### **Literary Fund.**

See the title **WILLS**.

### **Literary Property.**

See the titles **DOCUMENTARY EVIDENCE**, vol. 4, pp. 756, 763; **EVIDENCE**, vol. 5, pp. 295, 316.

### **Littoral Rights.**

See references under **RIPARIAN RIGHTS**.

**LIVELY OIL**.—See *Steelsmith v. Fisher Oil Co.*, 47 W. Va. 391, 35 S. E. 15.

### **Livery of Seisin.**

See the title **DEEDS**, vol. 4, p. 372.

## **LIVERY STABLE KEEPERS.**

### **CROSS REFERENCES.**

See the titles **INNS AND INNKEEPERS**, vol. 7, p. 654; **LIENS**, ante, p. 325.

**No Lien at Common Law**.—Liverymen have no lien at common law. 13 Am. Eng. Ency. Law (1st Ed.); *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 Am. St. Rep. 828.

**Under Statutes**.—One who keeps a horse or other live stock for compensation has a lien thereon for such compensation by Code, 1891, ch. 100, § 15. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 Am. St. Rep. 828. See also, Va. Code, 1904, § 2490.

**Lien Not Lost by Levying Attachment**.—An innkeeper or keeper of live stock who has a lien on the property does not lose the lien by levying an attachment upon the property. *Lambert v. Nicklass*, 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 Am. St. Rep. 828. See the titles **INNS AND INNKEEPERS**, vol. 7, p. 654.

**Injuries to Horses of Livery Stable Keepers**.—For punishment for injuries to horses owned by livery stable keepers, see § 3797, Va. Code, 1904; W. Va. Code, 1906, § 4269-71.

## **Live Stock.**

See the titles **ANIMALS**, vol. 1, p. 373; **CARRIERS**, vol. 2, p. 691.

## Live Stock Insurance.

For liability of carriers as insurers of live stock, see the title CARRIERS, vol. 2, pp. 671, 691. See also, the titles FIRE INSURANCE, vol. 6, p. 60; MARINE INSURANCE.

**LOAN.**—See LEND, ante, p. 246.

## Loan, Trust and Safe Deposit Companies.

See the titles BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645.

## LOANS.

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See the titles BAILMENTS, vol. 2, p. 223; BANKS AND BANKING, vol. 2, p. 254; BILLS, NOTES AND CHECKS, vol. 2, p. 401; BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645; EXECUTIONS, vol. 5, p. 416; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540; GIFTS, vol. 6, p. 714; INTEREST, vol. 7, p. 819; MORTGAGES AND DEEDS OF TRUST; RECORDING ACTS; SLAVES; USURY.

### I. Definition and General Considerations.

**Definition.**—In *Kelley v. Lewis*, 4 W. Va. 456, 461, it is said: "To lend is to deliver to another for use, on condition that the thing loaned, or an equivalent of the kind, shall be returned. To lend state bonds would be to deliver them to another for use on condition that the bonds loaned or other bonds of the same kind, equal in quantity, should be returned, and would not be usury. To deliver so many state bonds to another for use, on condition that

an equivalent in money at the par value of the bonds should be returned, would be to sell and not to loan the bonds, and as a naked proposition would not be usury." See also, the title USURY.

#### What Amounts to a Loan of Money.

—If one man goes to another, and obtains from him a sum of money, to be repaid at a future day, to himself, or to another, for his use, nothing more passing between the parties than a request to receive the money on the one hand, and a promise to repay it on the other, this transaction would be

considered as a loan of the money. *Watkins v. Taylor*, 2 Munf. 424.

#### As Used in Wills.

**Lend in the Sense of Give.**—In *Chapman v. Chapman*, 90 Va. 409, 410, 18 S. E. 913, it is said: "In support of the latter view the appellant lays much stress on the word 'loan,' as manifesting an intention on the part of the testator to annex the time of distribution to the substance of the gift. But it is clear that the will was written inops concilii, and that the word, like the word lend, in *Wade v. Boxley*, 5 Leigh 442; *Moon v. Stone*, 19 Gratt. 130, and other cases, was used as the equivalent of give."

So in *Moon v. Stone*, 19 Gratt. 130, where it is said: "The construction can not be affected by the use of the word lend. There is no difference in reason or authority between a loan for life and a gift for life." See also, *Parker v. Wasley*, 9 Gratt. 477; *London v. Turner*, 11 Leigh 403; *Deane v. Hansford*, 9 Leigh 253; *Wade v. Boxley*, 5 Leigh 442; *Shackelford v. Newbill*, 2 Pat. & H. 232, 237. And see generally, the title WILLS.

**What Sufficient to Divest Title.**—No act of ownership on the part of the loanee can divest the title of the loanor, unless there was something to show acquiescence or assent on the part of the loanor. *Dickinson v. Dickinson*, 2 Gratt. 493.

**Demand and Refusal Necessary to Give Adverse Title.**—A father-in-law put slaves into the possession of his son-in-law on loan; no length of possession will give the lendee title against the lender, till such possession has become adverse by demand and refusal of the possession. *Cross v. Cross*, 9 Leigh 245.

**Evidence of Ownership.**—Where one is sent as manager of an estate, and slaves are sent to work it, among the rest a house servant, and the owner lists her as his property, and pays taxes on her, this is sufficient evidence

that there is no loan of the property, to defeat the claim of a creditor of the manager. *Collins v. Lofftus*, 10 Leigh 5.

**Money Loaned to Sheriff Not Liable to Execution against Lender.**—Money bona fide lent to a sheriff, and applied by him to his own use, prior to his receiving a writ of fieri facias against the lender is not liable to satisfy such execution, either at law, or in equity; notwithstanding the same money was originally deposited in his hands as a pledge for certain purposes. *Price v. Crump*, 2 Hen. & M. 89. And see the title EXECUTION, vol. 5, pp. 416, 452.

## II. Distinctions.

### A. LOAN DISTINGUISHED FROM GIFT.

#### 1. Question of Intention.

**Neglect of Agent to Declare Loan Does Not Change Loan to Gift.**—A father sends a slave to a son upon a loan; but the agent who takes the slave to the son, neglects to inform him that the slave is a loan. The neglect of the agent does not affect the right of the father to have the slave considered as a loan. *Dickinson v. Dickinson*, 2 Gratt. 493.

**Effect of Declaration of One Not the Lender.**—When a father has declared that he has given a slave to a married daughter, and afterwards tells her to go and take possession of the slave, the declaration of the father's wife, in his absence, at the time the daughter takes possession, that she did not give but only lent her the slave, is of no effect to convert the father's gift into a loan, though the daughter received the possession from the donor's wife, without complaining of her qualification of the gift. *Brown v. Handley*, 7 Leigh 119.

#### 2. Presumption in Favor of Loan Rather than Gift.

##### a. General Rule.

In the absence of evidence to the

contrary, a loan rather than a gift of a slave will be presumed. *Brown v. Handley*, 7 Leigh 119; *Mahon v. Johnston*, 7 Leigh 317, 319; *Cross v. Cross*, 9 Leigh 245; *Scott v. Jones*, 76 Va. 233; *Ficklin v. Carrington*, 31 Gratt. 219; *Collins v. Lofftus*, 10 Leigh 5.

Thus, as between a loan and a gift in a transaction between father and son-in-law, the presumption is in favor of a loan, and the proof must be very strong to establish it as a gift. *Mahon v. Johnston*, 7 Leigh 317.

In the absence of C in a foreign country F sent to Mrs. C a check for \$500, which was collected by her. In the absence of all evidence bearing upon the intention of F in sending the check, the presumption is the intention was, not a gift to Mrs. C, but a loan on the credit of her husband, C. *Ficklin v. Carrington*, 31 Gratt. 219.

**Possession Very Equivocal Evidence.**—It seems, that, as between parent and child, possession of a slave is very equivocal evidence of a gift from the parent to the child, since the delivery of the possession would equally accompany a loan; and the law would rather infer a loan than gift from mere transfer of possession—*Sed quere*. *Cross v. Cross*, 9 Leigh 245.

## **b. Exceptions to General Rule.**

### **(1) In Virginia.**

A father, anterior to our statute of frauds, having delivered certain slaves to his son, which were proved by verbal evidence (without any deed or writing), to have been lent, for an indefinite period, and the son having retained the uninterrupted possession for many years, used the property as his own, and acquired credit on the strength of his possession; in a controversy between the father, or volunteer claimants under him, and creditors of, or fair purchasers from the son, the father shall be deemed to have given him the slaves; and on general

principles of law and equity, independently of any statutory provision, the title of the creditors and purchasers will be protected. The circumstance that the father, afterwards, by his last will and testament, bequeathed the slaves to the son for life, remainder to his children, makes no difference in the case. *Fitzhugh v. Anderson*, 2 Hen. & M. 289.

### **(1) In West Virginia.**

**Between Husband and Wife.**—Where money was advanced to a husband by a wife, where the husband was in failing circumstances, the advance was held under the circumstances to be a gift, and not a loan, as against the creditors of the husband. *Maxwell v. Hanshaw*, 24 W. Va. 405.

**What Necessary to Rebut Presumption of Gift.**—Where money belonging to the wife as her separate estate is delivered to her husband, and used by him in his business, the law presumed it was intended as a gift, and not as a loan; and, in order to constitute such delivery a loan as against the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift. *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960.

**Parol Testimony as between Husband and Wife Not Sufficient.**—Where the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony, of the husband and wife, of a private understanding between themselves that the transaction was by them considered or intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960.

## **B. LOAN DISTINGUISHED FROM HIRING.**

**Interest.**—A receipt from the princi-

pal to the collector for £100 paper money, for which the principal was to account with interest, was not a payment, by the collector, but a loan of so much paper money, and subject to the scale of depreciation. *Hawkins v. Minor*, 5 Call 118.

#### C. LOAN DISTINGUISHED FROM ADVANCEMENTS.

What in its inception was a loan, may be made subsequently, by will or otherwise, an advancement. *Darne v. Lloyd*, 82 Va. 859, 5 S. E. 87. And see generally, the title ADVANCEMENTS, vol. 1, p. 189.

#### D. LOAN DISTINGUISHED FROM BAILMENT.

**In General.**—Where the article delivered is to be returned, though in an altered form, the transaction is a bailment and the title to the property is unchanged. Where another thing of equal value may be returned, the receiver becomes debtor to make the return, the transaction is a sale or loan and the title is changed. *Reherd v. Clem*, 86 Va. 374, 10 S. E. 504. And see generally, the title BAILMENTS.

**Deposit in Bank.**—A deposit of money in a bank is a loan, and not a bailment. *Robinson v. Gardiner*, 18 Gratt. 509.

#### E. LOAN DISTINGUISHED FROM PAYMENT ON DEBT.

Where a trust fund is loaned to the trust creditor pending litigation over charges on the fund and its distribution, and on final settlement it is ascertained to belong to such creditor, and is not sufficient to pay his debt, the transaction should be treated as a payment on the debt as of the date of the loan, and not as a loan. *Cochran v. Richmond, etc., R. Co.*, 91 Va. 339, 21 S. E. 664.

### III. Rule at Common Law.

At common law, no length of possession by the loanee would protect a

purchaser from him. *Lightfoot v. Strother*, 9 Leigh 451, 457.

**Effect.**—This was productive of much mischief; for third persons who had been induced to become purchasers, relying on the possession of the loanee as the indicium of the right of property, were often surprised and defeated by the exhibition of loans, of the previous existence of which they had no knowledge, and no means of obtaining knowledge. *Lightfoot v. Strother*, 9 Leigh 451, 457.

### IV. Statutory Rights of Third Persons.

**Reason for Statutory Regulation.**—Protracted loans of slaves or other chattels have a strong tendency to mislead the public in regard to the ownership; such as to require, not a violent, but discreet legislation on the subject. *Davis v. Turner*, 4 Gratt. 422.

**Will as Record.**—A father having died within five years from the time when a slave went into the possession of the son; and having by his will disposed of the slave, of which the administrator of the son had notice, the slave may be recovered for the father's estate, after five years from the loan. *Dickinson v. Dickinson*, 2 Gratt. 493. And for full treatment, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 593, et seq., and p. 596, et seq.

### V. Termination of Loan.

In March, 1779, A. borrowed of B. six hogsheads of tobacco, to be shipped on board A.'s own vessel to a foreign port, and there invested in goods. In September, after the arrival of the goods, A., with a view to pay the loan, left six tobacco notes, exceeding the loan, with B., who lay sick. In April, A. wrote to B. that C. would receive any tobacco or money he might send. B. sent the whole six notes; which C. delivered to A., who expressed surprise. This did not rescind the loan;

and entitle B. to keep the goods. *Eppes v. Tucker*, 4 Call 346.

**By Death or Will.**—After a loan of a slave from a father to a son has been established, the loan is terminated, if

not at the death of the son, at least by the testator's will, which was admitted to record within five years from the time he parted with possession. *Dickinson v. Dickinson*, 2 Gratt. 493.

### **Lobbying Contracts.**

See the title **ILLEGAL CONTRACTS**, vol. 7, p. 272.

**LOCAL ACTIONS.**—See the title **VENUE**. And see *Bierne v. Rosser*, 26 Gratt. 537.

### **Local Assessments.**

See the title **SPECIAL ASSESSMENTS**.

### **Local Customs.**

See the title **USAGES AND CUSTOMS**.

### **Local Improvements.**

See the title **SPECIAL ASSESSMENTS**.

### **Local Laws.**

See the titles **JUDICIAL NOTICE**, vol. 8, p. 640; **STATUTES**.

### **Local Option.**

See the titles **INTOXICATING LIQUORS**, vol. 8, p. 14; **JUDICIAL NOTICE**, vol. 8, p. 645.

### **Local Prejudice.**

As ground for change of venue, see the title **CHANGE OF VENUE**, vol. 2, p. 781. As ground for continuance, see the title **CONTINUANCES**, vol. 3, p. 300. As ground for new trial, see the title **NEW TRIALS**.

**LOCATING.**—In *Richmond v. Henrico County*, 83 Va. 204, 213, 2 S. E. 26, it is said: "‘**Locating**’ is ‘the act of selecting and designating lands which the person making the location is authorized by law to select.’ 2 Bouv. Law Dict. 124." See generally, the title **PUBLIC LANDS**.

### **Location of Boundaries.**

See the title **BOUNDARIES**, vol. 2, p. 590.

**LOCATIVE CAUSE.**—See **DESCRIPTIVE CALL**, vol. 4, p. 633. And see generally, the title **PUBLIC LANDS**.

**LOCATION.**—See the title **RAILROADS**.

### **Locomotives.**

See the title **FIRES**, vol. 6, p. 126.



## **Loco Parentis.**

See the titles IMPLIED CONTRACTS, vol. 7, p. 307; PARENT AND CHILD.

## **Locus Pœnitentiæ.**

See the titles ATTEMPTS AND SOLICITATION TO COMMIT CRIME, vol. 2, p. 140; ILLEGAL CONTRACTS, vol. 7, p. 279.

## **Log Rolling.**

See the title ILLEGAL CONTRACTS, vol. 7, p. 272.

## **Lodging Houses.**

See the title INNS AND INNKEEPERS, vol. 7, p. 654.

# **LOGS AND LOGGING.**

### **I. Floating of Logs, 470.**

### **II. Trade Marks of Timber Dealers, 471.**

### **III. Measurement of Logs, 471.**

### **IV. Sale of Timber, 472.**

### **V. Booms and Boom Companies, 472.**

### **VI. Liens, 473.**

## **CROSS REFERENCES.**

See the titles FISH AND FISHERIES, vol. 6, p. 142; MILLS AND MILLDAMS; NAVIGABLE WATERS; TREES AND TIMBER; USAGES AND CUSTOMS; VENDOR AND PURCHASER; WATERS AND WATERCOURSES.

### **I. Floating of Logs.**

#### **What Constitutes a Floatable Stream.**

—To be a floatable stream so as to entitle the public to use it as a public highway, the stream need not be at all times capable of floating logs, but it will suffice that when the water is high it is thus capable for such a length of time as would make it useful and profitable for the public to so use it as a highway to float logs to mill or market. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60. See also, the titles MILLS AND MILLDAMS; NAVIGABLE WATERS; WATERS AND WATERCOURSES.

#### **Ownership of Floatable Stream.**

The third class of navigable streams are generally called "floatable" streams; and, though the public has a right to use them as a public highway

by floating logs and other products on forests, mines, and tillage down these streams to mills and market, yet the riparian owners along such streams own the bed of them, as well as their banks, differing in this respect from other navigable streams. The respective rights on such floatable streams of the public and the riparian owners is well stated in *Lancey v. Clifford*, 54 Me. 487. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 63. See also, *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 449, 41 S. E. 400; *Rogers v. Coal River, etc., Co.*, 41 W. Va. 593, 23 S. E. 919.

#### **Reasonable Use of Stream.**

—"A stream which in its natural condition is capable of being used for floating logs, lumber, and rafts, is subject to the public use as a highway, though it be private property, and not strictly

navigable. This right of the public, however, must be exercised in a reasonable manner, since each person has an equal right with every other person to its enjoyment, and the enjoyment of it by one, necessarily, to a certain extent, interferes with its exercise by another. What constitutes reasonable use by the public depends upon the circumstances of each particular case, as the occasions for the use are so numerous and diverse that no positive rule can be laid down to regulate it in every instance with anything like entire precision." *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 63.

The public in this state have a right to use as a highway, not only tidal rivers in which the tide ebbs and flows, and fresh water rivers capable of being profitably used to carry on commerce in their natural state, without artificial improvements, but also floatable streams; that is, such streams as are capable of being profitably used by the public, in their natural state, to float logs or timber, or the products of mines or tillage, to market or mills. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60.

**Private Streams.**—In *Wadsworth v. Smith*, 11 Me. 278, the doctrine is stated by Parris, J., that when a stream is naturally of sufficient size to float boats or mill logs, the public has a right to the free use for that purpose. But such little streams or rivers as are not floatable, that can not in their natural state be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, not to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 65.

## II. Trade Marks of Timber Dealers.

See generally, the title **PATENTS AND TRADE MARKS**.

**Code Provision.**—Chapter 119 of the acts of 1882, appendix to Code of 1899, provides for the adoption of trade marks by timber dealers. Section 6 declares that when timber is purchased by the proprietor of any such trade mark, and the said trade mark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 529, 539, 47 S. E. 279.

**Presumption from Trade Mark.**—Section 8 further provides that, in any action, suit or contest in which the title to any timber upon which any such trade mark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trade mark in the absence of satisfactory proof to the contrary. *Poling v. Condon-Lane, etc., Co.*, 55 W. Va. 529, 539, 47 S. E. 279.

## III. Measurement of Logs.

**When Scribner's Rule Applies.**—In measurement of logs, lumber, and timber where there is no contract provision as to mode of measurement, Scribner's rule applies, under § 17a, ch. 59, Code, 1891, and custom or usage has no application. *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686.

Where such contract does not provide a mode of measurement, and there is no such special agreement to apply a particular mode of measurement, and such logs are purchased with the knowledge on the part of the seller that they are to be manufactured into sawed lumber, in ascertaining the cubical contents of the logs Scribner's rule, designated "cubic measurement," reducing the logs to square measure, is the rule applicable. *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686.

**Proof of Agreement as to Measurement.**—A written contract shows that logs are purchased at a given price per cubic foot, no mode of measurement being specified by it. Evidence is admissible to prove a contemporaneous oral agreement that a certain mode of measurement is to be applied. *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686.

#### IV. Sale of Timber.

See generally, the title SALES; TREES AND TIMBER; VENDOR AND PURCHASER.

As to sale of standing timber, see the title TREES AND TIMBER.

#### V. Booms and Boom Companies.

See also, the title MILLS AND MILL DAMS; WATERS AND WATERCOURSES.

**Right to Erect Boom.**—The erection of a boom in a lawful manner for the purpose of catching and holding logs is a proper and lawful use of a navigable or floatable stream. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

Unless such boom be negligently, unlawfully or improperly erected or managed the corporation erecting or maintaining the same is not liable for any injury or damage occasioned thereby to others using the banks and bed of such stream for milling or other purposes. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

**Statutory Provision.**—By an act called the "Boom Law," passed in 1889, amending and re-enacting former laws on the subject, it was provided, among other things, that any number of persons not less than five might become an incorporated company for the purpose of constructing any boom or booms, with or without piers, dam, or dams, in the rivers, creeks, or other streams within any of the following counties in this state, to wit, Gilmer, Braxton, etc., which may be necessary for the purpose of stopping and secur-

ing boats, rafts, logs, masts, spars, lumber, and other timber. See Code, 1891, Append. p. 1004. *State v. Elk Island, etc., Co.*, 41 W. Va. 796, 24 S. E. 590.

**Liability for Injury to Mill.**—A lessor who erects a boom in so close proximity to a milldam as to injure the water power of such dam and thereby creates a nuisance against the same is equally liable with his lessee with notice for the continuance of such nuisance. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400. See also, the title MILLS AND MILL DAMS.

**Question of Fact.**—Whether a boom is in too close proximity to a milldam depends on the fall of the stream and the effect that such boom has on the flow of the waters above the same and is a question of fact for the determination of a jury from the evidence produced. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

**Damages from Erection of Boom.**—The measure of damages is the loss sustained by such mill owner during the continuance of such nuisance and is to be ascertained by the rental or profit earning value of such property, as through such nuisance did not exist. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

**When Erection of Boom a Nuisance.**—The erection of a boom in such close proximity to a mill without consent of the owner thereof as to impede the flow of the water and thereby cause a deposit of sand and other sediment immediately below the dam of such mill whether a natural fall or an artificial structure in such manner as to destroy in an appreciable degree the water power of such fall or dam, creates an unlawful nuisance and renders the owner of such boom liable to the mill owner for the damages occasioned by the creation and continuance of such nuisance. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

If defendant's boom is so located and constructed as to cause the deposit of sand and debris and temporarily injure plaintiff's natural fall or prior artificial dam, such location and construction are unlawful and wrongful in so far as plaintiff's private rights are concerned and defendant must answer to him for the damages occasioned thereby. *Pickens v. Coal River, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

**Indictment for Obstructing Stream.**—A boom company may be proceeded against by indictment for erecting and maintaining a dam or other thing in any watercourse which is a public highway, which dam obstructs the navigation or the passage of fish, under § 24 of ch. 44 of the Code. *State v. Elk Island, etc., Co.*, 41 W. Va. 796, 24 S. E. 590.

But such company may except itself from the operation of the statute by showing that such dam or other thing is or has been allowed by what is called the "Boom Law." See Code, 1891, Append. p. 1004. *State v. Elk Island, etc., Co.*, 41 W. Va. 796, 24 S. E. 590.

**Construction of Statute.**—The legislature may, by such general law, confer on individuals and corporations rights in waterways which are not navigable except for canoes, push boats, etc., and, for floating logs, rafts, etc., rights in opposition and paramount to such public right; but the law conferring such private right, so far as it is in derogation of such public right of way, must be strictly construed. *State v. Elk Island, etc., Co.*, 41 W. Va. 796, 24 S. E. 590.

**Sufficiency of Declaration.**—As to the sufficiency of a declaration in an action for injuries to land by the erection of a boom, see *Rogers v. Coal River, etc., Co.*, 41 W. Va. 593, 23 S. E. 919.

**Estoppel to Claim Boom a Nuisance.**

—H., after acquiescing and even assisting M. in maintaining a boom for the catching and preserving of ties, timber, etc., and receiving the benefits thereof in the saving of large numbers of his ties at an expense far less than it must have cost him if they had passed beyond the boom, can not, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and was a public nuisance, interfering with steamboat navigation, and therefore he should not be required to pay a just and reasonable compensation for the catching and preserving of his said ties in said boom. *Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722.

**Power of Individual to Object to Boom.**

—If a boom is erected and maintained on navigable stream in violation of law, and is therefore a public nuisance, an individual has no cause of complaint aside from that of the common public, unless he suffer a special and peculiar damage therefrom, distinct and apart from the common injury. *Miller v. Hare*, 43 W. Va. 647, 28 S. E. 722.

**VI. Liens.**

See the title TREES AND TIMBER.

**Longevity.**

See references under MORTALITY TABLES.

**Lord Fairfax.**

See the title PUBLIC LANDS.

**Lord's Day.**

See the title SUNDAYS AND HOLIDAYS.

**LOSS.**—See *Pratte v. Enslow*, 46 W. Va. 527, 33 S. E. 322. And see the titles **FIRE INSURANCE**, vol. 6, p. 60; **LIFE INSURANCE**, ante, p. 340; **MARINE INSURANCE**.

## **Loss of Service.**

See the title **SEDUCTION**.

# **LOST INSTRUMENTS AND RECORDS.**

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## **I. Lost Instruments.**

### **A. ACTIONS TO RECOVER LOST INSTRUMENTS.**

**Action for Purchase Money.**—If A purchase of B a foreign bill of exchange, which is afterwards lost before it is presented, and B refuses to give a second bill; A may bring indebitatus assumpsit for the purchase money. *Murray v. Carret*, 3 Call 373.

#### **Trover to Recover Lost Instrument.**

—If a military certificate be lost, and afterwards sold to a bona fide purchaser, without notice, still the original owner may maintain trover for it

against the innocent vendee. *Wilson v. Rucker*, 1 Call 500. See also, the title **TROVER AND CONVERSION**.

### **B. ACTIONS BASED ON LOST INSTRUMENTS.**

#### **1. When Action Will Lie.**

##### **Destruction of Deed before Recordation.**

—A father executed, acknowledged, and delivered a deed of gift of land to his son. After its delivery to the clerk for record, but before it was actually recorded, the father took it and destroyed it, and conveyed the land to others, having notice of the son's equitable rights. It was held,

the court below erred in refusing to set up the destroyed deed in behalf of the son. *Vaughn v. Moore*, 89 Va. 925, 17 S. E. 326.

A father, by deed executed, conveyed to his daughter several tracts of land, with many slaves, etc. After this, the father got possession of the deed surreptitiously, and cancelled it. Upon a bill by the daughter, the court restored the deed to its legal force. *Ward v. Webber*, 1 Wash. 274.

An heir promised his mother, that, if she would give him, the heir, half of her estate, he would give part of his lands to his younger brother, which she orally agreed to; and, in consequence thereof, the heir executed three deeds to his brother for several parcels of land. Two of the deeds were recorded; but the third, having been attested by two witnesses only, the mother trusted it with the heir, who promised to acknowledge it before a third witness; upon discovering, however, that the mother had conveyed part of her property to his brother, he destroyed it. Equity will not set up the deed against the heir, for the suppression of the deed by the heir, was not for a fraudulent purpose, but as a justifiable guard against fraud and injustice meditated against him. *Chapman v. Chapman*, 4 Call 430.

A grandfather, who had promised before marriage, to give his daughter a negro woman, made a conveyance of her after the marriage, and with the consent of the father, to the children of his daughter begotten, and to be begotten. The next day the grandfather and father agreed to exchange the above negro for another, which was duly carried into execution. Bill by the children to set up the first deed, which was lost, and for a decree for the negro named in it, dismissed. *Applebury v. Anthony*, 1 Wash. 287.

In 1862 land was conveyed to J. B. H. in trust for his wife and their children. Deed was lost and not recorded, but its contents were estab-

lished. In 1873 J. B. H. absconded. In 1873 same grantors conveyed same land to the wife, reciting deed of 1862, and she sold the land to T., and in 1878, an absolute owner sued T. for specific performance. T. defended on ground of defect of her title, but sale was ordered and made to R., and L., sheriff, ordered to deliver possession. T. obtained injunction, but it was dissolved. Then the children, who had never been parties to the proceedings, brought their bill, set up their rights under the lost deed, and obtained an injunction; but the injunction was dissolved, and their bill dismissed on appeal. It was held, the lost deed of 1862, though never recorded, was binding between the parties thereto, and all the parties to these suits (they having had actual notice of same), and secured the children's rights in the land. *Hess v. Rankin*, 78 Va. 175. See generally, the title RECORDING ACTS.

#### **Recovery on Mutilated Banknotes.—**

As to the recovery on a banknote which has been cut in two, and one-half of which is lost, see the title BANKS AND BANKING, vol. 2, p. 285.

### **2. Jurisdiction.**

#### **a. Legal.**

**Negotiable Note.**—An action at common law could not be maintained upon a lost negotiable note, whether not due or overdue at the time of the loss. Otherwise, if the note was destroyed. *Moses v. Trice*, 21 Gratt. 556.

But if at the time of the trial a recovery upon the lost note would be barred by the statute of limitations, the action may be maintained. *Moses v. Trice*, 21 Gratt. 556.

"This case presents the question, whether an action at law can be maintained upon a lost negotiable note transferable by delivery. No decision can be found in the Virginia reports involving this precise point. In England the doctrine is firmly established, that such an action can not be main-

tained; and the sole remedy of the owner is in a court of chancery, which can adjust the equities of the parties, and require suitable indemnity as a condition of relief. *Hansard v. Robinson*, 7 Barn. & Cress. 90; *Ramuż v. Crowe*, 1 Exch. R. 166, 18 Eng. Law & Eq. R. 514. In this country there has been some conflict of opinion on the subject; but the great weight of authority is in harmony with the English doctrine." *Moses v. Trice*, 21 Gratt. 556, 561.

#### **b. Equitable.**

Equity has jurisdiction wherever a lost instrument is to be set up, notwithstanding that the courts of law now exercise jurisdiction in the same cases. *Shields v. Com.*, 4 Rand. 541; *Kerney v. Kerney*, 6 Leigh 479; *Graves v. McCall*, 1 Call 414; *Hickman v. Painter*, 11 W. Va. 386; *Mitchell v. Chancellor*, 14 W. Va. 22; *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. 423; *Lyttle v. Cozard*, 21 W. Va. 183; *Thornton v. Stewart*, 7 Leigh. 128.

**Effect of Finding of Bond.**—The relief will be granted in such a case, though it be proven, that after the institution of the suit, but before the hearing of the case, the lost bond was found, provided the plaintiff had used diligence to find it before the suit was brought; and especially when the loss of it arose from its having been improperly in the possession of one of the obligors. *Lyttle v. Cozard*, 21 W. Va. 183.

**Extent of Jurisdiction.**—In such a case, a court of chancery, having jurisdiction for one purpose, will adjudicate the whole merits of the cause. *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118.

**Where Discovery Is Sought.**—Courts of equity have jurisdiction where a lost instrument is set up, and the discovery sought in relation thereto is material to the relief. *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. 423.

**Vendor's Lien.**—A court of equity has jurisdiction to enforce a vendor's lien on land for the purchase money represented by a bond, though the bond has been lost, and though a copy of the deed can not be produced by the vendor, the plaintiff; and a bill properly alleging these facts should be sustained on demurrer, though there is with the bill no affidavit that the bond has been lost and could not be found on search, as these facts may be shown by proof or otherwise during the progress of the trial. *Moore v. Smith*, 26 W. Va. 379.

In *Robinson v. Dix*, 18 W. Va. 528, 529, syl., point 3, where this court held: "A court of equity has jurisdiction to enforce a vendor's lien for the unpaid purchase money represented by a bond though it has been lost; and while its loss, and that it can not be found on search, may be properly stated in the bill and supported by affidavits; yet the failure to make such allegation would be no ground of demurrer, as it may afterwards be done on motion of the defendant, or these facts may be shown in the progress of the cause." In the case before us the bill would not have been demurrable, even if it had failed to state the loss of the bond. *Moore v. Smith*, 26 W. Va. 379, 383.

**To Charge Surety.**—A court of equity will not charge a surety, further than he is bound at law; but, if a surety bound at law, can not be charged there for want of the instrument of which the creditor is deprived by accident or fraud, as by loss of the instrument, or a withholding it by the surety, equity will give relief. *Graves v. McCall*, 1 Call 414.

**Destruction by Defendants.**—A bill alleging that I. and A. had obtained the possession of certain bonds or promissory notes executed by themselves to the plaintiff, and which were left in the hands of the plaintiff's agent, through false or fraudulent representations, with the design to cheat and de-

fraud the plaintiff, and had destroyed them, shows sufficient ground on its face for the jurisdiction of a court of chancery. *Campbell v. Lynch*, 6 W. Va. 17.

**To Set Up Lost Receipt.**—A bill is filed by H. to set up a lost receipt, which the defendant, P., had given H. as constable, for certain claims put in the said constable's hands for collection. On demurrer, it was held, equity has jurisdiction, notwithstanding courts of law exercise jurisdiction in the same class of cases. The court relieves against the accident of the loss, by setting up the evidence of the debt. *Hickman v. Painter*, 11 W. Va. 386.

**Loss of Agreement.**—The written agreement between the maker and the payee of the note, in relation to the contract in pursuance of which the note was made, having been lost at the time the judgment was recovered on the note, and without which agreement the maker could not make his defense at law; it was held, that is ground for the jurisdiction of a court of equity. *Vathir v. Zane*, 6 Gratt. 246.

**Enforcement of Bond.**—Courts of equity have always taken jurisdiction to enforce a bond, which has been lost. Originally this jurisdiction was assumed, because the common-law courts furnished no redress in such a case, as they required in a declaration on a bond proof of the bond, and no excuse in the declaration was regarded as sufficient to dispense with such proof. See *Whitefield v. Fausset*, 1 Ves. 392; *East India Company v. Boddam*, 9 Ves. 466. This rule of the common law was afterwards changed, and these courts assumed jurisdiction of suits on lost bonds. The allegation in the declaration, that the bond was lost being held to dispense with the proof of it. See *Read v. Brookman*, 3 T. R. 151; *Totty v. Nesbitt*, 3 T. R. 153, note. Yet, this assumption of jurisdiction by

the common-law courts was held by courts of equity, in accordance with a general principle applicable generally to all cases of extension of jurisdiction by the common-law courts, that they still continued to have jurisdiction to furnish redress upon lost bonds. See *Walmsley v. Child*, 1 Ves. 341; *Kemp v. Pryor*, 7 Ves. 249; *Evans v. Bicknell*, 6 Ves. 182; *Mayne v. Griswold*, 3 Sandf. S. C. 478; *Hickman v. Painter*, 11 W. Va. 386; *Mitchell v. Chancellor*, 14 W. Va. 22. *Lyttle v. Cozad*, 21 W. Va. 183, 196.

Equity will set up a lost bond against a surety, and upon satisfactory proof that the lost bond bound the heirs, against the heirs of the principal obligor also. *Kerney v. Kerney*, 6 Leigh 479.

If, however, the bond has been lost or destroyed by accident, or by the defendant himself, or be in his possession, and the fact be set forth in the declaration, it will be a good excuse for not making proof. *Colley v. Sheppard*, 31 Gratt. 312, 316.

**Stale Demands.**—For the proposition that equity does not lend its aid to enforce stale demands, when, by reason of the death of parties or witnesses, the loss of papers, or other circumstances, there is danger of doing injustice, and there can no longer be a safe determination of the controversy, see *Bargamin v. Clarke*, 20 Gratt. 544, 553; *Morrison v. Householder*, 79 Va. 627, 631; *Caruthers v. Lexington*, 12 Leigh 610.

### 3. Rules of Procedure.

Where a court of chancery is resorted to for the purpose of setting up a lost instrument, the rules of that court are applicable. *Mitchell v. Chancellor*, 14 W. Va. 22.

### 4. Parties.

In an action for the purpose of setting up a lost instrument, all persons who are materially interested in the subject matter or who will be directly affected by the decree, are necessary



parties to the suit. *Mitchell v. Chancellor*, 14 W. Va. 22.

**Original Holder of Public Certificate.**—A person losing a public certificate bearing interest which never was transferred to him by actual assignments from the original holder, ought not, by a suit in chancery, to obtain its renewal from the commonwealth, without making the original holder a party to the suit. *Auditor v. Johnson*, 1 Hen. & M. 536.

#### 5. Pleading.

**Sufficiency of Averment.**—In a declaration in a suit on a lost bond, it is alleged that the bond was given to one of the plaintiffs, who, by the affidavit filed of the loss of the bond, is alleged to be the wife of the other plaintiff, and it is held, that a sufficient interest appears in the female plaintiff, to justify the use of her name as plaintiff, without further averment to disclose her interest. *Hawver v. Seibert*, 4 W. Va. 586.

#### Averment of Loss or Destruction.

Where a plaintiff resorts to a court of equity for relief, on the ground that a deed on which his claim depends has been lost or destroyed, the claim being such that if he had the deed he would have complete remedy by action upon it at law; the bill must distinctly aver the loss or destruction of the deed, and it must be shown that it could not be found upon due search; otherwise the court of equity has no jurisdiction of the case. *Taliaferro v. Foote*, 3 Leigh 58.

"Another ground for demurrer to this bill is, that there is in it no allegation, that search has been made for the two bonds alleged in the bill to be lost. But it was admitted, that the allegations in the bill and in the affidavits made a part of it were not sufficiently definite and full to give a court of equity jurisdiction, when its jurisdiction was based on the loss of the bonds, yet it would not affect the jurisdiction of the court in this case, as it is based not on the loss of the bonds,

but on its right to enforce a lien on a trust of land owned by the defendant, *Mrs. Dix*. In such a case, while it may be proper for the bill to state the loss of the bonds, and that they could not be found on search, it is not proper to submit to give such indemnity as is proper and the court may direct, yet as these are not of the essence of the jurisdiction in equity, the absence of them or the fact of their being done in an imperfect manner, is no ground for a demurrer, as they may be supplied by amendment or on motion of the defendant or by proof in the cause, and the plaintiff be still entitled to a decree." *Robinson v. Dix*, 18 W. Va. 528, 539.

#### 6. Affidavit of Loss.

In an action upon a lost instrument, a court of equity generally requires an affidavit of the loss of the bonds to accompany the bill. *Lyttle v. Cozad*, 21 W. Va. 183; *Robinson v. Dix*, 18 W. Va. 528; *Moore v. Smith*, 26 W. Va. 379; *Givens v. Manns*, 6 Munf. 191.

**Cause of Demurrer.**—And such a bill must be accompanied with an affidavit of the loss or destruction of the deed; the want of such affidavit is good cause of demurrer. *Taliaferro v. Foote*, 3 Leigh 58. But see *Cabell v. Megginson*, 6 Munf. 202.

#### When Affidavit Need Not Be Filed.

—When a court of equity has jurisdiction of the case independently of the loss of the bond, no affidavit need be filed of its loss. *Lyttle v. Cozad*, 21 W. Va. 183.

**It is sufficient compliance with Code, § 3376,** where the sworn bill alleges and the answer admits the destruction of the original papers in a cause wherein there was a decree for sale of certain lands, and there is filed a certified copy of the papers from the supreme court, where the cause was on appeal; and an injunction will not lie to such sale on the ground that "no affidavit of the destruction was filed." *Hudson v. Yost*, 88 Va. 347, 13 S. E. 436.

**May Be Filed at Any Time.**—If the plaintiff fails to file such an affidavit, it may be supplied by filing it at any time before the hearing; and if this be done, the relief will be granted, if the proofs in the case established the loss of the bond. *Lyttle v. Cozad*, 21 W. Va. 183.

**Filed during Progress of Suit.**—Upon a bill in equity for relief upon a lost bond, though regularly an affidavit of the loss of the bond, etc., ought to be filed with the bill, yet if such affidavit is not so filed, but is filed afterwards in the progress of the cause, this is sufficient. *Thornton v. Stewart*, 7 Leigh 128.

### 7. Indemnity.

Where a bona fide holder of a bank-note having transmitted one-half thereof by mail which has been stolen or lost, before he can demand payment from the bank of any part of its amount, in consequence of holding the retained half, he must give the bank a satisfactory indemnity to secure it against future loss, from the appearance or setting up the other half of the note. *Bank v. Ward*, 6 Munf. 166; *Farmers' Bank v. Reynolds*, 4 Rand. 186; *Moses v. Trice*, 21 Gratt. 556; *Exchange Bank v. Morrall*, 16 W. Va. 546. See also, the title BANKS AND BANKING, vol. 2, p. 285.

**When Unnecessary.**—Where, in a suit to enforce the payment of lost bonds, the final decree recites that at the time of its rendition the bonds were found and filed with the papers of the cause, no provision of indemnification against the loss of the bonds is necessary. *Hunter v. Robinson*, 5 W. Va. 272.

### 8. Evidence.

#### a. In General.

**Power of Appellate Court as to Evidence.**—In an action of covenant upon a lost instrument, there is a verdict and judgment for the plaintiff. On a motion by the defendant to set aside the verdict and grant him a new trial,

which is overruled, the exception sets out all the evidence. If the evidence of the plaintiff is believed, the verdict is correct. If the evidence of the defendant is believed, it is erroneous. An appellate court can not reverse the judgment. *Great Falls Mfg. Co. v. Henry*, 32 Gratt. 467.

#### b. Proof of Existence and Loss.

See also, the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 358.

Courts of equity, in exercising their jurisdiction to set up a lost instrument which is to constitute a muniment of title, require strong and conclusive proof of its former existence, its loss, and its contents. *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329; *Thomas v. Ribble*, 2 Va. Dec. 321; *Carter v. Wood*, 103 Va. 68, 48 S. E. 553; *Board v. Calihan*, 33 W. Va. 209, 10 S. E. 382.

An action at law may be maintained upon a note that has been destroyed; the evidence should, however, satisfy the jury, beyond any reasonable doubt, that the note has been destroyed. *Moses v. Trice*, 21 Gratt. 556.

**Muniments of Title.**—"Where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss, and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. \* \* \* It is the policy of the law, adopted with a view to prevent frauds, that title to lands shall pass only by written instruments; and the difference is more in name than in fact between giving effect to a parol conveyance of lands and establishing a title to lands under an alleged lost deed, upon parol testimony of its contents and loss, unless the proof be clear and conclusive." *Thomas v. Ribble*, 2 Va. Dec. 321, 325; *Carter v. Wood*, 103 Va. 68, 71, 48 S. E. 553.

If a plaintiff in ejectment claims title

under a lost or destroyed deed, the proof of its former existence, contents, and loss or destruction must be strong and conclusive before the court will permit a title to be established by parol evidence. A bare copy of an order of a county court, showing that a deed of bargain and sale from the plaintiff's alleged grantor to him had been admitted to record, accompanied by proof of the destruction of the deed book in which the deed should have been recorded, and of the fact that the grantor owned no other land in that county than that sought to be recovered, and an unauthenticated copy of the alleged lost deed, without proof of the genuineness of the original from which the copy was made, is not sufficient to establish the existence of the deed alleged. *Carter v. Wood*, 103 Va. 68, 48 S. E. 553.

To establish title to land under an alleged lost deed, on parol testimony, proof that it existed must be clear and conclusive. *Thomas v. Ribble*, 2 Va. Dec. 321.

**Memorandum to Prove Existence of Deed.**—In a suit to set up a lost deed made a century ago, a memorandum in the handwriting of the grantee's attorney, found amongst the papers of the grantee, stating that the lands had been granted to the grantor, and by him and wife conveyed with general warranty to the grantee, is not in itself evidence of the execution of such deed; nor is such memorandum admissible as a declaration against interest in a suit where no relief is sought against the attorney, or his representatives; nor is it admissible as a part of the *res gestæ*, as the transaction to be explained or proved is the execution of the deed, and the memorandum neither accompanies nor explains the fact in issue. *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

**Effect of Failure to Establish Loss.**—In order to maintain a suit in equity setting up a lost negotiable note

or bond and praying for a decree for the payment thereof, it is indispensable, where the loss of such note or bond is controverted by the answer of the defendants, that the loss should at the hearing of the cause be established by competent and satisfactory proofs. It, therefore, the plaintiff in such bill fails at the hearing to establish the loss of the instrument, in such case the suit will be dismissed. *Exchange Bank v. Morrall*, 16 W. Va. 546.

**Contents of Permit.**—A witness can not be received to give evidence of the contents of a permit, not proved to have been lost. *Dawson v. Graves*, 4 Call 127.

**Certificate of Auditor.**—In a suit to establish a deed alleged to have been made a century ago, and lost, neither the certificate of the auditor showing that the lands were charged to the grantee for a great number of years after the date of the alleged deed, nor any number of intermediate conveyances, however numerous, from those claiming under the alleged grantee, unaccompanied by possession or other circumstance, can serve to establish the execution of such deed. *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329.

**Burden of Proof.**—It is incumbent on the plaintiff to prove the original existence and the loss of the bond, before proving its contents. *Colley v. Sheppard*, 31 Gratt. 312.

#### c. Proof of Contents.

See also, the title **BEST AND SECONDARY EVIDENCE**, vol. 2, p. 362.

In order to maintain a suit to enforce the collection of an obligation claimed to be lost, it is essential not only that the loss be proven, but that the terms of the contract be clearly and definitely established. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382. See also, *Thomas v. Ribble*, 2 Va. Dec. 321; *Carter v. Wood*, 103 Va. 68, 48 S. E. 553.

Where an action is brought to set up a lost instrument, the court of eq-

uity will require strong and conclusive proof as to its contents. *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329; *Thomas v. Ribble*, 2 Va. Dec. 321.

**Bill of sale of personal property** (not being necessary to pass the title), need not be shown in evidence by persons claiming under the grantee, in a controversy between them and the grantor, or those claiming under him; for they may prove, by any other legal evidence, a title in the person under whom they claim; and such grantee, or his representatives, may prove their title by other evidence than the bill of sale, unless it be alleged that such bill of sale contains other matter than the mere transfer of the property (and of which the grantor, or those claiming under him might avail themselves), and notice be given to produce it; but in neither case can the substance or contents of the bill of sale be given in evidence, without due affidavit by the party, or other satisfactory proof, of its loss, or that it is not in the power of the party so offering the evidence. *Givens v. Manns*, 6 Munf. 191.

**Competency of Party.**—C. claims that he executed his note or bond to P., on the 10th day of February, 1860, to secure the payment of which said deed of trust was executed by him, and that afterwards, in the year 1861, he paid and settled said note or bond with P., with an order he had against P., drawn by T.; and said note or bond was then and there delivered up to him by said P.; that he (C.) afterwards lost said note or bond, or the same was destroyed while in his possession; that he has made diligent search for the same, and has been unable to find it. P. died, and M. qualified as the administrator of P. A controversy arose in a suit between C. and the administrator of P., deceased, as to whether said debt from C. to P. had been paid. It was held, that under the provisions of the 23d section of ch. 130 of the Code of 1868, of West Virginia, C. is not a competent witness to testify in

his own behalf, as to the payment of said note or bond to P., or that P., on such payment, and at the time thereof delivered the said bond into his (C.'s) possession; or that afterwards, while said bond was so in the possession of C., he (C.) lost the same, or it was destroyed. *Calwell v. Prindle*, 11 W. Va. 307.

**When Confessed.**—In an action of debt upon a bond by C.'s administrator against S.'s administrator, profert of the bond is excused on the ground that it was lost by accident. S.'s administrator pleads payment, and special pleas in which he avers that the bond was not lost or destroyed by accident but was destroyed by the obligee in her lifetime, with the intention and for the purpose of releasing S. from the payment of the debt, and this he is ready to verify; and issues were made up on the pleas. On the trial of the cause the defendant insists the plaintiff should first prove to the satisfaction of the court the original existence of the bond and its loss, and it was agreed that all the evidence in the cause shall be heard, and the defendant may move to exclude it; and on his motion all the evidence was excluded. It was held, every pleading is taken to confess such traversable matter on the other side as it does not deny. The pleas, therefore, confess the original existence of the bond as described in the declaration and its destruction. There was, therefore, no necessity on the plaintiff to prove to the satisfaction of the court the original existence and loss of the bond before receiving testimony as to its contents. *Colley v. Sheppard*, 31 Gratt. 312.

#### 9. Province of Court and Jury.

**Action on Lost Lease.**—K. leased to M. a house and lot in the city of A. for four years; but there was a stipulation in the lease, that if K. sold the property before the time ran out, upon a proper notice of such sale M. should deliver up possession of the premises. The lease had been destroyed, and the

contents were proved by parol evidence. *K.* did sell the property before the four years expired, and gave a notice to *M.* to deliver possession. It was held, it was for the jury to ascertain from the evidence what were the terms of the contract, and to determine, under such instructions as the court might give for their information and guidance, what was their legal effect. *Millan v. Kephart*, 18 Gratt. 1.

**Sufficiency of Evidence of Loss.**—If the pleas put in issue the loss of the bond, then that issue must be tried by the jury; and if there was evidence introduced before the jury hearing on the question of the loss of the bond, it was for the jury to decide upon the sufficiency of the evidence to establish the loss; and it was error in the court to exclude it. *Colley v. Shepard*, 31 Gratt. 312.

**To Ascertain Terms.**—The court below was not called upon, however, to put a construction upon the clause which is the subject of the present controversy; nor are we. The written contract had been destroyed, and the particular terms of it were not submitted to the court by special verdict or otherwise, in order that the court might determine their legal effect. The contents of the writing were proved to the jury by parol evidence. It was the province of the jury to ascertain from the evidence, as well as they could, what were the terms used in the contract, and to determine, under such instructions as the court might give for their information and guidance, what was their legal effect. *Millan v. Kephart*, 18 Gratt. 1, 9.

## II. Lost Records.

### A. RECORDS OF TITLE.

**Copies as Evidence Where the Record Is Lost or Destroyed.**—As to the admission of copies as evidence where the record is lost or destroyed, see the title **BEST AND SECONDARY EVIDENCE**, vol. 2, p. 357.

### B. JUDICIAL RECORDS.

See also, the title **BEST AND SECONDARY EVIDENCE**, vol. 2, p. 359.

**An instruction** which is lost and not appearing in the record, will be presumed to be correct, and no error can be assigned as to it. *Jordan v. Benwood*, 42 W. Va. 312, 323, 26 S. E. 266, 270, citing and following *Turberville v. Long*, 3 Hen. & M. 309.

**If the original writ**, be lost, so that it can not be made a part of the record, the court will intend after verdict, that it was a good writ, though some of the subsequent process be erroneous. *Turberville v. Long*, 3 Hen. & M. 309.

**Effect of Loss of Indictment.**—In a prosecution for a felony or misdemeanor, if the indictment is lost at any time before the trial, though after arraignment and plea, the party can not be tried. *Bradshaw v. Com.*, 16 Gratt. 507.

**Weight of Evidence.**—The court will not, therefore, according to the authorities which have been cited, require that the loss or destruction of the original papers, and of the probate of them, shall be "proved beyond all possibility of mistake;" it is only necessary that the evidence in relation to the loss should produce "a moral certainty that the court has had every opportunity for examining and deciding the cause, upon the best evidence within the power or control of the litigants." *Corbett v. Nutt*, 18 Gratt. 624, 638.

**Imperfect Minute.**—Where the records of a court have been destroyed, an imperfect minute of a judgment may be admitted to record under the act of assembly, in lieu of the original; provided the substantial parts thereof appear; and the record of such minute, made by order of the court, is good evidence on a plea of noli tenere record; although the clerk has failed to indorse upon it that the original was lost, or destroyed, and has also failed

to make an entry to the same effect in the record book. *Lyons v. Gregory*, 3 Hen. & M. 237. See also, the title MINUTES OF COURT.

**Decrees and Reports.**—The papers in the suit of *J.* were lost at the time the decree appealed from was made, but there were found decrees and reports of commissioners, the exceptions thereto, made in the two suits, sufficient to enable the court to ascertain the merits of her claim. It was proper to decree upon the claim. *Mayo v. Carrington*, 19 Gratt. 74.

**Application to Criminal Proceedings.**—The act, Va. Code, ch. 180, p. 679, authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings. *Bradshaw v. Com.*, 16 Gratt. 507.

**Reinstatement of Cause.**—A cause was on the docket of the circuit court at its last session before the war. All records of that court destroyed during the war except such as are in the attorney's hands. In 1881, the cause was not on docket, it not appearing that it had been legally removed. On motion it was reinstated; it was held, no error. *Dismal Swamp Land Co. v. McCauley*, 83 Va. 16, 6 S. E. 697.

**Recovery on Lost Records.**—*D.* recovered judgment against *N.* from which *N.* complaining of error, regularly took an appeal; but before this appeal was or could be prosecuted, the office of the clerk of the court, and with it the record of the judgment, were destroyed by fire, and therefore the appeal was never prosecuted; then

*D.* brought debt on the judgment whereof the record was so destroyed. It was held, he was entitled to recover, notwithstanding the appeal taken from the judgment, and the circumstances which prevented the prosecution thereof. *Newcomb v. Drummond*, 4 Leigh 57.

**Waiver of Objections.**—Where the original papers in a cause have been lost, they may be supplied as provided in § 14 of ch. 130 of the Code; and in a chancery cause, where the lost bill is thus supplied, and the defendant appears and files his answer thereto, he thereby waives any objection to the manner in which the bill was supplied, or to the authenticity of the copy thus supplied. *Stewart v. Stewart*, 40 W. Va. 65, 20 S. E. 862.

**As Grounds for Bill of Review.**—It is not a sufficient ground for a bill of review, that certain documents, on which the complainant's right to a decree depended, and which he intended to exhibit with his original bill, were lost or mislaid by his counsel, and not found until after the decree against him. *Jones v. Pilcher*, 6 Munf. 425.

**May Be Read in Evidence.**—Where two suits are heard together, and it appears from the orders and decrees entered therein, that the proper parties were before the court either in one or both of the suits, and it is proven, that the file of papers in one of the suits is lost, such orders and decrees may be read in evidence, although it does not appear from the bill in the other suit, that all such persons were parties to it. *Waggoner v. Wolf*, 28 W. Va. 820.

## C. WILLS.

See the title WILLS.

## LOST PROPERTY.

### CROSS REFERENCES.

See the titles BAILMENTS, vol. 2, p. 223; LARCENY, ante, p. 207; LOST INSTRUMENTS AND RECORDS, ante, p. 474.

As to larceny of lost property by finder, see the title LARCENY, ante, p. 207.

**Effect of Loss on Ownership.**—If the owner of a personal chattel loses it accidentally, he does not part with his title, but the finder becomes a quasi depositary, from whom the rightful owner may recover it. *Tancil v. Seaton*, 28 Gratt. 601.

**Title of Finder.**—The general rule is that a finder of lost personal chattels becomes a quasi depositary, invested with such possessory interest as will entitle him to hold them against all the world except the rightful owner. *Tancil v. Seaton*, 28 Gratt. 601.

**Rule Extends to Banknotes.**—This rule is not strictly limited to chattels, but extends to money, and to banknotes, for they are regarded as money. *Tancil v. Seaton*, 28 Gratt. 601.

**Finder Has Possessory Interest in Note.**—The finder of a banknote as against a bailee without reward to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover

the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee. *Tancil v. Seaton*, 28 Gratt. 601.

**Depositary of Lost Banknote Estopped to Dispute Title of the Finder**

**—When.**—There is no good reason why a depositary of a lost banknote, as between himself and the finder thereof, should be an exception to the rule that a bailee is not permitted to dispute the title of his bailor where the owner is unknown, and there is no assertion of claim on his part against the depositary. *Tancil v. Seaton*, 28 Gratt. 601. See the title BAILMENTS, vol. 2, p. 223.

**Liability of Bailee.**—As to liability of bailee for banknote deposited by finder, see the title BAILMENTS, vol. 2, p. 226.

**Proof Requisite to Recovery.**—See the title BAILMENTS, vol. 2, p. 229.

**LOT.**—In *Counts v. Craig*, 2 Hen. & M. 618, 622, it is said: "It is clear that no land is vacant between the lumber house and Crouch's line; or at least, if any, it is so extremely minute a slip, as not to satisfy the expression 'lot.'"

In *Moseley v. Boush*, 4 Rand. 392, 395, it is said: "The act describes the persons intended to be made so liable, by various terms, 'owners of lots,' 'individual proprietors of lots,' 'landholders,' 'lot holders,' 'the proprietors.' These terms are used as synonymous through the act."

## LOTTERIES.

### CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 4, p. 1; GAMBLING CONTRACTS, vol. 6, p. 686; GAMING, vol. 6, p. 692.

**Raffling as Distinguished from Gaming.**—Taking a chance in a raffle, at twenty dollars, or any less sum, although the property raffled for exceeded that sum (the raffling being at

a private house), did not bring the person within the operation of the gaming act. *Com. v. Garland*, 5 Rand. 652.

But the winner of the thing raffled

for (it exceeding \$20), did come within the operation of the law, although neither of the losers (the loss of each being less than \$20), came within it. *Com. v. Garland*, 5 Rand. 652.

If the prize was won by two or more individuals in partnership, but the share of the gain of each was less than \$20, neither of them was embraced by the law. *Com. v. Garland*, 5 Rand. 652.

**Taking Chance in Raffle Distinguished from Purchase of Foreign Lottery Ticket.**—The taking a chance in a raffle was not the same offense as the purchase of a foreign lottery ticket, and was, therefore, not liable to the penalty prescribed for the latter offense, by the latter part of the 27th section of the gaming act. *Com. v. Garland*, 5 Rand. 652.

**Guarantee to Pay Prize Drawn to Lottery Ticket Equivalent to Lottery Ticket.**—A guarantee (or written assurance or promise, whereby the warrantor bound himself that he would pay the prize which might be drawn to a certain number in a lottery), when sold by the proprietor of a lottery, or a duly authorized agent of the proprietor, was strictly a lottery ticket, although it was not written in the usual form of lottery tickets; and the sale of such guarantee by such proprietor or his agent, was forbidden by the act of 1825. *Com. v. Chubb*, 5 Rand. 715.

**What Land Lottery Included.**—In Byrd's lottery, one of the prizes was described as McKeand's tenement, to which had been attached more than half an acre of land; and also as No. 327, by the survey made by said Byrd, and to which one-half an acre was attached. Said survey had been opposed and once defeated by the tenants; but was made and publicly hung up in the building where the lottery was drawn. S. drew the prize. Byrd afterward sold land adjoining said tenements to McKeand and he to others. S., over fourteen years after the lottery,

brought his bill claiming all that had ever been attached to the said tenement, as included in his prize. Held by the H. C. C., that a survey and plan of the lands was a necessary part of the scheme; and that S. took by and for his prize only the half-acre lot, No. 327. But the court of appeals, held that he was entitled to all that had been attached to McKeand's tenement, and gave him a decree against McKeand's estate; dismissing the bill as to the defendants who were purchasers from him without notice. *Southall v. McKeand*, Wythe 95, S. C., 1 Wash. 336.

**Mistake in Drawing—Effect.**—A mistake in the drawing of a lottery was fatal and a redrawing must take place. *Madison v. Vaughan*, 5 Call 562.

**Unpaid Lottery Tickets Passed by Will.**—Where the testator had bought some tickets in Byrd's lottery, but had not paid for them, the tickets passed by the residuary clause of his will; but the personal estate was chargeable with the price of them. *Cary v. Macon*, 4 Call 605. And see the title WILLS.

**Parol Evidence to Establish Title Acquired by Lot in Public Landing.**—If the owner of a tract of land, on a navigable river, was authorized, by law, to establish a town upon it, and dispose of the lots by way of lottery; and, in the scheme of such lottery, as advertised, adventurers therein were assured that the lots should be laid off in a town "convenient to the river, with public landings;" parol testimony was admissible, in aid of the inference deducible from such printed proposals, to establish an equitable title in the inhabitants of the town, as tenants in common, to a piece of ground, between the river and the lots actually laid off for the town. *Mayo v. Murchie*, 3 Munf. 358. See generally, the title PAROL EVIDENCE.

**Conveyance of Title by Deed.**—Where a deed conveyed lands, except-



ing several prizes drawn by fortunate adventurers in the maker's lottery, a prize drawn by a ticket proved to have been delivered to one of the trustees and superintendents of the lottery, without its appearing whether the ticket was sold or not, was within the exception. *Lyons v. Brown, Gilmer* 105.

**Act of 1825 Not Remedial.**—The act of assembly, passed 11th of February, 1825, entitled, "an act to prevent the sale of foreign lottery tickets within this commonwealth," did not come within the operation of the 29th section of the gaming law, and was, therefore, not to be interpreted as if it were a remedial law, but like other penal laws. *Com. v. Chubb, 5 Rand.* 715.

**Trading Stamps Not a Lottery.**—Where the evidence shows that the element of chance or lottery, in the use of "trading stamps" in this instance, was entirely wanting, as the articles to be received were fixed and certain, and kept constantly on exhibition for inspection by persons proposing to take the "trading stamps," it is not obnoxious to the laws against lotteries. *Young v. Com., 101 Va.* 853, 45 S. E. 327.

**Repeal by Implication.**—Section 4, act of 1816, conferring certain lottery privileges upon the D. S. C. Co. was, by implication, repealed by §§ 11, 12, acts, 1883-84, p. 268, and those privileges were revoked. *Justice v. Com., 81 Va.* 209; *Dismal Swamp Canal Co. v. Com., 81 Va.* 220.

By § 4, of act of February, 1816, the Dismal Swamp Canal Company was authorized to raise, by lotteries, \$50,000. By §§ 11, 12, acts, 1877-78, p. 309, the buying, selling, etc., of tickets in any lottery is prohibited under penalty. By necessary implication the latter act repeals the former. *Justice v. Com., 81 Va.* 209.

**Party Indicted Not Entitled to Continuance.**—Under § 4010, Va. Code, where a person is indicted for conduct-

ing a lottery, process may issue immediately, and if the accused appears and pleads to the charge the trial shall proceed without delay. Hence where the accused appears and pleads to the charge and moves for a continuance it is no error for the trial court to refuse a continuance. *Lawrence v. Com., 86 Va.* 573, 10 S. E. 840.

**Self-Crimination by Witness in Prosecution for Conducting Lottery.**—The act of criminal procedure, ch. 10, § 20 (Va. Code, 1873, ch. 195, § 20), which provides that a witness giving evidence in a prosecution for unlawful gaming shall never be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution, does not apply to a prosecution for managing and conducting a lottery; and a witness can not be required to testify in such a case if he will thereby criminate himself. *Temple v. Com., 75 Va.* 892. See generally, the title WITNESSES.

This is true, because, while in common parlance the word lottery may mean a game, yet the legislature has plainly drawn a distinction between lotteries and unlawful gaming. *Temple v. Com., 75 Va.* 892, 901.

**Liability of Subscriber to Creditors of Concern That Conducts a Lottery.**

—In an action by a receiver of an insolvent corporation against a stockholder, to recover a stock subscription for the benefit of creditors whose debts were contracted on the faith of his and other subscriptions, where the contract of subscription is lawful on its face, and the creditors have no knowledge of its vice, the stockholder can not defend on the ground that he was allured into making the subscription by the chance of obtaining one or more lots in a drawing for distribution of lots of unequal value. In determining whether or not such contracts shall be enforced, courts consider whether the good of the public, and the policy of the law, will be best

subservd, and the making of such contracts be discouraged, by enforcing the contract, or by refusing to do so. *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240.

**Repeal of Privilege of Conducting Lottery—No Impairment of Obligations of Contract.**—See the title CONSTITUTIONAL LAW, vol. 3, p. 216.

### **Lowest Bidder.**

See references under BIDS, vol. 2, p. 372.

### **Loyal and Greenbrier Company.**

See the title PUBLIC LANDS.

### **Lucid Intervals.**

See the titles INSANITY, vol. 7, p. 668; TESTAMENTARY CAPACITY.

### **Lucri Causa.**

See the title LARCENY.

### **Lumber.**

See the title LOGS AND LOGGING, ante, p. 470, and references given.

**LUNAR MONTH.**—See MONTH. And see the title TIME.

### **Lunatic Asylums.**

See the title HOSPITALS AND ASYLUMS, vol. 7, p. 174.

### **Lunatics.**

See the title INSANITY, vol. 7, p. 668.

### **Lying in Wait.**

See the title HOMICIDE, vol. 7, p. 118.

**LYNCH LAW.**—In *State v. Aler*, 39 W. Va. 549, 20 S. E. 585, 588, it is said: "Bouvier defines 'lynch law' as 'a common phrase, used to express the vengeance of a mob inflicting an injury and committing an outrage upon a person suspected of some offense;' and Webster defines 'lynch law' thus: 'The act or practice by private persons of inflicting punishment for crimes or offenses without the due process of law'—all of which definitions seem to concur in defining 'lynch law' as something done without the warrant or sanction of law. **Lynch law** and Judge Lynch are so well defined and so well understood that there is nothing in the contention of counsel that the demurrer should have been sustained because there was nothing in the inducement stating who Judge Lynch was, or what was understood by his court. Words and expressions so well known must be taken in their ordinary acceptation."

### **Machinery.**

See the titles FIXTURES, vol. 6, p. 149; MASTER AND SERVANT; MECHANICS' LIENS; MINES AND MINERALS; NEGLIGENCE.

## **Machinist's Lien.**

See the title MECHANICS' LIENS.

**MADE.**—In *Roanoke Grocery, etc., Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612, 614, it is said: "The court instructs the jury that if they believe from the evidence in this case that the defendant, H. C. Jones, indorsed his name on the back of the note sued on in this case, after it was **made**, for the purpose of procuring an extension of time for Watkins & Surface on a debt then due, and which they at the time owed to the plaintiff in this case, then the said H. C. Jones became a guarantor, and the plaintiff can not recover in this case.' The court called the attention of counsel to the fact that the word **made**, used in the instruction, was, under the evidence in the case, ambiguous, and did not show whether it was meant in the sense of 'delivered' or simply 'prepared ready for delivery'; but no modification was asked or **made**, and the instruction was properly refused."

## **Magisterial Districts.**

See the titles COUNTIES, vol. 3, p. 636; ELECTIONS, vol. 5, p. 1.

## **Magistrate.**

See the title JUSTICES OF THE PEACE, ante, p. 68.

## **Magnetic Lines.**

See the title BOUNDARIES, vol. 2, p. 586.

## **Mail.**

See generally, the title POST OFFICE. See also, the titles BILLS, NOTES AND CHECKS, vol. 2, p. 456; JUDICIAL NOTICE, vol. 8, p. 632; SERVICE OF PROCESS. See also, references under LETTERS, ante, p. 246.

**MAIL CARRIER.**—A mail carrier has been held a laboring man. *Farinholt v. Luckhard*, 90 Va. 936, 21 S. E. 817.

A mail carrier is not an officer of the government. *Sawyer v. Corse*, 17 Gratt. 231, 246.

## **Mail Crane.**

See the titles NEGLIGENCE; NUISANCES.

## **Maim.**

See the title MAYHEM.

**MAINTAIN.**—See *Bacon v. Com.*, 7 Gratt. 602.

## **Maintenance.**

See the title CHAMPERTY AND MAINTENANCE, vol. 2, p. 773. See also, references under SUPPORT AND MAINTENANCE.

## **Majority.**

See the titles ASSOCIATIONS, vol. 1, p. 844; INFANTS, vol. 7, p. 466; STATUTES. See also, references under QUORUM.

## **Maker of Note.**

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 463.

**MAKE GOOD.**—See *Hylton v. Hunter*, Wythe, 195, 204.

**MALE ISSUE.**—See *Tidball v. Lupton*, 1 Rand. 194, 197; *Birtright v. Hall*, 3 Munf. 536, 546.

## **Malfeasance and Misfeasance.**

See the titles **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 603; **GUARDIAN AND WARD**, vol. 6, p. 811; **PUBLIC OFFICERS; TRUSTS AND TRUSTEES**.

## **Malice.**

As an element of crime, see the titles **ARSON**, vol. 1, p. 727; **ASSAULT AND BATTERY**, vol. 1, p. 733; **ATTEMPTS AND SOLICITATION TO COMMIT CRIME**, vol. 2, p. 135; **CRIMINAL LAW**, vol. 4, p. 16; **HOMICIDE**, vol. 7, pp. 114, 137, 147, 155; **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**, vol. 7, p. 411; **MALICIOUS MISCHIEF**. In actions for torts, see the titles **ACTIONS**, vol. 1, p. 131; **ASSAULT AND BATTERY**, vol. 1, p. 740; **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 120; **EXEMPLARY DAMAGES**, vol. 5, p. 748; **FALSE IMPRISONMENT**, vol. 5, p. 816; **MALICIOUS PROSECUTION**.

## **Malicious Abuse of Process.**

See the title **SUMMONS AND PROCESS**.

## **Malicious Arrest or Imprisonment.**

See the title **FALSE IMPRISONMENT**, vol. 5, p. 816.

## **Malicious Burning.**

See the title **ARSON**, vol. 1, p. 722.

## **MALICIOUS MISCHIEF.**

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### CROSS REFERENCES.

See the titles ANIMALS, vol. 1, p. 373; TRESPASS.

## I. Definition.

Malicious mischief is the wanton or reckless destruction of property, and the willful perpetration of injury to the person. 2 Bouv. L. Dict. 296.

## II. Statutory Provision.

### A. IN GENERAL.

The statutes in Virginia and West Virginia provide in substance that if any person unlawfully, but not feloniously, take and carry away, or destroy, deface, or injure any property, real or personal, not his own, he shall be guilty of a misdemeanor. Va. Code, 1904, § 3729; W. Va. Code, 1899, ch. 145, § 4268.

### B. PROPERTY EMBRACED BY STATUTE.

**Rule of Ejusdem Generis.**—Quære, whether the taking of any property other than such as is ejusdem generis with that specially mentioned in the statute of 1822-23, ch. 34, § 1, for punishing willful trespasses, be within the meaning of the statute? Com. v. Israel, 4 Leigh 675.

Upon an indictment on the statute of 1822-23, ch. 34, § 1, the jury find, in a special verdict, that defendant shot and killed hogs the property of another, the hogs being on defendant's own land at the time of his shooting and killing them. Held, the provisions of that statute are not confined to property ejusdem generis with that specially there enumerated. Com. v. Percavil, 4 Leigh 686.

**Dogs.**—Under this statute as contained in the statute of 1822-23, ch. 34, § 1, it was held, that no prosecution could be sustained for the destruction of dogs. That by the words "property

real and personal," the legislature did not intend to embrace dogs. Com. v. Maclin, 3 Leigh 809, approved in Davis v. Com., 17 Gratt. 620, though with great reluctance.

**Slaves.**—See the title SLAVES.

Indictment lay upon the statute of 1822-23, ch. 34, against a free person for willfully and without lawful authority injuring, by assaulting and beating, the slave of another, whether it would lie at common law or not. Com. v. Howard, 11 Leigh 632.

"This incident is founded on the statute of 1822-23, ch. 34, to provide for the more effectual punishment of certain offenses, and is a good indictment under that statute, upon the principle decided by this court in Com. v. Percavil, 4 Leigh 686." Com. v. Howard, 11 Leigh 632.

**Gates on Highways.**—See the title STREETS AND HIGHWAYS.

The county court authorizes W. to erect a tollgate on a turnpike road in the county, and take toll thereon at a rate fixed, he being bound to keep the road in order. S. & M. came with their teams to the gate, which they found shut and fastened. They demanded that the gate should be opened, and the gatekeeper demanded the usual tolls before opening the gate. S. & M. refused to pay the tolls, and the gatekeeper refused to open the gate. Thereupon S. & M. broke down and destroyed the gate, and passed through without paying tolls. Held, W. having erected the gate under the authority of the county court, whether or not the court had authority to make the order, S. & M. were guilty of a misdemeanor under the statute, Va. Code, 1873, ch. 188, § 28, which de-

clares that "if a person unlawfully, but not feloniously, take and carry away, or destroy, deface or injure, any property, real or personal, not his own \* \* \* he shall be deemed guilty of a misdemeanor." *Smart v. Com.*, 27 Gratt. 950.

Held, if the toll gate was such an obstruction on the highway as could be regarded as a nuisance, S. & M. could only be justified in removing it peaceably, and not in destroying it, and having destroyed it they were guilty of misdemeanor. *Smart v. Com.*, 27 Gratt. 950.

**Carrying Off Line Tree.**—Information charges that defendant did knowingly and willfully, without lawful authority, cut down and carry off a line tree between his land and the land of a certain J. H. contrary to the form of the statute. Held, the offense is not so charged as to be punishable by any law in force in Virginia. *Com. v. Powell*, 8 Leigh 719.

### C. RIOTOUS DESTRUCTION OF DWELLING HOUSE.

A partial pulling down or destruction of a dwelling house is an offense under the act, Code, ch. 194, § 6. "It is, 'If any rioter, being free, pull down, or destroy, in whole, or in part, any dwelling house, or assist therein, he shall be confined in the penitentiary not less than one, nor more than five years; and, though no such house be so injured, every rioter,' etc. It seems to have been intended by this statute to put the partial destruction of a dwelling house on the same footing with its total destruction, as to the guilt and punishment of the rioters engaged in it; and the terms used appear to have been adopted with the express view of excluding the possibility of any such construction as that placed upon the English statute." *Samanni v. Com.*, 16 Gratt. 543, 546.

S. occupies a house, the front room on the first floor as a store, the back room as a dining room, the upper rooms as sleeping apartments for her family;

but the only mode of ascent to the upper rooms is outside the house. A riotous destruction of the front door and window of the store room is an offense under the act, Code, ch. 194, § 6. "The only question remaining is, whether, in this case, any part of the house was pulled down or destroyed? A window was broken into; and the front door was broken open, by splitting a panel and removing the bar with which it was fastened. The door was thus rendered useless, and destroyed as a door. This was a destruction of a part of the house, sufficient to bring the perpetrators within the purview of the statute passed to prevent rioters from injuring dwellings." *Samanni v. Com.*, 16 Gratt. 543, 546.

### D. MALICIOUS BURNINGS.

See the title ARSON, vol. 1, p. 722.

The malicious burning of "a stack of wheat, or other grain, or of fodder, straw or hay," is a felony under our statute. Code of 1873, ch. 188, § 5. *Womack v. Circle*, 29 Gratt. 192, 198.

The malicious burning of wheat threshed from the straw is not a violation of the sixth section of the act of 1847-48, ch. 4, § 7, p. 99. *Erskine v. Com.*, 8 Gratt. 624.

In an action of trespass on the case, the count, without any special averments, charges that the defendant falsely and maliciously charged that the plaintiff attempted to bribe H. (a negro woman), to burn the wheat stacked on his land. Held, the statute, Va. Code, 1873, ch. 188, § 5, makes the malicious burning of a stack of wheat a felony. To solicit another to commit a felony, though the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, and the count avers a good cause of action. *Womack v. Circle*, 29 Gratt. 192.

### III. Intent.

#### A. KNOWINGLY AND WILLFULLY.

An essential ingredient required by

the statute of 1822 to constitute the offense is that it was done, "knowingly and willfully, without lawful authority." *Com. v. Percavil*, 4 Leigh 686.

The statute of February 14, 1823, has been uniformly construed to be a statute against willful trespass. *State v. Porter*, 25 W. Va. 685, 690, citing *Com. v. Israel*, 4 Leigh 675; *Campbell's Case*, 2 Rob. 791, and *Dye's Case*, 7 Gratt. 662.

**Sufficiency of Verdict.**—Upon an indictment on the statute of 1822-23, ch. 34, § 1, the jury find, in a special verdict, that defendant shot and killed hogs, the property of another, the hogs being on defendant's own land at the time of his shooting and killing them. Held, the verdict is defective and insufficient, in not finding the essential ingredients required by the statute to constitute the misdemeanor, viz.; that defendant killed the hogs "knowingly and willfully without lawful authority." *Com. v. Percavil*, 4 Leigh 686, is cited with approval in *Com. v. Howard*, 11 Leigh 632.

#### **B. BONA FIDE CLAIM OF RIGHT.**

Section 3729 of the Virginia Code provides: "If any person unlawfully, but not feloniously, take and carry away, or destroy, deface, or injure any property, real or personal, not his own, \* \* \* he shall be fined not less than five, nor more than five hundred dollars." A defendant can not be convicted of a trespass where the act complained of was done under a bona fide claim of right, and evidence of a verbal contract to convey to the defendant the land on which the alleged trespass was committed, though not admissible to show title, is admissible to show the bona fides of defendant's claim. *Wise v. Com.*, 98 Va. 837, 36 S. E. 479, citing *Ratcliffe v. Com.*, 5 Gratt. 657.

If the defendant removes the fence under a claim of right, believing it to be his own, and that he had a bona fide right to it, he committed no of-

fense against the statute. *Ratcliffe v. Com.*, 5 Gratt. 657.

A party in actual and peaceable possession of land, which he claims as his own, encloses it with a fence. About four years afterwards another person, who claims the same land and has a better title to it, forcibly pulls down and removes the fence. Held, this is not a trespass for which a prosecution can be sustained under the statute of February 14, 1823, acts of 1822-23, ch. 34, § 1, which enacts, "that any person who shall knowingly and willfully, without lawful authority, cut down any tree growing on the land of another, or destroy or injure any such tree, or any building, fence or other improvement, or the soil or growing crop on the land of another; or shall knowingly and willfully, without lawful authority, but not feloniously, take and carry away, or destroy or injure any tree already cut, or any other timber or property real or personal belonging to another," "shall be deemed guilty of a misdemeanor, and may be prosecuted and punished as in other cases of misdemeanor at the common law." *Campbell v. Com.*, 2 Rob. 791.

**Instructions.**—In *Wise's Case*, 98 Va. 837, 36 S. E. 479, it was held, citing *Ratcliffe v. Com.*, 5 Gratt. 657, that the court was right where it instructed the jury that if they believed from the evidence that the defendant pulled down the fence and left it down under a claim of right, believing it to be his own and believing that he had a bona fide right thereto, then they shall find for the defendant. See also, citing *Ratcliffe v. Com.*, 5 Gratt. 657, *State v. Ohio*, etc., R. Co., 38 W. Va. 242, 18 S. E. 583.

#### **IV. Place of Commission of Offense.**

The circumstance of the property destroyed being at the time of the alleged offense on defendant's own land, does not take the case out of the statute. *Com. v. Percavil*, 4 Leigh 686.

## V. The Indictment.

### A. IN GENERAL.

An indictment under that section providing that if any person unlawfully, but not feloniously, take and carry away, or destroy, injure or deface any property, real or personal, not his own, shall be guilty of a misdemeanor, is sufficient if it be in form or effect as follows: "State of West Virginia, —, to wit: The grand jurors of the state of West Virginia, in and for the body of the county of —, upon their oaths present, that A — B —, on the — day of —, eighteen —, in the county aforesaid, did unlawfully, but not feloniously, take and carry away, destroy, injure and deface the following personal property, not his own, to wit: (Here describe the property; or if it be real property, after the star say 'destroy, injure and deface the following real property, not his own, to wit: ' Here describe it). Against the peace and dignity of the state." W. Va. Code, 1899, ch. 145, § 4268.

### B. ALLEGATIONS.

**"Knowingly and Willfully without Lawful Authority."**—An indictment under the statute making it a misdemeanor for any person "knowingly and willfully, without lawful authority," to cut down any tree growing on the land of another, etc., must allege that the taking was "knowingly and willfully, without lawful authority" in the terms of the statute; it is insufficient to charge that the taking was "unlawful and injurious." Com. v. Israel, 4 Leigh 675.

**"Feloniously"—Not Error to Omit Words "But Not Feloniously."**—However in an indictment for malicious trespass, it is not error to omit the words "but not feloniously," these words not constituting any part of the description or definition of the offense, but inserted out of abundant caution to exclude the possible conclusion or

inference that the legislature intended thereby to confound malicious trespasses with felonies. Dye v. Com., 7 Gratt. 662.

**"Unlawfully and Injuriously."**—An indictment at common law for taking a horse "unlawfully and injuriously"—the usual form with force and arms being also used—was held not to describe the act as one that constitutes a breach of the peace. Com. v. Israel, 4 Leigh 675.

**Ownership.**—An indictment under the statute which enacts that any person, who shall knowingly and willfully, without lawful authority, cut down any tree growing on the land of another, etc., shall be guilty of a misdemeanor, must allege that the property belonged to another person. Com. v. Israel, 4 Leigh 675.

"The offense mentioned in the statute consists in unlawfully taking away the property of another; and it ought to appear by the indictment, that it is the property of another; for every indictment ought to show, with certainty, that the accused is guilty of the offense punished by the law." Com. v. Israel, 4 Leigh 675, 677.

### C. DUPLICITY.

Supplement Rev. Code, ch. 226, § 1, p. 280, provides: That any person who shall knowingly and willfully, without lawful authority, cut down any tree growing on the land of another, or destroy or injure any such tree, or any building, fence or other improvement, or the soil or growing crop on the land of another; or shall knowingly and willfully, without lawful authority, but not feloniously, take and carry away, or destroy or injure any tree already cut, or any other timber, or property, real or personal, belonging to another, or any courthouse, etc., etc., shall be deemed guilty of a misdemeanor, and may be prosecuted and punished as in other cases of misdemeanor, at the common law. An indictment under this statute which charges that defend-



ant knowingly and willfully removed a fence from the lands of P., and did injure and expose the growing crop of P., then on said land, charges but one offense; and is valid. *Ratliffe v. Com.*, 5 Gratt. 657.

#### **D. SUFFICIENCY OF RECORD OF FINDING.**

Indictment for unlawfully, willfully and maliciously setting fire to the woods near the plantation of A. M. and burning said woods and a fence belonging to said A. M. is described, in the record of the finding, as an indictment "for setting fire to the woods and burning the same." Held, a sufficient record of the finding. *Earhart v. Com.*, 9 Leigh 671.

On the 26th day of October, 1876, the grand jury, in and for the body of the county of Ritchie, attending upon the circuit court of said county, then in session, upon their oaths found an indictment for willful trespass; and the entry on the record of the finding of the indictment is as follows, viz.: "An indictment against B. S. Compton for trespass." The indictment appearing in the record, and certified by the clerk as being the indictment found in the cause, is against Benjamin S. Compton, J. C. Gilman, G. Slutter, John O'Brien, Patsey Ames, Martin Ames, Martin King, Thomas Faulkner, John Tate, George Tate, Charles Gilman and Henry Keneline for willful trespass. On the 23d day of October, 1877, the defendants, by their attorney, moved the court to quash the indictment, upon the ground that there is no record of the finding of the same; and the court sustained the motion to quash, as to all the defendants except the defendant Compton, and as to him overruled

the said motion. The said Compton then pleaded not guilty, on which issue was joined, and a trial was had before a jury, and the jury found and returned into court their verdict on the issue as follows: "We, the jury, find the defendant, B. S. Compton, guilty, as charged in the within indictment, and assess his fine at \$10." The defendant moved the court to set aside the verdict of the jury; and the court overruled the motion, and rendered judgment in favor of the state, upon the verdict of the jury, against the defendant for the fine and costs. No bill of exceptions was taken as to the ruling of the court; nor are the facts proved certified. Held, that the court did not err in quashing the indictment as to all the defendants except Compton, nor in overruling the motion to quash as to him. That the court did not err in overruling the motion to set aside the verdict of the jury, nor in rendering judgment upon the verdict of the jury, against the defendant, for the fine and costs. That the quashing of the indictment for the cause aforesaid did not, under the circumstances, amount to or operate to quash the indictment as to the defendant, Compton, but in fact only operated a dismissal of the indictment as to all the defendants therein named, except said Compton. *State v. Compton*, 13 W. Va. 852.

#### **E. VARIANCE.**

See the title **VARIANCE**.

Where an indictment was for an injury to ten white oaks, and the evidence showed that only one black oak was injured, it was held, that the variance is fatal. *Com. v. Butcher*, 4 Gratt. 544.

## MALICIOUS PROSECUTION.

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### CROSS REFERENCES.

See the titles FALSE IMPRISONMENT, vol. 5, p. 816; TRESPASS.

As to malice as an element of damages in false imprisonment, see the title EXEMPLARY DAMAGES, vol. 5, p. 748.

#### **I. In General.**

**Purpose of Action.**—"This action is to redress any damages the plaintiff may have sustained, either in his reputation by the scandal, in his person by imprisonment, or in his property by

expense incurred." *Spangler v. Booze*, 103 Va. 276, 279, 49 S. E. 42.

**Gist of Action.**—The gist of the action of malicious prosecution is the want of probable cause, and the maliciousness of the defendant's conduct.

*Tavenner v. Morehead*, 41 W. Va. 116, 120, 23 S. E. 673; *Harper v. Harper*, 49 W. Va. 661, 669, 39 S. E. 661; *Waldron v. Sperry*, 53 W. Va. 116, 123, 44 S. E. 283; *Vinal v. Core*, 18 W. Va. 1.

**Effect of Irregular Proceedings.**—The fact that the proceedings complained of were irregularly instituted or maintained is no defense to an action for malicious prosecution. *Vinal v. Core*, 18 W. Va. 1.

**Effect of Void Proceedings.**—The better doctrine seems to be that where the proceedings are void no action for malicious prosecution will lie. *Vinal v. Core*, 18 W. Va. 1.

**Distinguished from False Imprisonment.**—In false imprisonment proper, as distinguished from malicious prosecution, malice is not required, but want of reasonable and probable cause is sufficient. *Gillingham v. Ohio, etc., R. Co.*, 35 W. Va. 588, 14 S. E. 243. And see generally, the title FALSE IMPRISONMENT, vol. 6, p. 816.

## II. What Proceedings May Give Right of Action.

**Contempt Proceedings.**—A rule for contempt, though the judicial act of the court issuing it, may be the foundation for an action for malicious prosecution, provided the application for the same is without probable cause, actuated by impure and malicious motives, and founded on falsehood or misrepresentation. *Tavenner v. Morehead*, 41 W. Va. 116, 23 S. E. 673.

**Injunction.**—So also, where an injunction is sued out maliciously and without probable cause, an action for malicious prosecution may be maintained. *Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co.* 47 W. Va. 725, 35 S. E. 978.

**Attachment Proceedings.**—The legislature, considering that the remedy afforded by an action of malicious prosecution did not afford an adequate protection against the abuse of a process by an attachment, provided by § 22, ch. 151, Code, 1849, that "the right to

sue out an attachment may be contested; and when the court is of opinion that it was issued on false suggestions or without sufficient cause, judgment shall be entered that the attachment be abated." *Claffin v. Steenbock*, 18 Gratt. 482; *Spengler v. Davy*, 15 Gratt. 381. The court, in the case first above cited, draws the distinction between the two remedies, saying that the object of the action for damages is to obtain indemnity from the parties, and to inflict punishment upon him for wrongfully and maliciously abusing the process, whereby the plaintiff in the action has been injured and oppressed, while the object of the motion is to arrest the mischief by abating the attachment. And see generally, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

**Malicious Institution of Judicial Proceedings.**—If a person agree to pay the debt of another to a third party, and either pay or be in a condition to pay it, and, having control of such third party's debt, willfully ignoring his obligation, maliciously institutes judicial proceedings, and carries them through to a finality in such third party's name for the purpose of sacrificing the debtor's property and destroying his business, such proceedings are without probable cause, and render such person liable to an action for malicious prosecution. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

But if a person who has assumed to pay the debt of another be not in condition for any reason to do so, and at the same time he is the agent for the creditor, and it is his duty as such agent to collect the debt of his debtor, his performance of the duty by legal proceedings is not without probable cause, and will not render him liable to a suit for malicious prosecution, although the debt, interest, and costs may be recovered from him in an action of assumpsit for breach of his contract. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

**Search Warrant.**—An action for damages lies for maliciously, and without probable cause, procuring the issuance and execution of a search warrant for goods alleged to have been stolen. *Spangler v. Booze*, 103 Va. 276, 49 S. E. 42.

"This action is to redress any damages the plaintiff may have sustained, either in his reputation by the scandal, in his person by imprisonment, or in his property by expense incurred; and it would have well lain upon the mere affidavit of the defendant, if made with malice and without probable cause; for assuredly an application for a search warrant, upon the ground that goods have been stolen and are concealed within a person's inclosure, is a sufficient scandal to the reputation to sustain an action as to this ground." *Spangler v. Booze*, 103 Va. 276, 279, 49 S. E. 42, citing *Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693.

### III. Constituent Elements of the Tort.

To warrant a verdict and judgment for damages in an action for malicious prosecution it must be proved on the part of the plaintiff: First, that the prosecution alleged in the declaration has been set on foot and conducted to its termination, and that it ended in the final discharge of the plaintiff. Second, that it was instigated or procured by the co-operation of the defendant. Third, that it was without probable cause. Fourth, that it was malicious. *Vinal v. Core*, 18 W. Va. 1; *Hale v. Boylen*, 22 W. Va. 234.

### IV. Institution and Termination of Prosecution.

#### A. GENERALLY.

By the requirement that the prosecution must have been set on foot and conducted to its termination resulting in the final discharge of the plaintiff, is meant that the plaintiff must have been arrested under a process not abso-

lutely void. And by its being ended is meant, not that the plaintiff had been so discharged that no subsequent prosecution for the same alleged crime could have been instituted, but only that this particular prosecution was ended. *Vinal v. Core*, 18 W. Va. 1.

In *Scott v. Shelor*, 28 Gratt. 891, 894, it was said, by way of dictum, by Burks, J., that, as to the first essential element of the tort, that the prosecution must have ended in the final acquittal and discharge of the plaintiff. This was followed in *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470.

Judge Cooley, upon this subject, says: "The reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such manner that this can not be revived, and the prosecutor, if he proceeds further, will be put to a new one." Cooley on Torts, p. 216. *Spangler v. Booze*, 103 Va. 276, 279, 49 S. E. 42.

#### B. REASON FOR REQUIRING TERMINATION OF PROCEEDINGS.

The purpose of requiring allegation and proof of the termination of the prosecution is to avoid the litigation of the same thing at the same time in separate proceedings. So long as the criminal action is pending the innocence of the accused can not be litigated in the civil action, since the accused may eventually be found guilty in the criminal proceeding; and, if guilty, no civil action can be maintained.

#### C. SUFFICIENCY OF TERMINATION.

This being the reason for the allegation and proof of finality of the prosecution, it follows that the manner of ending it is immaterial, provided it be finally terminated in favor of the prisoner. But in the case of *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470, the court sustained a demurrer to a declaration because it alleged that the magistrate,

before whom the accused was brought for trial, dismissed the proceedings "without hearing any evidence," though there were the usual allegations of malice, want of probable cause, and termination of the prosecution favorably to the accused. This action of the magistrate was held by the court to be tantamount to the entry of a *nolle prosequi*, and the court said that where a prosecution is so ended, no action for malicious prosecution can be maintained. For a criticism of this case, see editorial in 6 Va. Law Reg. 356. See also, *Scott v. Shelor*, 28 Gratt. 891.

**View That Prosecution Must Have Ended in Acquittal.**—Although an action for malicious prosecution can not be maintained, unless the plaintiff has been fully acquitted of the criminal charge, yet the plaintiff is not obliged to prove that he was acquitted by the jury promptly, without hesitation, delay or deliberation; and the evidence of a juror to show that the deliberation of the jury was caused by their doubts as to the guilt or innocence of the accused is inadmissible. *Scott v. Shelor*, 28 Gratt. 891. But this was a dictum of Burks, J., followed in *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470, but contrary to the weight of authority.

**Failure to Find Stolen Goods on Execution of Search Warrant.**—The failure to find goods alleged to have been stolen, upon the execution of a search warrant, is a termination of that proceeding. No other trial or acquittal is necessary to support the action for damages. *Spangler v. Booze*, 103 Va. 276, 49 S. E. 42.

**Dismissal of Justice without Hearing Evidence.**—On complaint and information, on oath, of S., charging W. with felony, the justice before whom the complaint was made, issued his warrant in due form for the arrest of W.; the warrant was placed in the hands of an officer, who was authorized to execute it; W. was arrested thereon and brought before said justice for examination on said complaint; S. was

the only witness summoned on behalf of the state; he failed to appear; for that reason, the examination was, by the justice, continued until the next day; S. again failed to appear, although he was sent for; the complaint and warrant were then discussed by the justice, without having heard any evidence whatever; and the accused was discharged from custody. W. has not been, in any way, further prosecuted on said charge. Held, the dismissal of the complaint and warrant, and discharge of W. as aforesaid, are a sufficient ending and termination of that particular prosecution to entitle W. to maintain his action for malicious prosecution, so far as that element of his case is concerned. *Waldron v. Sperry*, 53 W. Va. 116, 44 S. E. 283.

## V. Probable Cause.

### A. DEFINITION.

Probable cause, in a criminal prosecution, is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Scott v. Shelor*, 28 Gratt. 891; *Vinal v. Core*, 18 W. Va. 1; *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262.

In a case brought for maliciously suing out an attachment it was held that justifiable probable cause for suing out an attachment against the effects of a debtor, is a belief by the attaching creditor in the existence of the facts essential to the prosecution of the attachment, founded upon such circumstances as were sufficient to produce such belief in the mind of a man of ordinary caution, prudence and judgment. *Spengler v. Davy*, 15 Gratt. 381. See also, *Clafin v. Steenbock*, 18 Gratt. 842.

### B. FACTS WITHIN PROSECUTOR'S KNOWLEDGE.

If facts exist which render it prob-

able that a certain party has committed a crime the public interest requires that he should be prosecuted; and if it turns out that he was innocent he has suffered *damnum absque injuria*, even though the prosecutor was influenced by improper motives or malignant feelings. This doctrine is based upon public policy, which requires that prosecution for an offense should not be discouraged, when there is probable cause to charge a particular party with the crime. *Vinal v. Core*, 18 W. Va. 1. Hence, it may be laid down as a general rule that if the defendant, being a man of ordinary prudence, believed in good faith from his own knowledge and understanding of the facts and circumstances, that the judicial proceeding instituted by him was necessary and justifiable, he can not be held liable, although it should be afterwards made to appear, in a suit for that purpose by a preponderance of evidence, that such proceedings were without just foundation. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Sisk v. Hurst*, 1 W. Va. 53; *Vinal v. Core*, 18 W. Va. 1; *Spengler v. Davy*, 15 Gratt. 381, 384. See also, *Clafin v. Steenbock*, 18 Gratt. 842.

It has been said that as the reason for the averment of want of probable cause is merely because no man can maintain an action for a malicious prosecution where there was probable cause, it is obvious that these words should be made to refer to the state of fact, as it respects the person prosecuted, and not to the degree of knowledge of that fact in the party prosecuting. *Mowry v. Miller*, 3 Leigh 561, 24 Am. Dec. 680. And this rule, though criticised in *Spengler v. Davy*, 15 Gratt. 381, 388, was approved in two recent West Virginia cases: *Brady v. Stiltner*, 40 W. Va. 289, 293, 21 S. E. 729; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

But where the facts within the knowledge of the prosecutor are not sufficient to cause a reasonable and pru-

dent man to believe that the accused is guilty of the crime charged the prosecution is without probable cause, and the prosecutor is liable, if the other elements of the tort are present. Thus in a case where the plaintiff was arrested by the procurement of the defendant on a charge of larceny of certain oil, the evidence adduced showed that when he was alleged to have stolen the oil he was in possession thereof as tenant of oil wells, it being oil which he had himself produced. It further appeared that he was bound to deliver one-third of the oil as rent to his landlord whenever called upon to do so, and that he was forbidden by his contract to remove any oil from the premises without notice to his landlord; that without such notice he did remove all the oil, which at a particular time he had on the premises, and appropriated it to his own use, claiming that there was no rent oil then due to his landlord, because more oil had been taken as rent on a previous occasion by the landlord than he was entitled to; and that this had been taken in the absence of the plaintiff. These facts and this claim of the plaintiff was known to the prosecutors. They, nevertheless, had him arrested on a charge of stealing the rent oil claimed to have been due and taken off under these circumstances, and appropriated by the plaintiff to his own use. It was held that there was no probable cause to justify the defendant in procuring this prosecution to be set on foot and a verdict in favor of the plaintiff was sustained. *Vinal v. Core*, 18 W. Va. 1.

### C. INFORMATION RECEIVED FROM OTHERS.

So also, a party is not liable for damages when he has information received from reliable sources, which leads him, as a prudent man, to suspect or believe that the person alleged to have committed an offense, was engaged with others in committing the same, or was in company with others who actually

committed the offense. *Sisk v. Hurst*, 1 W. Va. 53; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

### **D. BELIEF IN GUILT OF ACCUSED.**

To sustain an averment of want of probable cause, the plaintiff must show such a state of facts as precludes a reasonable ground of belief in the minds of the defendants, warranting them to institute and maintain in good faith the alleged malicious proceedings. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459. See also, *Spengler v. Davy*, 15 Gratt. 381. But see *Vinal v. Core*, 18 W. Va. 1.

It is not necessary that the facts sworn to should have been absolutely true, but it is necessary that the defendant should have believed they were true, and that as a prudent man, under the circumstances then known to him, he was warranted in entertaining that belief. *Forbes v. Hagman*, 75 Va. 168, 180, citing *Scott v. Shelor*, 28 Gratt. 891, 906; *Spengler v. Davy*, 15 Gratt. 381, 389; 2 Greenl. on Ev., § 455.

A belief by an attaching creditor in the existence of facts essential to the prosecution of his attachment, founded upon such circumstances as are sufficient to induce such belief in the mind of a man of ordinary caution, prudence and judgment, is justifiable and probable cause for suing out an attachment. *Burkhart v. Jennings*, 2 W. Va. 242.

### **E. COMMITMENT BY MAGISTRATE.**

The commitment by a magistrate, of a person accused of felony, or binding him in a recognizance to appear at court and answer the charge, is sufficient evidence that the prosecution was with probable cause, although the person accused was acquitted by the court, unless in his action for malicious prosecution, he can prove by other evidence that the prosecution was in fact without any probable cause. *Maddox v. Jackson*, 4 Munf. 462; *Blanks v. Robinson*, 1 Va. Dec. 600; *Womack v.*

*Circle*, 29 Gratt. 192; *Hale v. Boylen*, 22 W. Va. 234.

And the judgment of a justice holding a party guilty of petit larceny, which judgment is reversed on appeal, is only prima facie evidence of probable cause in an action for malicious prosecution by the party so adjudged guilty. *Blanks v. Robinson*, 1 Va. Dec. 600; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342. This case overrules the case of *Womack v. Circle*, 32 Gratt. 324, where it was held that a judgment of a justice requiring a party accused of a misdemeanor, to give security for good behavior, though the judgment was reversed on appeal, was conclusive evidence of probable cause for the prosecution unless the testimony before the justice was known to be false by the prosecutor. See also, *Womack v. Circle*, 29 Gratt. 192.

In an action for malicious prosecution the weak presumption that exists in every case, that every public prosecution is founded on probable cause, is strengthened by proof, that the plaintiff had after an examination by a justice been committed to jail to answer an indictment when found; but this presumption is still capable of being rebutted by other testimony showing that there was no probable cause. *Hale v. Boylen*, 22 W. Va. 234.

### **F. WAIVER OF PRELIMINARY EXAMINATION.**

The waiver of a preliminary examination by a person charged with crime is also prima facie evidence of probable cause. *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729.

### **G. DISCHARGE BY MAGISTRATE.**

That the converse of the proposition above laid down, as to the commitment by a justice, is true, and that the judgment of the justice dismissing the complaint is prima facie evidence of the want of probable cause for the prosecution, has never been doubted. *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Womack v. Circle*, 32 Gratt. 324;

*Blanks v. Robinson*, 1 Va. Dec. 600; *Harper v. Harper*, 49 W. Va. 661, 39 S. E. 661; *Vinal v. Core*, 18 W. Va. 1; *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729.

An acquittal before a United States commissioner is likewise prima facie evidence of want of probable cause, as the functions of such a commissioner in committing for trial are precisely like those of a justice of the peace. *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Womack v. Circle*, 32 Gratt. 324; *Blanks v. Robinson*, 1 Va. Dec. 600.

#### **H. REFUSAL OF GRAND JURY TO INDICT.**

The refusal of the grand jury to indict is prima facie evidence of want of probable cause, except where it appears that refusal to indict was after the hearing of the witnesses for the accused as well as for the prosecution; but such prima facie evidence is liable to be rebutted by proof. *Harper v. Harper*, 49 W. Va. 661, 39 S. E. 661.

When the refusal of the grand jury to indict is opposed to the refusal of the justice to discharge, one rebuts the other, so as to render neither prima facie evidence of the existence or want of probable cause; and, if the plaintiff manages in any way to have the evidence for his defense considered by the grand jury, their finding is tantamount to an acquittal by a petit jury, and is not prima facie evidence of the want of probable cause on the part of the prosecutor. *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729.

#### **I. MIXED QUESTION OF LAW AND FACT.**

Probable cause is a mixed question of law and fact. What are existing facts, of which probable cause or its absence may be predicated, is a question of fact to be decided by the jury. But in those cases where the facts are admitted, or are undisputed or assumed, the question whether they constitute probable cause or not, or whether from them the existence

or the absence of probable cause is to be inferred, are questions of law for the decision of the court and not for the jury. *Vinal v. Core*, 18 W. Va. 1; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703; *Waldron v. Sperry*, 53 W. Va. 116, 44 S. E. 283; *Crabtree v. Horton*, 4 Munf. 59.

"The question of probable cause, in an action for malicious prosecution, embraces a mixed question of law and fact. Whether the evidence relied on, if true, establishes probable cause, is a question of law for the court, but whether such evidence is true is a question of fact for the jury. It is permissible, therefore, for the trial court to instruct the jury that certain facts and circumstances, if they exist, are sufficient to constitute probable cause; but in the determination of the existence or nonexistence of such facts and circumstances it is not permissible for the court to restrict the jury to a consideration of part only of the evidence tending to show probable cause or a want thereof. The plaintiff can not sustain the burden imposed upon him of showing affirmatively the absence of probable cause, unless the court takes cognizance of his theory of that question, if material, and the jury is permitted to consider the evidence upon which it is based. In the case at bar an agent was arrested on a charge of embezzlement, and there was evidence tending to support the charge, but there was also evidence tending to show that the principal and agent had agreed to occupy the relation to each other of debtor and creditor, and that the defendant knew of this fact, but this evidence was ignored by the trial court in its instruction." *Boush v. Fidelity, etc., Co.*, 100 Va. 735, 42 S. E. 877.

#### **J. WANT OF PROBABLE CAUSE CAN NOT BE INFERRED FROM MALICE.**

Though, as will be seen later, malice may be inferred from want of prob-



able cause, yet no rule is better settled than that want of probable cause can never be inferred from malice no matter how strong the evidence of malice may be. *Vinal v. Core*, 18 W. Va. 1; *Scott v. Shelor*, 28 Gratt. 891; *Womack v. Circle*, 32 Gratt. 324; *Spengler v. Davy*, 15 Gratt. 381; *Forbes v. Hagman*, 75 Va. 168.

## VI. Malice.

**Definition.**—Malice may be defined as some motive other than a desire to have punished a person believed by the prosecutor to be guilty of the crime charged. It is a sinister or improper motive, and may be malignity or a desire by means of the prosecutor to get possession of the goods alleged to be stolen, or any other improper motive. *Vinal v. Core*, 18 W. Va. 1.

In a legal sense, any unlawful act which is done willfully and purposely, to the injury of another, is, as against that person, malicious. *Scott v. Shelor*, 28 Gratt. 891.

**Malice Inferred from Want of Probable Cause.**—Malice may be inferred from the want of probable cause, but the latter can never be inferred from the plainest malice. The improper motive, or want of a proper motive, inferrible from a wrongful act, based on no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of an action for malicious prosecution. *Scott v. Shelor*, 28 Gratt. 891; *Womack v. Circle*, 32 Gratt. 324; *Spengler v. Davy*, 15 Gratt. 381; *Vinal v. Core*, 18 W. Va. 1.

So, in *Forbes v. Hagman*, 75 Va. 168, which was a kindred action for false imprisonment, it was held, that malice might be inferred from want of probable cause. And in this case malice was defined as "malus animus, and as denoting that the party is actuated by an improper and indirect motive. The improper motive, inferrible from a wrongful act, based upon no reason-

able ground constitutes of itself all the malice deemed essential in law to the maintenance of the action." And see the title FALSE IMPRISONMENT, vol. 5, p. 816.

**Advice of Counsel as Evidence of Want of Malice.**—The advice of the counsel to the defendant to institute criminal proceedings may be considered by the jury in determining the question of fact, whether the defendant was or was not actuated by malice. The fact that the defendant acted upon the advice of counsel is entitled to more or less weight or to no weight at all according to all the circumstances attending it, all of which should be considered by the jury. Among the circumstances referred to the following are believed to be the more important: Whether the advice of counsel was sought bona fide or was sought only as a mode of protecting the defendants in a contemplated wrong; whether it was followed in good faith or not; whether it was really believed to be good counsel by the defendant; whether the attorney giving the advice was an attorney of character and standing or otherwise; whether he was or was not candid and disinterested in the opinion of the defendant in giving the advice; whether all the facts and circumstances as known to the defendant were frankly communicated to the attorney, or a portion of them suppressed or misstated; whether the defendant had or had not made a careful investigation of the facts before consulting counsel. *Vinal v. Core*, 18 W. Va. 1.

**Malice a Question for the Jury.**—As malice consists in some improper motive or the absence of a proper motive, it is obviously a question for the jury in all cases. And though there be no express evidence of malice, the jury may infer it from want of probable cause alone. This inference, however, is an inference of fact and not of law and must be drawn by the jury and not by the court; and being an in-

ference of fact merely, it is of course not necessarily to be drawn and is liable to be rebutted. *Vinal v. Core*, 18 W. Va. 1; *Moats v. Rymer*, 18 W. Va. 642; *Forbes v. Hagman*, 75 Va. 168, 183.

## VII. Necessity for Concurrence of Malice and Want of Probable Cause.

It is essential to the plaintiff's recovery in an action for malicious prosecution that there should be proof of the concurrence of malice and want of probable cause. Malice alone, or want of probable cause alone, is insufficient to give the ground of action. *Vinal v. Core*, 18 W. Va. 1.

## VIII. Advice of Counsel.

**Advice of Counsel as Evidence of Probable Cause.**—The advice of counsel to the defendant to institute the criminal proceedings ought not to be taken into consideration in determining whether probable cause existed or not. *Vinal v. Core*, 18 W. Va. 1.

Or, as was said in another case, if the defendant relies upon the defense that he acted under the advice of counsel and not upon a fixed determination of his own, the burden is on him to prove that he sought counsel with an honest purpose of being informed as to the law, that he made a full, correct, and honest disclosure to his counsel of all the material facts within his knowledge bearing on the guilt of the plaintiff, and that he was in good faith guided by the advice of such counsel in causing the arrest of the plaintiff. Whether such disclosures were made, or the defendant in good faith acted on such advice are questions for the jury under the evidence in the particular case. *Jones v. Morrison*, 97 Va. 43, 33 S. E. 377. See also, *Forbes v. Hagman*, 75 Va. 168.

## IX. Advice of Magistrate.

Where a party applies to a justice for a warrant for the arrest of another,

and details to the justice the whole of the information he has derived from other persons as to the commission of an offense by the party whom he seeks to arrest, and the justice in the discharge of his duty, advises the issuing of the warrant against him, this is such a matter of defense to an action for malicious prosecution as will prevent the recovery of damages by the party arrested. *Sisk v. Hurst*, 1 W. Va. 53.

## X. Evidence.

**Burden of Proving Want of Probable Cause.**—As the law presumes that every public prosecution is founded on probable cause, the burden of proving the want of probable cause in the first instance must be upon the plaintiff. In every such case, therefore, he must show some evidence of the want of probable cause, before the defendant can be called upon to justify his conduct. But as the plaintiff is thus called upon to prove a negative, slight evidence is often regarded as sufficient to prove the want of probable cause. *Vinal v. Core*, 18 W. Va. 1; *Scott v. Shelor*, 28 Gratt. 891; *Boush v. Fidelity, etc., Co.*, 100 Va. 735, 42 S. E. 877; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

And although the allegation of want of probable cause in the declaration is negative in its character, yet it must be proved or the plaintiff must fail in his action. *Scott v. Shelor*, 28 Gratt. 891.

Though the facts on which are based the existence or nonexistence of probable cause are those known to the defendant when the prosecution was begun by him, yet he may be presumed by the jury to know all the existing facts, and the burden is on him to satisfy the jury that any particular fact proven to be then existing was unknown to him. *Vinal v. Core*, 18 W. Va. 1.

**Bad Character of Plaintiff as Evidence.**—The bad character of the plain-

tiff is a fact or circumstance to be considered in determining whether there was or was not probable cause, or it may be considered in mitigation of damages. *Vinal v. Core*, 18 W. Va. 1.

**Rebuttal of Evidence to Show Malice.**—In an action for malicious prosecution the plaintiff having given evidence of conversations of the defendant to show malice, the defendant may prove by the committing magistrate what he swore before him. *Guerrant v. Tinder*, Gilmer 36.

**Irregular Trial and Acquittal by Jury.**—In an action for malicious prosecution it appeared that the plaintiff had been arrested and taken before a justice charged with a misdemeanor, and without lawful authority a jury of six were sworn to try the question of his guilt and rendered a verdict of not guilty, upon which the justice discharged the prisoner. Upon the trial for malicious prosecution the transcript of the docket of the justice showing what took place at the trial and the verdict and judgment was offered in evidence by the plaintiff, and the whole transcript was objected to by defendant, and the objection was overruled and the transcript admitted. Held, no error sufficient to reverse the judgment, as the plaintiff was entitled to whatever weight such evidence had, in establishing the question of want of probable cause. *Sullivan v. Myers*, 28 W. Va. 375.

"But slight as the evidence is, that is necessary to prove in the first place a want of probable cause, yet there are many cases which hold that the acquittal of the plaintiff by a jury will not even amount to prima facie evidence of such want of probable cause, though some have said such acquittal would amount to prima facie evidence of a want of probable cause, and thus throw the burden of showing that there was probable cause on the defendant. It is obvious therefore from the decisions, that if the acquittal of the plaintiff is any evidence at all on the

question of whether there was or was not probable cause, it is entitled to very little weight." *Sullivan v. Myers*, 28 W. Va. 375, 377; *Hale v. Boylen*, 22 W. Va. 234, 236.

## **XI. Damages.**

**Measure of Damages — Punitive Damages.**—In an action for malicious prosecution for a crime alleged to have been committed by the plaintiff, the measure of damages is such an amount as will compensate the plaintiff for the actual outlay and expenses about his defense in the prosecution against him, and for his loss of time, and for the injury to his feelings, person and character by his detention in custody and prosecution. And if the jury should find that the prosecution was commenced or pursued for private ends or with reckless disregard of the rights of the plaintiff they may, in addition to the damages above enumerated, give such punitive damages as they may think proper for such conduct on the part of the defendant. *Vinal v. Core*, 18 W. Va. 1.

**Evidence to Enhance Damages.**—In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the wealth and influence of the defendant, offered in evidence certified abstracts from books containing the returns of the assessments for taxation on the land and personal property belonging to the defendant for the year in which the trial of the cause took place. There being no objection to the form of the abstracts, or that they did not truly state what they purported, they were held admissible in evidence. *Womack v. Circle*, 29 Gratt. 192.

**Excessive Damages Allowed by Jury.**—Where the damages awarded by the jury are excessive, the court may set aside the verdict, or it may put the plaintiff upon terms. That is, the court will award a new trial unless the plaintiff agrees to remit a portion of the damages allowed by the jury. *Vinal*

*v. Core*, 18 W. Va. 1. See generally, the title **DAMAGES**, vol. 4, p. 162.

But a new trial should not be granted because the damages are excessive, unless they are so large as to furnish evidence of prejudice, partiality, passion or corruption on the part of the jury. This rule applies with special force to new trials by the appellate court. *Vinal v. Core*, 18 W. Va. 1.

**Liability of Joint Defendants for Damages.**—Where two persons are sued jointly they are both responsible to the full extent of the damages which the plaintiff is entitled to recover against either, though one may have been actuated by malignity and the other by no malice except such as was inferrible from his uniting with his codefendant in doing a wrongful act. *Vinal v. Core*, 18 W. Va. 1.

**Evidence of Plaintiff's Bad Character in Mitigation of Damages.**—The bad character of the plaintiff may be given in evidence in mitigation of damages. *Vinal v. Core*, 18 W. Va. 1.

**Fraud of Plaintiff in Mitigation of Damages—Punitive Damages.**—Where it appears that there was no probable cause for charging the plaintiff with larceny, but it appears that he was guilty of gross fraud in appropriating the property of another to his own use, which property was in his custody but to which he neither had a just claim nor believed he had any claim, such fraud should be considered in mitigation of damages, to which he may be entitled in an action for maliciously prosecuting him for stealing such property, and makes it improper for the jury in such case to award punitive damages. *Vinal v. Core*, 18 W. Va. 1.

## **XII. Matters of Procedure.**

### **A. JURISDICTION.**

Where two joint defendants in an action for malicious prosecution have been served with process within the jurisdiction of the court in which the

action is brought, the court has jurisdiction of the action, though one of the defendants is a nonresident of the state, and though the cause of action arose in a county of the circuit other than the county in which the court is sitting. *Vinal v. Core*, 18 W. Va. 1. And see generally, the title **JURISDICTION**, vol. 8, p. 842.

### **B. FORM OF ACTION.**

The proper action to bring for an alleged prosecution is trespass on the case, and not trespass *vi et armis*. *Shaver v. White*, 6 Munf. 110. But see *Cleek v. Haines*, 2 Rand. 440.

### **C. PARTIES.**

**Where One Party Procures the Prosecution.**—An action on the case for procuring a malicious prosecution may be maintained by the person prosecuted, against him who procured such prosecution to be maintained. *Mowry v. Miller*, 3 Leigh 561, 24 Am. Dec. 680.

**Joint Action.**—For a malicious prosecution, two or more persons may be sued jointly in one action, or severally in separate actions. But counts against two or more can not be joined in the same declaration with counts against each person severally. *McMullin v. Church*, 82 Va. 501.

**Against Party Maliciously Suing Out an Attachment.**—An action for malicious prosecution may be maintained against one who, maliciously and without probable cause, sues out an attachment, and causes it to be levied on the property of another. *Shaver v. White*, 6 Munf. 110; *Spengler v. Davy*, 15 Gratt. 381; *Burkhart v. Jennings*, 2 W. Va. 242; *Clafin v. Steenbock*, 18 Gratt. 842.

**Joint Action—Motion for New Trial.**—Where, in an action for malicious prosecution against several defendants, some of whom are found guilty and some innocent, there is a motion for a new trial by those found guilty because of the improper exclusion of evidence by the court, a new trial will

be granted only as to those found guilty. *Guerrant v. Tinder*, Gilmer 36.

#### D. DECLARATION.

**Essential Averments in General.**—To be sufficient in law, the declaration, in an action for malicious prosecution, should allege (1) the prosecution in its particulars; (2) that it was set on foot, instigated, or procured by the defendant; (3) that it had terminated favorably to the plaintiff; (4) that it was without probable cause; and (5) that it was malicious. *Womack v. Circle*, 29 Gratt. 192; *Blanks v. Robinson*, 1 Va. Dec. 600; *Scott v. Shelor*, 28 Gratt. 891; *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470; *Vinal v. Core*, 18 W. Va. 1.

**Averment of Want of Probable Cause.**—The want of probable cause is an essential averment in the declaration in an action on the case for malicious prosecution. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Ellis v. Thilman*, 3 Call 3; *Young v. Gregorie*, 3 Call 446; *Kirtley v. Deck*, 2 Munf. 10; *Scott v. Shelor*, 28 Gratt. 891; *Marshall v. Bussard*, Gilmer 9; *Burkhart v. Jennings*, 2 W. Va. 242; *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673; *Mowry v. Miller*, 3 Leigh 561, 24 Am. Dec. 680; *Spengler v. Davy*, 15 Gratt. 381, 388.

And it seems to be essential that the words "without probable cause" should be used in the declaration. Thus it has been held, that a declaration alleging that the acts were done "wrongfully and injuriously without good cause" is not sufficient, as these words are not equivalents for the words required by law. *Burkhart v. Jennings*, 2 W. Va. 242.

And in the case of *Young v. Gregorie*, 3 Call 446, the court held, that "justifiable" was not equivalent to "proper cause;" and in *Kirtley v. Deck*, 2 Munf. 10, it was decided, that the words "false and malicious" were insufficient, but there must also be added "without probable cause." See also, *Marshall v. Bussard*, Gilmer 9. And

an allegation that the prosecution was without just cause is insufficient. *Ellis v. Thilman*, 3 Call 3.

**Averment of Malice and Want of Probable Cause.**—The declaration in a special action on the case, for suing out a foreign attachment, must aver both malice and want of probable cause, either expressly or by equivalent words. *Marshall v. Bussard*, Gilmer 9; *Burkhart v. Jennings*, 2 W. Va. 242.

**Averment of Malice.**—So, also, it is essential that the declaration in an action for malicious prosecution should aver that the prosecution was instigated by the defendant through malice. And the declaration must set forth the alleged malicious conduct of the defendant of which the cause of action is predicated, otherwise it will be demurrable. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673.

In a case in which the declaration did not allege malice, it was held improper to admit evidence to show that the act of suing out an attachment was instigated by malice. *Burkhart v. Jennings*, 2 W. Va. 242.

**Averment of Termination of Prosecution.**—And a declaration charging a conspiracy to sacrifice and destroy the plaintiff's property and business by the malicious use of judicial proceeding must allege that such proceedings were instigated, instituted, and prosecuted to finality by the defendants. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

**Particular Day Immaterial.**—But where, in an action for procuring a malicious prosecution, the day on which the plaintiff was acquitted is stated in the declaration under a scilicet, a variance between the day so laid and the day stated in the record by which the acquittal is proved, is not material; it is sufficient for the declaration to allege that the acquittal took place before the suit was brought. *Mowry v. Miller*, 3 Leigh 561, 24 Am. Dec. 680.

**Irregularity Cured by Verdict.**—Where, in an action for maliciously

suing out an attachment against the effects of the plaintiff, the declaration alleges that the attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause," this irregularity is cured by the verdict. *Spengler v. Davy*, 15 Gratt. 381.

### E. INSTRUCTIONS.

The court should not instruct the jury that probable cause is proved to have existed at the time the prosecution was instituted; but the question as to the weight of the testimony should be left to the jury, unless the facts on which such question depends be agreed by the pleadings, or be submitted to the court by the parties or by the jury. *Crabtree v. Horton*, 4 Munf. 59.

But upon a supposed or assumed state of facts, if there is testimony tending to prove such facts, and they are pertinent to the question, the court is bound, at the instance of the parties, to instruct the jury whether such supposed or assumed state of facts does or does not amount to probable cause. *Vinal v. Core*, 18 W. Va. 1.

An instruction to the jury that a magistrate having committed the plaintiff, or bound him in a recognizance to answer the charge, "furnished sufficient evidence of the probable cause to induce the prosecution," is not to be understood as excluding from the jury other evidence on the part of the plaintiff to disprove the probable cause inferable from such commitment or

recognizance. *Maddox v. Jackson*, 4 Munf. 462.

An instruction to the jury that if they believe the prosecution to have been without reasonable and probable cause they must find for the plaintiff, is not objectionable because containing the word "reasonable," as this does not restrict the ordinary meaning of the words "probable cause." *Forbes v. Hagman*, 75 Va. 168.

The judgment of the justice, though reversed, is *prima facie* evidence of probable cause; and an instruction by the court to the jury which properly propounds the law upon this point is unobjectionable. *Womack v. Circle*, 29 Gratt. 192. See *Hale v. Boylen*, 22 W. Va. 234.

### F. LIMITATIONS.

An action for malicious prosecution, sounding in consequential and punitive damages, although affecting business and property, is such a personal action as does not survive to the personal representative, and is barred by the statute of limitations after one year from the time when the right to bring the same first accrued. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459; *Mumpower v. Bristol*, 94 Va. 737, 27 S. E. 581, 3 Va. Law Reg. 439. See also, *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, 189, 12 S. E. 395.

**Nonassignable.**—A right of action for malicious prosecution, which dies with the party and does not survive to the personal representative, can not be assigned. *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, 189, 12 S. E. 395.

## Malicious Shooting, Stabbing, etc.

See the title MAYHEM.

**MALICIOUS STABBING.**—See the title ASSAULT AND BATTERY, vol. 1, p. 732. And see *Crookham v. State*, 5 W. Va. 510, 512.

Though the indictment only uses the word "malicious" the jury might have found the prisoner guilty of the "unlawful" cutting, etc., with intent, etc. *Canada v. Com.*, 22 Gratt. 899. The court said: "In other words, in such an indictment the word 'maliciously' embraces in its meaning the word 'unlaw-

fully' also, and a general finding of 'not guilty of the malicious cutting and wounding as charged in the within indictment,' is, in effect, a finding of not guilty of unlawful, as well as of malicious, cutting and wounding, etc. Surely, if the word 'malicious' is sufficient in the indictment to embrace the word unlawful, it is sufficient for that purpose in a verdict on such an indictment."

### **Malicious Trespass.**

See the titles MALICIOUS MISCHIEF, ante, p. 489; TRESPASS.

### **Malpractice.**

See the titles ATTORNEY AND CLIENT, vol. 1, p. 170; PHYSICIANS AND SURGEONS.

**MALUM PROHIBITUM.**—In *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 138, it is said: "Mr. Pomeroy, in his late and elaborate and learned work on Equity Jurisprudence (vol. 1, § 402), says: 'Wherever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, in pari delicto, it is a well-settled rule, subject to only a few special exceptions depending upon other considerations of policy, that a court of equity will not aid a particeps criminis, either by enforcing the contract or obligation while yet it is executory, or by relieving him against it by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner where the illegality is merely a *malum prohibitum*, being in contravention to some positive statute, and when it is *malum in se*, as being contrary to public policy or good morals.'" See the title ILLEGAL CONTRACTS, vol. 7, p. 281.

### **Manager.**

See references under GENERAL MANAGER, vol. 6, p. 713.

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### **CROSS REFERENCES.**

See the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; APPEAL AND ERROR, vol. 1, p. 418; BRIDGES, vol. 2, p. 623; CLERKS OF COURT,

vol. 2, p. 834; CORPORATIONS, vol. 3, p. 510; COSTS, vol. 3, p. 604; COUNTIES, vol. 3, p. 636; COURTS, vol. 3, p. 696; ELECTIONS, vol. 5, p. 1; EXCEPTIONS, BILL OF, vol. 5, p. 357; HOSPITALS AND ASYLUMS, vol. 7, p. 174; INJUNCTIONS, vol. 7, p. 512; JUDGES, vol. 8, p. 150; JUDGMENTS AND DECREES, vol. 8, p. 161; JURISDICTION, vol. 8, p. 842; JUSTICES OF THE PEACE, ante, p. 68; LICENSES, ante, p. 305; PLEADING; TAXATION.

## I. Definition and Distinctions.

**Defined.**—"The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." High on Extraordinary Legal Remedies, § 1; *Wise v. Bigger*, 79 Va. 269.

**Distinguished from Certiorari.**—See the title CERTIORARI, vol. 2, pp. 735, 736.

## II. Origin and Nature of Writ.

In its origin a mandamus was not a judicial writ, but was simply a mandate issued directly by the king to his subject, ordering the performance of some specified act. Any such mandate was originally called a mandamus, but gradually a mandate ceased to be called a mandamus and this name was applied to a judicial writ issued by the king's bench in the name of the king. This writ was at first a prerogative writ and issued not of right but at the will of the sovereign and only in cases in which the king or the public at large was interested. But the writ has lost its prerogative character in this country generally and is regarded as a writ of right and in the nature of an ordinary suit between the parties, when the aggrieved party shows himself entitled to this kind of relief. *Fisher v. Charleston*, 17 W. Va. 595, 628; *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Dew v. Judges*, 3 Hen. & M. 122, 3

Am. Dec. 639; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

It is an extraordinary remedy however, and issues only in cases where the usual and ordinary modes of proceeding are powerless to afford remedies to the party aggrieved, and when, without its aid, there would be a failure of justice. *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483; *Lewis v. Whittle*, 77 Va. 415; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

**Civil Writ.**—The writ is a civil writ, not a criminal process, not an auxiliary criminal process. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265; *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

## III. Principles Governing Issuance of Writ.

### A. DISCRETION OF COURT IN GRANTING.

The writ of mandamus is no longer a prerogative writ, any more than an action of debt, but if the petition shows a right to the writ in the relator, he is entitled to it as a matter of right. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Dew v. Judges*, 3 Hen. & M. 1.

Mandamus, however, is so far a discretionary writ that where an assessor has refused to assess property exempt by a statute which the governor has decided to be unconstitutional under a decision of the supreme court, the court of appeals might decline to issue the writ if the decision of the governor were clearly wrong, not because the assessor could set up such a defense, but in order not to involve tax-

payers in an expensive litigation. *State v. Buchanan*, 24 W. Va. 362, 384.

### B. DEMAND AND REFUSAL.

Before mandamus will lie to compel the performance of public duty, it must be shown that the right to the performance of such duty has been denied. *Gleaves v. Terry*, 93 Va. 491, 25 S. E. 552; *Welty v. County Court*, 46 W. Va. 460, 33 S. E. 269.

Yet where the thing required is the plain duty of the respondents no previous demand is necessary, as where the petitioner has recovered a judgment against a municipal corporation and execution has been returned "no property found," no previous demand and refusal of the municipal authorities to make a levy to pay the judgment is necessary, such being their plain duty. Hence of course it is unnecessary to allege such previous demand and refusal either in the petition or the alternative writ. *Fisher v. City of Charleston*, 17 W. Va. 595.

### C. GENERAL FUNCTIONS AND SCOPE OF WRIT.

As a general rule a mandamus is proper where a party has a legal right, and there is no other appropriate remedy, and where, in justice, there ought to be one. *Fleshman v. McWhirter*, 54 W. Va. 161, 164, 46 S. E. 116.

The office of the writ of mandamus is to compel corporations, inferior courts and tribunals and public officers to perform some particular duty incumbent upon them by law, and which is imperative in its nature, and to the performance of which the relator has a clear legal right, without any other adequate specific legal remedy to enforce it. *Page v. Clopton*, 30 Gratt. 415; *Thomas v. Mason*, 39 W. Va. 526, 20 S. E. 580; *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312; *Wilcox v. Hunter*, 2 Va. Dec. 434; *Parker v. Anderson*, 2 Pat. & H. 38; *Milliner v. Harrison*, 32 Gratt. 422; *Tyler v. Taylor*, 29 Gratt. 765; *Ex parte Morris*, 11 Gratt. 292; *Eubank v. Boughton*, 98

Va. 499, 36 S. E. 529; *Wise v. Bigger*, 79 Va. 269; *Richmond R., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775; *Board v. Minturn*, 4 W. Va. 300; *Dew v. Judges*, 3 Hen. & M. 1; *Supervisors v. Powell*, 95 Va. 635, 29 S. E. 682.

The tendency in West Virginia is to enlarge and advance the remedy of mandamus, rather than to restrict and limit it, to allow amendments to meet the justice of the case and to make it flexible to accomplish the relief to which the party shows himself entitled where there is no other adequate and complete legal remedy. *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071; *Com. v. Justices*, 2 Va. Cas. 9; *Wolfe v. McCaull*, 76 Va. 876.

**Protects Civil Rights.**—Mandamus is applied to the protection of civil rights. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

### D. MUST BE PRE-EXISTING RIGHT OR DUTY.

And mandamus only lies to enforce a pre-existing right or duty; if no such right or duty existed, it can not be conferred, or imposed by mandamus. *Tyler v. Taylor*, 29 Gratt. 765; *Chew v. Justices*, 2 Va. Cas. 208; *Amory v. Justices*, 2 Va. Cas. 523; *Richmond v. Epps*, 98 Va. 233, 35 S. E. 723; *Callahan v. Young*, 90 Va. 574, 19 S. E. 163; *Ohio Valley Iron Works v. Moundsville*, 11 W. Va. 2; *Wise v. Bigger*, 79 Va. 269; *Board v. Catlett*, 86 Va. 158, 9 S. E. 999; *Dent v. Board*, 45 W. Va. 750, 32 S. E. 250; *Fisher v. Charleston*, 17 W. Va. 595; *Sights v. Yarnalls*, 12 Gratt. 292; *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528; *Gleen v. Cutshaw*, 90 Va. 677, 679, 32 S. E. 1015; *Taylor v. LaFollette*, 49 W. Va. 478, 39 S. E. 276; *Gleaves v. Terry*, 93 Va. 491, 25 S. E. 552; *Brander v. Justices*, 5 Call 548; *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118, 22 S. E. 867; *Ratliffe v. County Court*, 36 W. Va. 202, 14 S. E. 1004; *Supervisors v. Rule*, 5 W. Va. 276; *County Court of Gloucester v. County Court of Middlesex*, 79 Va. 15;

*Gloucester Co. v. Middlesex Co.*, 88 Va. 843, 14 S. E. 660; *McCullough v. Hunter*, 90 Va. 699, 19 S. E. 776; *Wilcox v. Hunter*, 2 Va. Dec. 434; *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291, 26 S. E. 946; *Morgan v. Fleming*, 24 W. Va. 186; *Taylor v. Williams*, 78 Va. 422; *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312; *Price v. Smith*, 93 Va. 14, 24 S. E. 474; *Parker v. Anderson*, 2 Pat. & H. 38; *Bunting v. Willis*, 27 Gratt. 144; *Schmulbach v. Speidel*, 50 W. Va. 553, 40 S. E. 424.

## E. CHARACTER OF RIGHT OR DUTY.

### 1. Must Be Clear.

The right or duty which is sought to be established must be clear; the writ is never granted in a doubtful case; to warrant the court in granting this writ such a state of facts must be presented as to show that the petitioner has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing. *Milliner v. Harrison*, 32 Gratt. 422; *Tyler v. Taylor*, 29 Gratt. 765; *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483; *Wise v. Bigger*, 79 Va. 269; *Marcum v. Commissioners*, 42 W. Va. 263, 26 S. E. 281; *Page v. Clopton*, 30 Gratt. 415; *Supervisors v. Rule*, 5 W. Va. 276; *Wolfe v. McCaull*, 76 Va. 876.

Unless the petitioner shows a clear legal right to have the thing done of which he complains, mandamus will be denied. *Hutton v. Holt*, 52 W. Va. 672, 44 S. E. 164.

One asking a mandamus must show a right vested in him to be vindicated or aided by the writ. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927. See also, *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265.

### 2. Adequate.

The rule is that mandamus is restricted to cases where the relator is deprived of some adequate right. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

A pecuniary interest in an individual in an act sought to be compelled by mandamus must exist to maintain it. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

## F. ACT MUST BE LAWFUL.

**Generally.**—Mandamus will not lie to compel the performance of an unlawful act. *Tyler v. Taylor*, 29 Gratt. 765; *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Ohio Valley Iron Works v. Moundsville*, 11 W. Va. 1, 2; *Powell v. Dawson*, 45 W. Va. 780, 32 S. E. 214; *Wise v. Bigger*, 79 Va. 269; *Board v. Catlett*, 86 Va. 158, 9 S. E. 999; *Dempsey v. Board*, 40 W. Va. 99, 20 S. E. 811; *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450.

### Act Which Has Been Enjoined.—

And mandamus will not lie to compel the performance of an act, against the performance of which there is a pre-existing injunction. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

## G. ACTS MUST BE MINISTERIAL NOT DISCRETIONARY OR JUDICIAL IN CHARACTER.

### 1. Ministerial Acts.

Mandamus is the proper remedy where the act whose performance is sought to be compelled is ministerial. *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483; *Richmond v. Epps*, 98 Va. 233, 35 S. E. 723; *Broadus v. Essex Co.*, 99 Va. 370, 38 S. E. 177; *Board v. Min-turn*, 4 W. Va. 300; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Dawson v. Thurston*, 2 Hen. & M. 132; *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552; *Thurston v. Hudgins*, 93 Va. 780, 20 S. E. 966; *Wise v. Bigger*, 79 Va. 269; *Delaney v. Goddin*, 12 Gratt. 266; *Robinson v. Rogers*, 24 Gratt. 319; *Doolittle v. County Court*, 28 W. Va. 158; *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281; *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 307; *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187; *Daniel v. Simms*, 49 W. Va. 554, 39 S.

E. 690; *Stanton v. Wolmesdorff*, 55 W. Va. 601, 47 S. E. 245.

When there is left to the inferior tribunal no discretion but to perform the duty in a particular way, by doing a certain specific act, then the inferior tribunal acts ministerially and may be compelled by mandamus not only to perform its duties, but to perform them by doing the certain specific act. *Board v. Minturn*, 4 W. Va. 300.

A duty is not less ministerial because an officer has to determine the existence of the facts which make it necessary for him to act, and mandamus is the proper remedy to enforce the performance of such duty. *Lewis v. Christian*, 101 Va. 135, 43 S. E. 331.

#### **Compelling Rendition of Judgment.**

—When an affidavit is filed of the amount which the plaintiff is entitled to recover, prescribed in § 46, ch. 125, W. Va. Code, 1899, in a case wherein there is an office judgment, but no order for an inquiry of damages, and the defendant fails to plead to issue at the next term after such office judgment, it is the duty of the court to render judgment for the plaintiff upon such affidavit, and such duty being ministerial, mandamus lies to enforce its performance. *Marsteller v. Ward*, 52 W. Va. 74, 75, 43 S. E. 178; *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 307.

**Can Not Direct What Decision Shall Be Made.** When there is left to the inferior tribunal any discretion to perform its duties in any other way than by doing a certain specific act, then such inferior tribunal can be compelled by mandamus to act and perform the duties required of it by law, but can not be directed what decision shall be made. In such case the court has no jurisdiction by mandamus, and the decision of the inferior tribunal can not be reviewed by mandamus. If any errors have been committed the proper mode of review is by certiorari. *Board v. Minturn*, 4 W. Va. 300.

#### **2. Matters of Discretion.**

But where the act is of a discretionary or judicial nature mandamus will only lie to compel action generally, not to direct such action. The general rule on this subject is that if the inferior tribunal, corporate body or public officer has a discretion and exercises it, this discretion can not be controlled by mandamus; but if the inferior tribunal, etc., refuse to act when the law requires them to act, and the party has no other adequate legal remedy, and when in justice there ought to be one, mandamus will lie to set them in motion and compel action, but without controlling such discretion. *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483; *Page v. Clopton*, 30 Gratt. 415; *Richmond v. Epps*, 98 Va. 233, 35 S. E. 723; *Broadus v. Essex Co.*, 99 Va. 370, 38 S. E. 177; *Board v. Minturn*, 4 W. Va. 300; *State v. Buchanan*, 24 W. Va. 362, 385; *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552; *Thurston v. Hudgins*, 93 Va. 780, 20 S. E. 966; *Wise v. Bigger*, 79 Va. 269; *Frisbie v. Justices*, 2 Va. Cas. 92; *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281; *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187; *Dent v. Board*, 45 W. Va. 750, 32 S. E. 250; *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *Rowe v. Drisgell*, 100 Va. 137, 40 S. E. 609; *Daniel v. Simms*, 49 W. Va. 554, 39 S. E. 690; *Poling v. Board of Education*, 50 W. Va. 374, 40 S. E. 357; *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26; *Simons v. Military Board*, 99 Va. 390, 39 S. E. 125; *Wolfe v. McCaull*, 76 Va. 876.

Mandamus will not compel an act judicial in nature, but only ministerial; it will compel action, but not any particular action, that savors of the judicial function. *Stanton v. Wolmesdorff*, 55 W. Va. 601, 47 S. E. 245.

Mandamus will not lie to control the exercise of the discretion of any court, board, or officer, when the act complained of is either judicial or quasi-judicial in its nature. *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

It seems that where the court has to exercise discretion, for mere error of judgment, mandamus does not lie. *Marsteller v. Ward*, 52 W. Va. 74, 43 S. E. 178.

Nor where such judgment and discretion has been once exercised, will mandamus lie to compel the undoing of what has been done and the doing of a different thing. *Thurston v. Hudgins*, 93 Va. 780, 20 S. E. 966.

**Writ as Allowed in Election Statute—Exception.**—See generally, the title ELECTIONS, vol. 5, p. 1.

But the writ as allowed in the election statute is an exception, and has wider functions. When used under the election law, applicable to election matters, "whether ministerial or judicial, in other words, giving it the appellate function of certiorari." *Stanton v. Wolmesdorff*, 55 W. Va. 601, 47 S. E. 245; *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

### 3. Criterion.

The question, however, whether certain duties are ministerial or judicial, depends upon the general nature of the duties to be performed, and if these duties be clearly ministerial in their character, the fact that the county court or other officers in the performance of such ministerial duty was necessarily compelled in declining to perform it, to decide disputed questions of law, would not render the duty judicial. *Doolittle v. County Court*, 28 W. Va. 158, 173.

### 4. Mere Preliminary Question of Discretion.

So where the matter involving judgment or discretion is a mere preliminary question of fact leading up to the main fact which is purely ministerial, mandamus will lie, notwithstanding the

determination of such preliminary question calls for the exercise of judgment or discretion. *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281; *Com. v. Justices*, 2 Va. Cas. 9.

Thus a writ of mandamus was granted to compel a county court to build a bridge, though it was necessary for them to exercise their discretion as to whether a necessity for such bridge had arisen and whether the surveyor or his assistants could not make or maintain the same. *Com. v. Justices*, 2 Va. Cas. 9.

So in mandamus proceedings to compel the admission of a clerk, the amount of the security being fixed by law, the sufficiency or insufficiency of the security offered is a mere preliminary question of fact, a discretion in the determination of which will not bar the writ. *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

In *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281, the court disapproved of the laxness of the Virginia courts in allowing the writ wherever the general nature of the main act was ministerial, and refused the writ where it was sought to compel the ballot commissioners to put a different name upon the ballots as the democratic candidate, there being two persons claiming to be the regular candidate, on the ground that the commissioner had acted judicially in deciding which was the regular candidate; although the mere act of putting the name on the ballots was a ministerial act.

### H. CONTRACTUAL DUTIES.

Mandamus will not lie to enforce contract rights of a private and personal nature. *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007; *Johnston v. State Board of Agriculture*, 46 W. Va. 196, 32 S. E. 1039; *Supervisors v. Rule*, 5 W. Va. 276.

Though if a person has a right to have a public officer perform a purely ministerial act under the law, the fact



that it grows out of contract would be no bar to mandamus. *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007; *Johnston v. State Board of Agriculture*, 46 W. Va. 196, 32 S. E. 1039.

Mandamus does not lie to enforce mere contractual duties. Its proper employment is to enforce the performance of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked; rights of a private or personal nature, and obligations resting entirely upon contract, not involving any question of trust or of official duty, can not be enforced by mandamus. In other words, the writ of mandamus can not be substituted for a decree for specific performance of duties other than those growing out of public relations, or such as are clearly imposed by statute, or in some respects involving a trust. *Richmond Ry., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 773.

A duty imposed upon a street railway corporation to transfer its passengers free of charge, by order of the judge of the county court in pursuance of a stipulation in the charter that the corporation might build its road upon the highways of the county upon such terms as said judge should prescribe, is not a duty arising out of contract any more than if it were a part of the charter itself but a duty enforced by law, hence mandamus is the proper remedy to enforce it. *Richmond Ry., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 773.

**By State Officers.**—As the state can not be sued, mandamus or other judicial process will not lie against state officers or boards to compel them to execute an executory contract between an individual and the state. Though the state is not in name a party, such suit is against it, within the meaning of the provision of the constitution prohibiting suit against the state. *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007.

## **I. VAIN OR USELESS ACT.**

### **1. General Consideration.**

A writ of mandamus will not be granted to compel the performance of a vain or useless act. *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552; *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528; *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

"It is well settled as a fundamental principle in the law of mandamus," says an able text writer, "that courts will not grant this extraordinary remedy where to do so would be fruitless and unavailing. If it appear that the writ would be ineffectual to accomplish the object in view, either from the want of power of the respondent to perform the act required, or on the part of the court granting the writ to compel its performance, the court will refuse to interfere. 2 *Spelling on Extraordinary Relief*, § 1377." *Strasburg v. Winchester, etc., R. Co.*, 94 Va. 647, 27 S. E. 493.

The extraordinary writ of mandamus will never be issued in any case where it is unnecessary or where if issued, it would prove unavailing, fruitless, and nugatory. The court will not compel the doing of a vain thing. A mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 263.

There must be a purpose, a substantial right recognized by law, to be vindicated, to warrant a mandamus. It is not lightly called into exercise. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 263.

### **2. To Serve Curiosity or Fancy.**

It will not lie for mere curiosity or fancy. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 263.

### **3. No Money to Perform Act Desired.**

So where there is no money to perform the act desired. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

### **4. Extension of Railroad—Financial Inability.**

And a mandamus will not be issued

to compel a railroad which had leased its road to another road which is in the hands of a receiver, to extend its road, where the road is financially unable to make such extension, and the court has no power to compel the receiver to operate such extension if made. *Strasburg v. Winchester, etc., R. Co.*, 94 Va. 647, 27 S. E. 493.

#### **5. Signing Bill of Exceptions—No Appeal.**

See post, "Bills of Exception," IV, D, 2, a.

A writ of mandamus will not lie to compel the signing of a bill of exceptions in a case where no appeal lies from the decision of the judge refusing to sign such bill, since it would be futile. *Poteet v. County Com'rs*, 30 W. Va. 58, 3 S. E. 97.

#### **6. Indorsement of Land Grant—Valid without.**

So mandamus will not lie to compel the register of the land office to endorse a land grant, where, at the time the right to such grant accrued, the necessity for such endorsement no longer existed and the grant was as valid without as with such endorsement. *Parker v. Anderson*, 2 Pat. & H. 38.

#### **7. Contested Election of City Councilmen—Hearing by Corporation Judge.**

So mandamus will not lie to compel the judge of a corporation court to hear a contest as to the election of city councilmen, since any decision he might render would be unavailing, the council being the judge of the election, qualification and returns of its members and also having the power to fill a vacancy by an election. *Mitchell v. Witt*, 98 Va. 439, 36 S. E. 528.

#### **8. Admission to Office.**

See post, "Admission or Restoration to Office," VI.

So where a person holding one office accepts an incompatible office, mandamus will not lie to compel his admission to his old office, whether the ac-

ceptance of an incompatible office vacates the old office or only renders his tenure voidable, since in either case it would be availing to compel his admission. *Amory v. Justices*, 2 Va. Cas. 523. See also, *Com. v. Tate*, 3 Leigh 804; *Bunting v. Willis*, 27 Gratt. 144, 160; *Chew v. Justices*, 2 Va. Cas. 208.

#### **9. Removal of Justice from County.**

Where a justice has removed from the county and his office is thereby rendered void or voidable. *Chew v. Justices*, 2 Va. Cas. 208.

#### **10. Report by City Engineer.**

So mandamus will not lie to compel the performance of an unnecessary act. Thus, where the corporation court has decided that an additional survey of a lot need not be made because a sufficient description of the lot can be obtained from the records, there is no necessity for a report by the city engineer, and the making of such a report will not be compelled by mandamus. *Glenn v. Cutshaw*, 96 Va. 677, 32 S. E. 1015.

#### **11. Thing Sought Answers No Legal Purpose.**

A writ of mandamus will not be granted where it appears that the thing sought will answer no legal purpose. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265.

#### **12. Would Not Afford Relief Sought.**

Mandamus will not be granted where it would be fruitless to afford the relief sought. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265.

### **J. ACTS IMPOSSIBLE OF PERFORMANCE.**

So the writ will not be granted where compliance with the mandate of the writ is impossible. *Wise v. Bigger*, 79 Va. 269.

As where it is sought to compel the county court to build a courthouse and there is no money with which to do it. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

**K. OTHER ADEQUATE REMEDY.****1. Generally.**

Mandamus is not available where another specific and adequate remedy exists. *State v. County Court*, 33 W. Va. 389, 11 S. E. 72; *Justices v. Munday*, 2 Leigh 165, 21 Am. Dec. 604; *Ex parte Goolsby*, 2 Gratt. 575; *Moon v. Wellford*, 84 Va. 34, 4 S. E. 572; *Dew v. Judges*, 3 Hen. & M. 1; *Supervisors v. Powell*, 95 Va. 635, 29 S. E. 682; *Page v. Clopton*, 30 Gratt. 415; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *Wolfe v. McCaull*, 76 Va. 876; *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

In order that the existence of another remedy shall constitute a bar to relief by mandamus, such other remedy must not only be adequate in the general sense of the term, but it must be specific and appropriate to the circumstances of the particular case. The remedy at law which will operate as a bar to mandamus must generally be such a remedy as will enforce a right, or the performance of a duty. A remedy can not be said to be fully adequate to meet the justice and necessities of a case, unless it reaches the end intended, and actually compels a performance of the duty in question. Such other remedy, in order to constitute a bar to mandamus, must be adequate to place the injured party, as nearly as the circumstances of the case will permit, in the position which he occupied before the injury or omission of duty complained of. The controlling question is not, "Has the party a remedy at law?" but "Is that remedy fully commensurate with the necessities and rights of the party under all the circumstances of the particular case?" Or, as was said in one case, "To supersede the remedy by mandamus the party must not only have a specific remedy, but one competent to afford relief upon the very subject matter of his application, and one which is

equally as convenient, beneficial, and effective as the proceeding by mandamus." 2 Spell. Ex. Relief, § 1375; *Richmond Ry., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

Where the other remedy is obsolete, inconvenient or incomplete the court exercises a sound discretion in granting or refusing the writ. *King William Justices v. Munday*, 2 Leigh 165, 21 Am. Dec. 604; *Dew v. Judges*, 3 Hen. & M. 1; *Page v. Clopton*, 30 Gratt. 415; *Wolfe v. McCaull*, 76 Va. 876.

But the mere fact that there is no other remedy, will not make mandamus available, if it is otherwise improper; thus mandamus will not lie to compel a judge to award costs merely because no writ lies in a mere matter of costs. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470.

**2. Appeal, Error on Certiorari.**

See generally, the titles APPEAL AND ERROR, vol. 1, p. 418; CERTIORARI, vol. 2, p. 734.

Mandamus will never be allowed to usurp the functions of a writ of error, appeal or certiorari; it can never be employed in the absence of statute for the correction of errors of inferior tribunals acting judicially or quasi judicially. *State v. County Court*, 33 W. Va. 389, 11 S. E. 72; *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529; *Ex parte Goolsby*, 2 Gratt. 575; *Moon v. Wellford*, 84 Va. 34, 4 S. E. 572; *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702.

Thus a writ of mandamus was refused to a petitioner whose child had been refused admission to a white school on the ground that he was a negro, where the statute gave him a right of appeal to the county superintendent of schools. *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529.

The writ was refused where it was sought to compel a judge to allow a certain person to become a party to a suit. *Moon v. Wellford*, 84 Va. 34, 4 S. E. 572.

Where a party aggrieved by an action of the board of school directors has an adequate remedy by appeal to the county superintendent, he is not entitled to a writ of mandamus. *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26.

Where the district court refused to grant a supersedeas to the judgment of a county court, mandamus will not lie to compel the district court to grant it, but will itself grant the supersedeas. *Mayo v. Clark*, 2 Call 276.

So it was refused where it was sought to compel a court to remove a cause from the docket on the ground that an office judgment had been erroneously set aside after it had become final, and to award execution. *Ex parte Goolsby*, 2 Gratt. 575.

**Absence of Remedy by Appeal.**—On an application for a writ of prohibition, it has been held, that the writ does not lie for error committed, or about to be committed by a circuit court, in respect to a matter which is clearly within its jurisdiction, notwithstanding the lack of a remedy by appeal. *Fleshman v. McWhorter*, 54 W. Va. 161, 166, 46 S. E. 116; *Sperry v. Sanders*, 50 W. Va. 70, 74, 40 S. E. 327.

"Counsel for the petitioner urge in support of this application the want of any other remedy. As applicable to this phase of the case, the following is quoted from *Spelling on Extraordinary Remedies*, at § 1373: 'It does not necessarily follow that because the law by ordinary methods of procedure does not afford an adequate remedy, relief will be given by mandamus. There are many cases of wrong, and consequent damage to the party, resulting from omitted duty, wherein the law affords no redress in the usual forms, and where yet the courts refuse to grant relief by mandamus. Though a party may fancy himself injured by a decision of an inferior court upon a matter where the law gives no right of appeal, yet this circumstance alone does not entitle him to relief by man-

damus. The desirability of having the matter finally settled in the first instance may have been the prevailing motive of the legislature in withholding the right of appeal.'" *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

### 3. Action at Law.

A specific remedy by action at law to recover the sum due with costs is a bar to a writ of mandamus to compel the justices of the county court to make a county levy to pay the builders of a public bridge. *Justices v. Munday*, 2 Leigh 165, 21 Am. Dec. 604.

An action for damages is not such an adequate remedy as will bar a writ of mandamus to compel a street car company to transfer a passenger free of charge as required by its charter. *Richmond Ry., etc., Co. v. Brown*, 97 Va. 36, 32 S. E. 775.

Mandamus will not lie to compel a county treasurer to collect taxes from a town which claims to be exempt therefrom, there being an adequate remedy provided by action against the treasurer and his sureties for the amount of the tax. *Supervisors v. Powell*, 95 Va. 635, 29 S. E. 682.

### L. RELATING TO CRIMES.

It seems that it will not lie to reveal crime merely, to bring upon another infamy and disgrace. *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265.

It will not lie for a private individual to ferret out crime. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927; *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265.

"The only end stated is to gather evidence for criminal prosecution. The grand jury is the medium of that end. It can send for persons and papers, and bring offenders to justice. Citizens can not meddle in prosecutions save in the appointed modes, by becoming prosecutors or informants before grand juries or by recourse to criminal process. We do not think they can use mandamus for such pur-

pose." *Payne v. Staunton*, 53 W. Va. 202, 214, 46 S. E. 927.

### M. UNCONSTITUTIONALITY OF STATUTE AS DEFENSE.

It seems to be a prevailing rule that ministerial officers charged by a certain statute with a duty may urge the unconstitutionality of the statute as a defense to mandamus to compel them to perform the duty. *Payne v. Staunton*, 53 W. Va. 202, 46 S. E. 927.

In *Danville v. Blackwell*, 80 Va. 38, the court seems to have impliedly admitted that the unconstitutionality of a statute would be a defense to a mandamus to compel the performance of duties imposed by such statute, but the court held the statute constitutional in that case. See also, *Cowan v. Fulton*, 23 Gratt. 579; *Bridges v. Shallcross*, 6 W. Va. 562.

It seems that madamus will not issue to compel an officer to do an act going directly to execute an invalid statute. *Payne v. Staunton*, 53 W. Va. 202, 46 S. E. 927; *State v. Buchanan*, 24 W. Va. 362.

### N. AFTER EXPIRATION OF TERM OF OFFICE.

Mandamus will not lie against an officer, in his official capacity, after the expiration of his term of office. The petition should be against the officer holding the office at the date of the petition. *Dent v. Board of Com'rs*, 45 W. Va. 750, 32 S. E. 250.

An unaccepted resignation will not relieve a public officer, e. g., a registrar, from the obligation to perform duties attached to his office. *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148.

## IV. Inferior Courts and Judges.

### A. GENERALLY.

The general rule is that where the inferior court or judge is acting judicially, mandamus is not the proper remedy to control such action. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Miller v. County*

*Court*, 34 W. Va. 285, 12 S. E. 702; *Jones v. Justices*, 1 Leigh 584; *Ex parte Goolsby*, 2 Gratt. 575; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974; *Marcum v. Ballot Com'rs*, 42 W. Va. 263, 26 S. E. 281. But the party aggrieved must be left to his remedy by appeal, error or certiorari. Page v. Clopton, 30 Gratt. 415; *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *Jones v. Justices*, 1 Leigh 584; *Ex parte Goolsby*, 2 Gratt. 575; *Moon v. Wellford*, 84 Va. 34, 4 S. E. 572; *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

It often happens that duties are devolved upon courts or judges, either by operation of law or by express statute, which partake more of a ministerial, than a judicial, nature, and where the duty is so plain and imperative that no element of discretion can enter into its performance. While the courts uniformly refuse to interfere with the discretion of inferior tribunals in the performance of their duties, yet as to acts to be performed by a court or judge in a merely ministerial capacity, or as to duties which are imposed upon them by statute, and as to which there can be no dispute, and no element of discretion, mandamus, not writ of error, is the appropriate remedy. *United States, etc., Co. v. Peebles*, 100 Va. 585, 42 S. E. 310.

The fact that a court performs a ministerial act does not make its action any the less ministerial, it is the character of the act, not the tribunal performing it, that gives character to the act. *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 307.

**To Justices of County Court.**—It is held, that a mandamus will lie from the circuit court to the justices of the county court, both as members of the court and individually in pairs. *Ex parte Morris*, 11 Gratt. 292; *Com. v. Justices*, 2 Va. Cas. 9; *Dawson v. Thruston*, 2 Hen. & M. 132; *Brand v. Justices*, 5 Call 548; *Brown v. Crip-*

pin, 4 Hen. & M. 173; *Manns v. Givens*, 7 Leigh 689; *Harrison v. Emmerson*, 2 Leigh 764.

Thus, if the justices being asked to administer the oath, and order a discharge of the prisoner accordingly, refuse to do so, a mandamus lies from the circuit court to compel them. *Harrison v. Emmerson*, 2 Leigh 764.

## B. HEARING AND DETERMINATION OF CAUSE.

### 1. In General.

If the inferior court or judge refuses to take jurisdiction, mandamus is the proper remedy to compel him to do so and hear and determine the cause. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470; *Page v. Clopton*, 30 Gratt. 415; *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *Jones v. Justices*, 1 Leigh 584; *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182.

### 2. Where Cause Transferred.

Mandamus, not supersedeas, is the proper remedy to compel the judge of a circuit court, to hear and determine a cause, transferred to his court in pursuance of acts, 1869-70, ch. 182, § 29, which it has erroneously ordered to be stricken from the docket. *Cowan v. Doddridge*, 22 Gratt. 458; *Cowan v. Fulton*, 23 Gratt. 579; *Kent v. Dickinson*, 25 Gratt. 817. See also, *Valley Turnpike Co. v. Moore*, 100 Va. 702, 42 S. E. 675.

### 3. Contested Election Case.

See the title ELECTIONS, vol. 5, pp. 1, 46.

### 4. To Convene, Ascertain and Declare Vote for Relocation of County Seat.

See the title COUNTIES, vol. 3, pp. 636, 653.

Mandamus will lie to compel the county court to submit to the voters of the county the question whether the county seat should be removed. *Doolittle v. County Court*, 28 W. Va. 158.

### 5. Where Court Refuses to Hear Cause until Further Legislation.

So where a circuit court declines to

render a decree until further legislation on the subject, a mandamus will lie from the supreme court of appeals to compel it to determine the cause. *Supervisors v. Alexandria*, 95 Va. 469, 28 S. E. 882.

### 6. Refusal to Hear Where Cause Properly Refused Removal.

So where a state court has properly refused to allow a cause to be removed to a federal court, but refuses to try the case on the ground that a transcript of the record had nevertheless been filed, and the cause docketed in the federal court, mandamus will lie to compel the state court to take jurisdiction and proceed to try the case. *White v. Holt*, 20 W. Va. 792.

A federal court can not enjoin the mandamus proceeding in the supreme court of the state in such a case. *White v. Holt*, 20 W. Va. 792.

### 7. At Designated Time to Prevent Unreasonable Delay.

The statute of 1825-26, ch. 15, was intended to prevent unreasonable and causeless delays in suits in chancery; and, with that view, the 14th section authorizes the court of appeals to award a mandamus to the court of chancery, to compel them to hear causes at the first term at which they are prepared for hearing, when no special cause appears for the refusal of the court to hear them; but the statute does not authorize a mandamus to compel a hearing of a cause, which the court of chancery, in its discretion, for reasons satisfactory to it, thinks proper to continue. *Ex parte Richardson*, 3 Leigh 343.

### 8. Where Judge Has No Jurisdiction.

A mandamus will not lie to compel a judge to hear and determine a cause over which he has no jurisdiction.

Thus the writ was refused where it was sought to compel a judge of a corporation court to decide a contest as to the election of a city councilman, the council being the sole judge of the election, qualification and returns of its

own members, and having authority to order an election to fill a vacancy. *Mitchell v. Witt*, 98 Va. 459, 36 S. E. 528.

**9. Where Court Is Acting or Has Acted upon Matter.**

It seems well settled that if an inferior court, board, or other officer, is acting in respect to the matter which is the subject of complaint, or has acted upon it, mandamus does not lie at all. If the court is proceeding to act, and commits an error, or has completed its function, and erred in doing so, the remedy, if any, is by some form of appellate proceeding. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72; *Miller v. County Court*, 34 W. Va. 283, 12 S. E. 702; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974; *Marcum v. Ballott Com'rs*, 42 W. Va. 263, 26 S. E. 281; *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

**10. Writ from Superior Court of Chancery to County Court.**

In *Webb v. Barbour*, 4 Hen. & M. 462, the superior court of chancery awarded a rule against the county court to show cause why a mandamus should not issue commanding them to hear and decide a case, but the court declined to decide whether it would award the writ.

**11. Compelling Trial of Cause in Circuit Court.**

The supreme court of appeals has no jurisdiction, whether under the constitution or the statute, to issue a mandamus to a judge of a circuit court to compel him to try a cause depending in his court. *Barnett v. Meredith*, 10 Gratt. 650.

But where the circuit court was of opinion that it had no jurisdiction to try the cause, and directed that it be dismissed, and stricken from the docket, an appeal and supersedeas was allowed to that order, but at hearing it was dismissed as having been improvidently awarded. Afterwards, on application of appellant, a peremptory mandamus was

ordered by the supreme court commanding the judge of the circuit court to hear and finally dispose of the cause. *Cowan v. Fulton*, 23 Gratt. 579. See also, *Kent v. Dickinson*, 25 Gratt. 817; *Valley Turnpike Co. v. Moore*, 100 Va. 702, 42 S. E. 675.

**C. REMOVAL OF CAUSE.**

**Where There Is Other Remedy.—**

See ante, "Other Adequate Remedy," III, K.

A mandamus was refused in *Ex parte Goolsby*, 2 Gratt. 575, where it was sought to compel a court to remove a cause from its docket and direct an execution to be issued, on the ground that there was an adequate remedy by application to the court to issue execution on the judgment, which was equivalent to saying such application should have been first made.

**From Corporation to Circuit Court.**

—Mandamus will lie to compel the judge of a corporation court to remove a cause pending in his court to the circuit court for that corporation, according to acts, 1883-84, p. 424, the duty imposed by such statute being absolute, and purely ministerial and there being no other adequate remedy. *Danville v. Blackwell*, 80 Va. 38.

**From State Court to Federal Court.**

—Mandamus from a higher state court is the proper remedy to compel a state court to remove a cause to the federal courts in pursuance of the act of congress, 1 sess. acts, ch. 26, § 12. *Brown v. Crippin*, 4 Hen. & M. 173.

**D. APPEALS.**

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

**1. Allowance and Determination.**

Mandamus is the proper remedy to compel the circuit court to take jurisdiction of an appeal from an assessment made by the board of public works as provided by statute, that court erroneously refusing to exercise jurisdiction on the ground that the

statute conferring the right of appeal was unconstitutional. *Wheeling Bridge, etc., R. Co. v. Paull*, 39 W. Va. 142, 19 S. E. 551.

Mandamus is the proper remedy to compel a mayor or justice to grant an appeal from his decision, where the party has a right to appeal. *Ex parte Morris*, 11 Gratt. 292; *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450. Obiter where no appeal is provided. *Woodford v. Hull*, 31 W. Va. 470, 7 S. E. 450.

Mandamus will not lie to compel a justice to allow an appeal from his decision where the amount involved is below the jurisdictional amount. *Norfolk, etc., R. Co. v. Clark*, 92 Va. 118, 22 S. E. 867.

If an appeal from a justice of the peace to the county court is improperly dismissed by the latter, the proper remedy to correct the error is a writ of mandamus. *Valley Turnpike Co. v. Moore*, 100 Va. 702, 42 S. E. 675.

But failure of the law to give a right of appeal, where a party feels that he has been injured by a decision, affords no ground for an application for the writ of mandamus. *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

## **2. Perfecting Appeal.**

### **a. Bills of Exception.**

See the title EXCEPTIONS, BILL OF, vol. 5, pp. 357, 392, 393.

Mandamus is the proper remedy to compel a judge to sign a proper bill of exceptions, or to proceed and settle the matter of a bill objected to, and, when settled, to sign it. *Dryden v. Swinburne*, 20 W. Va. 89, 113; *Morgan v. Fleming*, 24 W. Va. 186; *Porter v. Harris*, 4 Call 485; *Henry v. Davis*, 13 W. Va. 230.

Where a cause has been tried, resulting in a verdict for the defendant, and a motion to set aside the verdict has prevailed, a new trial has been awarded, and the record shows that the defendant excepted, and at a subsequent term of the court a new trial has taken place before another judge, resulting in a verdict for the plaintiff, and the de-

fendant moves to set aside the verdict, and, his motion being unsuccessful, he excepts, and counsel agree that two bills of exception may be signed within ninety days, setting out the facts on both trials, and the court enters an order showing that said bills were signed, the judge who presided at the first trial can not be compelled, within ninety days, or at any other time, by mandamus, to sign the bill of exceptions which pertains to said first trial. *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312.

### **b. Certification of Evidence.**

See the title EXCEPTIONS, BILL OF, vol. 5, pp. 357, 383, 386.

Mandamus is a proper remedy to compel a judge to certify the evidence, when he refuses to do so. *Powell v. Tarry*, 77 Va. 250; *Dillard v. Dunlop*, 83 Va. 755.

But mandamus will not lie to compel a judge to certify the evidence, where such evidence is conflicting, since there is no obligation upon him to do so. *Morgan v. Fleming*, 24 W. Va. 186.

### **c. Execution of Mandate of Appellate Court.**

Mandamus is the proper remedy to compel a lower court to execute the mandate of a higher court; it is not necessary that such adjudication appear in the syllabus. *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

## **E. COSTS.**

See generally, the title COSTS, vol. 3, p. 604.

Mandamus will not lie to compel a judge to award costs, since his action in awarding or refusing costs, in a case over which he has jurisdiction, is judicial. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470; *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116.

## **F. RÉMOVAL OF CAUSE FROM DOCKET AND ISSUANCE OF EXECUTION.**

See generally, the title REMOVAL OF CAUSES.



Mandamus will not lie to compel the circuit court to remove a cause from its docket and direct an execution to be issued, on the ground that the court erroneously set aside an office judgment after it had become final, since if such action was competent, the judicial discretion of the court will not be interfered with, and if the court was without authority to set it aside, still the petitioner had an adequate remedy either by appellate process or by motion to the circuit court to award him execution on the office judgment which he affirms to be final. *Ex parte Goolsby*, 2 Gratt. 575.

#### **G. COMPELLING COURT TO ALLOW A PERSON TO BECOME A PARTY TO A SUIT.**

The action of the court in refusing to allow a person to become a party to a suit will not be interfered with by mandamus, there being an adequate remedy by appeal. *Moon v. Wellford*, 84 Va. 34, 4 S. E. 572.

#### **H. ENFORCEMENT OF INJUNCTION.**

See generally, the title *INJUNCTIONS*, vol. 7, p. 512, 651.

Where upon the refusal of a circuit judge to award an injunction, application is made to a judge of the supreme court who awards it, but the judge of the circuit court refuses to enter and enforce it, mandamus will lie from the supreme court to compel him to do so. *Wilder v. Kelley*, 88 Va. 274, 13 S. E. 483.

#### **I. ISSUE OF PLURIES ATTACHMENT.**

See generally, the title *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 70.

Where an attachment has been issued against a garnishee and he has been discharged by habeas corpus, mandamus will not lie to compel the county court to issue a pluries attachment. *Jackson v. Justices*, 1 Va. Cas. 314.

#### **J. RELEASE OF SURETY.**

See generally, the title *SURETYSHIP*.

Mandamus, not writ of error, is the proper remedy to compel a court to release a surety company on an official bond, in accordance with § 2887 and acts 1895-96, p. 284. *United States Fidelity & Guaranty Co. v. Peebles*, 100 Va. 585, 42 S. E. 310.

#### **K. APPOINTMENT OF COMMISSIONERS TO DETERMINE DISPUTED BOUNDARY LINE.**

See generally, the title *BOUNDARIES*, vol. 2, pp. 579, 610.

Mandamus, not writ of error, is the proper remedy to compel the circuit court to appoint commissioners to determine a disputed boundary line between counties, under W. Va. Code, 1891, ch. 39, § 18, such action being purely ministerial. *Summers Co. v. Monroe Co.*, 43 W. Va. 207, 27 S. E. 307.

#### **L. ADMINISTERING OATH OF INSOLVENCY.**

See generally, the title *BANKRUPTCY AND INSOLVENCY*, vol. 2 pp. 232, 251.

Mandamus was the proper remedy to compel the justices of a county to administer the oath of insolvency under 1 Rev. Code, ch. 134, and discharge the insolvent, the justices having no discretion in the matter. *Harrison v. Emmerson*, 2 Leigh 764.

#### **M. NOMINATION OF PARTICULAR JUSTICE FOR SHERIFF.**

See generally, the titles *JUSTICES OF THE PEACE*, ante, p. 68; *SHERIFFS AND CONSTABLES*.

Mandamus will not lie to the county court to compel it to nominate a particular justice for sheriff. *Frisbie v. Justices*, 2 Va. Cas. 92.

#### **N. ROADS AND BRIDGES.**

See generally, the title *STREETS AND HIGHWAYS*.

**Roads.**—Mandamus will not lie to compel a county court to open a road,

such a matter lying within the judicial discretion of the court, and its judgment being conclusive until reversed by an appellate court. *Jones v. Justices*, 1 Leigh 584.

**Enforcement of Judgment for Injuries from Defects in Road.**—See *W. Va. Code* (1906), 1445; 23 *W. Va.* 456.

**Bridges.**—See the title **BRIDGES**, vol. 2, pp. 623, 625.

**To Compel Performance of Duties as to Boundary Road or Bridges.**—See *W. Va. Code* (1906), § 1416.

### O. COMPELLING ACCEPTANCE OF COUPONS FOR INTEREST.

The act passed by the legislature on February 4, 1863, and styled "an act to incorporate the little Kanawha Navigation Co.," and the several acts mandatory thereof, were held to be constitutional and the bonds issued by the board of supervisors of Wirt County by authority thereof, were valid, and a mandamus was the proper remedy to compel the county court of Wirt county to take coupons for the accrued interest therein. *State v. County Court*, 37 *W. Va.* 808, 17 *S. E.* 379.

## V. Public Officers and Board.

See generally, the title **PUBLIC OFFICERS**.

### A. GENERALLY.

Where the public officer or board is acting ministerially, mandamus is the proper remedy. *Tyler v. Taylor*, 29 *Gratt.* 765.

But where the officer or board is invested with a discretion, such discretion can not be controlled or reviewed by mandamus in the absence of statute, but only by certiorari or other appellate process. *Board v. Minturn*, 4 *W. Va.* 300; *State v. McAllister*, 38 *W. Va.* 485, 18 *S. E.* 770; *State v. County Court*, 33 *W. Va.* 589, 11 *S. E.* 72; *Miller v. County Court*, 34 *W. Va.* 285, 12 *S. E.* 702; *Marcum v. Ballot*

*Com'rs*, 42 *W. Va.* 263, 26 *S. E.* 281, 287. Though if the officer or board refuse to exercise its discretion it may be compelled to do so by mandamus, without controlling the manner of its exercise. *Miller v. County Court*, 34 *W. Va.* 285, 12 *S. E.* 702.

The writ of mandamus is the appropriate remedy for compelling the performance, by a public officer, of a duty which is either imposed upon him by law, or necessarily results from the office which he holds. It does not lie in any matter requiring official judgment, or resting in sound discretion. It may require an inferior officer to act, but the character of the action can not be affected. *Eubank v. Boughton*, 98 *Va.* 499, 36 *S. E.* 529.

Notice to a public officer to discharge a duty of a strictly public nature is not a necessary condition precedent to relief by mandamus. The law itself imposes the duty, and the omission to discharge it is a refusal. *Lewis v. Christian*, 101 *Va.* 135 43 *S. E.* 331.

### B. AUDITING AND FISCAL OFFICERS AND BOARDS.

#### 1. Allowance of Claims by County Court.

Mandamus will not lie to compel a county court to allow certain claims in a sheriff's report, since in such a matter it is vested with discretion and this discretion can not be controlled by mandamus. *Miller v. County Court*, 34 *W. Va.* 285, 12 *S. E.* 702.

**Enforcement of Claims against Counties.**—See *W. Va. Code* (1906), § 1257.

**To Compel Payment by Counties for Maintenance of West Virginia Asylum.**—See *W. Va. Code*, 1906, § 2696.

#### 2. Transfer and Funding of State Bonds by Auditor.

Mandamus is a proper remedy to compel the state auditor to transfer and fund state bonds in accordance with an act of the legislature. *Robinson v. Rogers*, 24 *Gratt.* 319.

Two coupon bonds issued by the

state of Virginia, payable to bearer, are redeemed by the state, and other bonds issued in their stead. Later the bonds were stolen from the state treasury, came into the hands of B., a bona fide holder for value without notice of the theft, and by B. were presented to the commissioners of the sinking fund, to be funded into other bonds of the state. The commissioners refused, on the ground that the bonds had been stolen from the state treasury. B. applied for a mandamus. Held, mandamus denied. *Branch v. Commissioners*, 80 Va. 427.

The act of March 30th, 1871, which authorized the holders of state bonds to invest them in tax-receivable coupon bonds, was modified and repealed as to the tax-receivable coupons by the act of March 7th, 1872, and was wholly repealed by the act of March 28th, 1879, entitled "an act to provide a plan of settlement of the public debt." And a holder of statute bonds applying in November, 1879, can not have them funded under the act of March, 1871, in tax-receivable coupon bonds. *Paulsen v. Rogers*, 32 Gratt. 654.

### **3. Signing and Delivery of County Bonds by President of County Court.**

So a writ of mandamus will not be granted to compel the president of a county court to countersign and deliver county bonds, where such bonds are to be issued subject to his approval, a discretion being thereby conferred upon him, which can not be controlled by mandamus. *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552.

### **4. Delivery by Auditor of Land and Property Books to Commissioner of Revenue.**

Mandamus will lie to compel the auditor of public accounts to deliver the necessary blank land and property books to a commissioner of the revenue. *Peters v. Auditor*, 33 Gratt. 368.

### **5. Payment of Salary by Auditor.**

Mandamus is the proper remedy to

compel the auditor to pay the salary of the attorney general, when he unlawfully withholds it. *Blair v. Marye*, 80 Va. 485.

Mandamus is the proper remedy to compel the auditor to pay a judge his salary as fixed by law, there being no other adequate remedy. *Neal v. Allen*, 76 Va. 437.

F. was duly commissioned and qualified, and acted as county judge for the two counties of K. W. and K. & Q., until the general assembly ascertained that K. & Q. county had eight thousand inhabitants and made it a judicial district, and J. was elected and commissioned, and qualified as county judge thereof, and assumed the office. Nevertheless G., claiming still to be judge of K. & Q. county and to be entitled to the salary as such, applied to the supreme court for a mandamus to compel the supervisors of K. & Q. to pay it. Held, that F. was no longer judge of K. & Q. county court, and was of course not entitled to receive a salary as such. *Foster v. Supervisors*, 79 Va. 633.

### **6. Payment of Interest Coupons by County Court.**

Mandamus is the proper remedy to compel a county court to pay interest coupons on county bonds. *State v. County Court*, 37 W. Va. 808, 17 S. E. 379.

### **7. Payment Out of Unappropriated Funds.**

Mandamus will not lie against the treasurer of a city to compel him to pay a judgment out of unappropriated funds in his hands, since it is not his duty to pay out such funds until they have been appropriated. *Fisher v. Charleston*, 17 W. Va. 595.

And mandamus will not lie to compel the state treasurer to pay out money without the authority of a warrant of the auditor. *Taylor v. Williams*, 78 Va. 422.

Hence an alternative mandamus requiring the treasurer of a city to do so,

is erroneous, and should be quashed, since it is not his duty to pay over such moneys until they have been specifically applied to the payment of such judgment. *Fisher v. Charleston*, 17 W. Va. 595, 628.

But, while an alternative writ of mandamus can not properly issue against the treasurer of a municipal corporation commanding him to pay over the unappropriated moneys in his hands not exceeding the plaintiff's demand, but only against the mayor, recorder and councilmen requiring them to make the requisite levy or show cause against it, such a prayer in the petition is no ground for objections, the petition and rule being merely preliminary proceedings and not to be tested by the ordinary rules of pleading. *Fisher v. Charleston*, 17 W. Va. 595.

#### **8. Payment of Uncertain Compensation**

Mandamus will not lie against a municipality to compel the city auditor to issue a warrant to the sergeant of the city for money claimed by him as jailor for the support of prisoners for violation of city ordinances, where there is no statute prescribing or fixing the compensation in such case. *Richmond v. Epps*, 98 Va. 233, 35 S. E. 723.

#### **9. Payment of Unauthorized Claim.**

Mandamus will not lie to compel the auditor of a city to draw a warrant in favor of the sergeant of the city as jailor for fuel furnished the city jail, though such account has been allowed by the corporation court, there being no authority of law for any such allowance. *Price v. Smith*, 93 Va. 14, 24 S. E. 474.

Where the governor's order does not bind or authorize the auditor to issue his warrant for the payment of certain charges, the supreme court, upon such order, will not, by mandamus, compel the auditor to do so. *Shields v. Bennett*, 8 W. Va. 74.

#### **10. Enforcement of Liabilities between Counties.**

See the title COUNTIES, vol. 3, pp. 636, 691. And see ante, "Roads and Bridges," IV, N.

#### **C. EXECUTIVE OFFICERS GENERALLY.**

The judiciary pretends to no direct control over actions of the supreme executive; but it seems that it may decide upon the validity of the acts of either affecting private rights, and by writ of mandamus it may coerce a ministerial officer, though of the executive department, to the performance of a legal duty for the effectuation of a legal right. *Arkle v. Board of Com'rs*, 41 W. Va. 471, 23 S. E. 804.

#### **D. SECRETARY OF STATE.**

A writ of mandamus was refused where it was sought to compel the secretary of state to issue a certificate of incorporation to a religious denomination. *Powell v. Dawson*, 45 W. Va. 780, 32 S. E. 214.

#### **E. BOARD OF SCHOOL TRUSTEES.**

See generally, the title SCHOOLS.

The discretion of the board of school trustees in deciding whether a child is a white person or a negro with reference to his admission to a white school, will not be interfered with by mandamus. *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529.

Where a party aggrieved by an action of the board of school directors has an adequate remedy by appeal to the county superintendent, he is not entitled to a writ of mandamus. *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26.

The school system as regulated for cities, went into operation in the city of R., in May, 1871. The city council failed to classify the school trustees as required by law. The individual trustees failed to take and subscribe the required oath of office before entering on the discharge of their official duties. The board of education,

February 17th, 1883, appointed C. and eight other school trustees for said city, "to fill vacancies caused by trustees not qualifying." Duly commissioned they qualified and organized, and demanded the records, etc., of the public free schools of said city, from R. and eight others, who were then acting as such school trustees, and who refused to surrender. Thereupon C. and others petitioned for a mandamus. The rule nisi being served on R. and others, they made return, claiming to be the rightful trustees, and denying that their offices were vacant; that the oath of office was required of them; and that the failure to take it, caused such a vacancy as the board of education could fill. Petitions demurred to this return. Held, that the demurrer to the return must be sustained, and the writ of mandamus awarded. *Chil-drey v. Rady*, 77 Va. 518.

On September 21st, 1882, the town council of the incorporated town of A., which then had over 500 and less than 5,000 inhabitants, organized that town into a separate school district and elected K. and two other trustees therefor, who duly qualified and organized "the board of trustees for the school district for the town of A. in the county of H." On the 19th of February, 1883, P. and two others, who had been duly appointed, qualified and organized as "the board of school trustees in and for school district No. 3 in said county of H." which district had embraced within its limits the said town of A. before its erection into a separate school district, presented to this court their petition for a mandamus to compel said K. and his two associates to restore to them the control of that portion of district No. 3, which is included within the limits of said town of A., as it has been prior to the creation of the separate district. Held, that the writ of mandamus is denied. *Pumphrey v. Brown*, 77 Va. 569.

#### **F. BOARD OF EDUCATION.**

**In General.**—If a board of education

refuses to do an act required by statute to be done at a particular time, and the act is such that the board could be compelled by mandamus to perform it, the board may afterwards, on its own motion, do the act. *Corrothers v. Board of Education*, 16 W. Va. 527. See also, *Board v. Minturn*, 4 W. Va. 500.

**Approval of Contract.**—Mandamus will not lie to compel the board of education of a school district to approve a contract made by the trustees of a subdistrict with a teacher. *Wintz v. Board*, 28 W. Va. 227.

**Allowance of Claims.**—Mandamus is the proper remedy to compel a board of education to exercise its discretion in allowing or disallowing a claim, but it will not lie to compel the payment of such a claim until it has been reduced to judgment or put in the form of an order. If the board disallows the claim assumpt-it is the proper remedy to test the validity of the claim. *Poling v. Board*, 50 W. Va. 374, 40 S. E. 357.

But if the board allows the claim and issues an order on the sheriff, which he refuses to pay, then the remedy is by mandamus against the board, if the sheriff has no funds, or has funds, but refuses to pay and he and his sureties are insolvent without remission on the part of the plaintiff. If the sheriff has funds applicable, but refuses to pay the order, then the remedy is by motion against the sheriff and his sureties, if solvent. If in such case the sheriff and his sureties become insolvent after the claimant has had opportunity to recover by motion but has neglected it, of course he is without remedy. *Canby v. Board of Education*, 19 W. Va. 93; *Poling v. Board of Education*, 50 W. Va. 374, 40 S. E. 357.

**Compelling Levy of Tax.**—Mandamus will not lie to compel the board of education to levy a tax to pay orders issued by it on the sheriff, where such orders were issued when there were no funds in the hands of the sheriff, and hence were in violation of

the West Virginia Code, ch. 45, § 45. *Dempsey v. Board of Education*, 40 W. Va. 99, 20 S. E. 811. See also, W. Va. Code (1906), § 1630.

**Enforcement of Judgment against Board of Education.**—See W. Va. Code (1906), § 1625; *Polling v. Board of Education*, 50 W. Va. 374, 376, 40 S. E. 357.

#### G. MILITARY BOARD.

See generally, the title MILITIA.

Mandamus will not lie to compel the "military board" to approve a claim for services rendered on a court martial and direct the auditor to issue his warrant therefor, since the board is invested with discretion in such matter. *Simons v. Military Board*, 99 Va. 390, 39 S. E. 125.

#### H. SUPERINTENDENT OF INSANE ASYLUM.

See generally, the title HOSPITALS AND ASYLUMS, vol. 7, p. 174.

Mandamus is the proper remedy to compel the superintendent of an insane asylum to give a certificate of discharge to a person who has been confined in a lunatic asylum, but who has recovered while on a furlough, without compelling her to return to the asylum for examination. Habeas corpus is not proper since there is no actual custody of the person. In such a case the circuit court of the residence of the lunatic has jurisdiction. *Statham v. Blackford*, 89 Va. 771, 17 S. E. 233.

#### I. FLOUR INSPECTOR.

See generally, the title INSPECTION, vol. 7, p. 699.

Mandamus is the proper remedy to compel the public inspector of flour to inspect flour by boring through the head with an auger of a certain diameter as required by statute. *Delaplane v. Crenshaw*, 15 Gratt. 457.

#### J. OYSTER INSPECTOR.

See generally, the titles INSPECTION, vol. 7, p. 699; OYSTERS.

So an oyster inspector, who has assigned territory as a reservation for

planting oysters can not be compelled by mandamus to give notice to the assignee to remove the stakes marking such reservation, or have them removed at the expense of such assignee, since the action of the oyster inspector in thus assigning a location for oyster planting, under the provisions of the statute, involves the exercise of his discretion as to whether such location contains any natural oyster bed or conflicted with the superior rights of other riparian proprietors. *Thurston v. Hudgins*, 93 Va. 780, 20 S. E. 966; *Rowe v. Drisgell*, 100 Va. 137, 40 S. E. 609.

Under existing statutes the limits and boundaries of the natural oyster rocks, beds, and shoals in every county are conclusively established by the survey and report required to be made under the direction and control of the fish commissioner. The only question which the oyster inspector is required to determine, in reference to these matters, is whether a particular oyster rock is natural oyster rock according to said survey and report. If so, and stakes have been placed on the natural oyster rock or beds, it is made his imperative duty to have them removed. He has no discretion in the matter, and, although he has to determine these facts, his duties are wholly ministerial and performance thereof may be enforced by mandamus. *Lewis v. Christian*, 101 Va. 135, 43 S. E. 331.

#### K. INSPECTION AND COPY OF RECORDS.

See generally, the titles CLERKS OF COURT, vol. 2, p. 834; ELECTIONS, vol. 5, pp. 1, 9, 28; PUBLIC OFFICERS.

While those facts of the record of the electoral board, as to which secrecy is not enjoined by law, are public records and any citizen and voter has a right to inspect and make copies therefrom, which right may be enforced by mandamus, the portions of such records as to which secrecy is enjoined by law are not public and no

such right of inspection, etc., exists, hence mandamus will not lie to compel the inspection or copying of the whole record indiscriminately. *Gleaves v. Terry*, 93 Va. 491, 25 S. E. 552.

Under the law, both common and statute, it seems that when it comes to the test, under strict law, when mandamus is asked to compel inspection, the plaintiff must have some legal right to have inspection for legitimate use. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

Mandamus will not lie to compel inspection of records by a private individual for the sole purpose of learning evidence for the institution of criminal prosecution. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

#### **L. RECORDATION OF INSTRUMENTS.**

See generally, the titles RECORDS; RECORDING ACTS.

**Recordation of Deeds.**—The county court, under the old law, in admitting a deed to record, acted merely as a court of registry, its function was merely to examine the witnesses as to the execution of the deed or to receive the acknowledgment by the maker as a matter of right and duty; the contents of the deed, further than to know whether it ought to be proved by one, two or three witnesses, in order to be admitted to record, are not a subject for their inquiry, much less the operation or effect of it, hence their duties as to proof and recordation being merely ministerial, their performance may be compelled by mandamus. *Dawson v. Thruston*, 2 Hen. & M. 132.

Mandamus is the proper remedy to compel the county court, acting as a court of probate, to admit to record a deed of emancipation, where the evidence offered is admissible and sufficient, such an act being purely ministerial. *Manns v. Givens*, 7 Leigh 689.

**Surveyor's Report.**—The action of the county court in recording the sur-

veyor's report of land sold for non-payment of taxes, under § 15, ch. 37, Code, 1849, is purely ministerial, hence mandamus is the proper remedy to enforce such duty, not writ of error or supersedeas. *Delaney v. Goddin*, 12 Gratt. 266; *Randolph Justices v. Stalnaker*, 13 Gratt. 523.

**Memorandum of Conditional Sale.**—See generally, the title CHATTEL MORTGAGES, vol. 2, p. 798.

In *Callahan v. Young*, 90 Va. 574, 19 S. E. 163, it was held that mandamus would not lie to the clerk of a court to compel him to record a memorandum of a conditional sale under acts, 1889-90, p. 108, where the contract had not been acknowledged by either party, or proved by witnesses as required by the former statute, the court holding that the statute authorizing the recordation of a memorandum instead of the contract itself, did not do away with the necessity for acknowledgment or proof of the contract by witnesses before such memorandum could be recorded.

#### **M. RELATING TO LICENSES, FRANCHISES AND PRIVILEGES.**

See generally, the titles CLERKS OF COURT, vol. 2, p. 834; LICENSES, ante, p. 305.

Mandamus will not lie to compel the clerk of a municipality to issue a license to keep an ordinary before the 1st of May of any year, that being the date fixed by law for their issuance, even in pursuance of an order for its issuance passed prior to that date, since such an order is repealable at any time prior to that date; nor will the pendency of an application for a mandamus affect the right of the council to repeal such an order prior to the 1st of May. *Sights v. Yarnalls*, 12 Gratt. 292.

It seems that the county court is bound to act upon every application for a license which is made to it; and if it refuses to act, the circuit court

will coerce it by mandamus. But when the county court does act, its judgment and discretion is not to be controlled. *Ex parte Yeager*, 11 Gratt. 655.

The act, Va. Code, ch. 96, § 3, p. 443, vests in the county courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they can not be controlled by the circuit courts, either by mandamus, writ of error, or certiorari. *Ex parte Yeager*, 11 Gratt. 655.

Though the applicant for a license to keep a tavern may bring himself fully within and up to all the statute requires, so that the county court may properly grant him the license if they think fit, he does not thereby acquire any such right to a license, as that the county court may be coerced to grant it. *Ex parte Yeager*, 11 Gratt. 655.

**Enforcement of Act Relating to Franchises. (Clause 6.)**—See Va. Code (1904), § 1033f.

**Compelling Compliance with Duties and Obligations Imposed, Franchise, License, Rights, etc.**—See W. Va. Code, 1906, § 1871.

## N. ELECTIONS.

See generally, the title ELECTIONS, vol. 5, pp. 1, 46, et seq.

**Trial of Right to Register.**—See the title ELECTIONS, vol. 5, p. 7.

**Issuance of Certificate of Election.**—See the title ELECTIONS, vol. 5, pp. 1, 30.

Mandamus is the proper remedy to compel the clerk of a county court to issue a certificate of election, when the result of an election has been ascertained from the returns, and has been signed by the commissioners, and attested by the clerk and been annexed to the abstract of the votes cast, since the duties of the board are then completed. It makes no difference if they afterwards reconvene and reconsider their actions, throw out a precinct and declare another candidate elected, since they have no authority to do so. *McKinney v. Peers*, 91 Va. 684, 22 S. E. 506.

**Enforcement of Employees' Right to Vote.**—See Va. Code (1906), § 71.

## O. STATE BOARD OF AGRICULTURE.

See generally, the title AGRICULTURE, vol. 1, p. 288.

Where X had a contract with the state for furnishing stationery for state use, under ch. 16, W. Va. Code, 1891, and sought of the supreme court a mandamus to compel the state board of agriculture to buy stationery of him, the mandamus was refused. *Johnston v. State Board of Agriculture*, 46 W. Va. 196, 32 S. E. 1039; *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007.

## P. TAXATION.

See generally, the titles SPECIAL ASSESSMENTS; TAXATION.

### 1. Assessment of Property.

Mandamus is the proper remedy to compel assessors to enter and assess property on their books in accordance with the instructions of the auditor, and it is no defense that in the opinion of the assessors such property has been constitutionally exempted from taxation. *State v. Buchanan*, 24 W. Va. 362.

Mandamus is the proper remedy to compel commissioners to reassess land which has been laid off on the land books in town lots as lots and not by the acre as farm land, although, of course, the amount at which he assesses is a matter within his discretion. *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974.

### 2. Collection of Taxes.

See generally, the title TAXATION. See also, ante, "Other Adequate Remedy," III, K.

Mandamus will not lie to compel a county treasurer to collect taxes from a town which claims to be exempt therefrom, there being an adequate remedy provided by action against him and his sureties. *Supervisors v. Powell*, 95 Va. 635, 29 S. E. 682.



### 3. Reception of Coupons for Taxes.

Mandamus was the proper remedy to compel a treasurer to receive coupons, etc., from the state bonds issued under the funding bill of 1879; the act of January 14, 1882, limiting the scope of mandamus in such a case, applying only to bonds issued under the act of 1871. *Com. v. Smith*, 76 Va. 477; *Com. v. Guggenheimer*, 78 Va. 71.

Nor did the act of January 26, 1882, abolishing the writ of mandamus in such cases, as to coupons cut from bonds issued under the act of 1879, affect the remedy by mandamus, as to coupons cut from such bonds and tendered prior to December 1, 1882, at which date the act went into effect. *Com. v. Guggenheimer*, 78 Va. 71.

But under the act of May 12, 1887, mandamus will not lie to compel a treasurer to receive coupons cut from state bonds issued under acts of 1871, and 1879 in payment of taxes and issue a certificate thereof, since there is no obligation resting upon him to do so, it being his duty, on the contrary, to proceed by motion for the amount of the taxes in spite of such tender and then the other party may plead the tender of the coupons in payment of the taxes and file with his plea, the coupons tendered, and then if the tender and genuineness of the coupons are established, judgment shall go for defendant. *Wilcox v. Hunter*, 2 Va. Dec. 434.

Sessions acts, 1881-82, p. 342, taking away the remedy by mandamus in such cases is constitutional and valid, another adequate remedy having been given. *Poindexter v. Greenhow*, 84 Va. 441, 4 S. E. 742.

### 4. Execution of Tax Deed.

Granting that the duty of a city treasurer in executing a tax deed is purely ministerial and may be compelled by mandamus, yet such a writ will be refused where it appears from the certificate of sale that the sale was made by an ex-city collector, whose

authority to make such sale had expired. *McCullough v. Hunter*, 90 Va. 699, 19 S. E. 776.

### 5. Accounting with Sheriff.

Mandamus will not lie to compel the auditor to account to a sheriff for taxes paid over to the auditor by his defaulting predecessor, with special direction as to their application. *Taylor v. LaFollette*, 49 W. Va. 478, 39 S. E. 276.

### 6. Compelling Return of List of Sales of Real Estate for Taxes.

See W. Va. Code (1906), § 872.

### 7. Against Municipal Corporation to Compel Levy to Pay Claim.

See the titles MUNICIPAL CORPORATIONS; MUNICIPAL, STATE AND COUNTY SECURITIES.

### 8. To Compel County Levy.

Mandamus will not lie on behalf of the builder of a public bridge to compel the justices of the county court to raise the sum due by a county levy, where there is a specific remedy given by statute, 2 Rev. Code, ch. 236, § 9, to recover such sum with costs by action of debt against such justices, on their refusal to make the levy. *Justices v. Munday*, 2 Leigh 165, 21 Am. Dec. 604.

Mandamus is the proper remedy to compel the board of supervisors of a county to levy a tax to pay coupons of the county, and it is not necessary for such coupons to be reduced to judgment. *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722.

Mandamus does not lie to compel a board of supervisors to levy a tax for the payment of a claim which it has no authority to pay, even though the claim may have been allowed. In such a case there is no estoppel by the judgment, and a fortiori there is none where the claim is of a class, payment of which is prohibited by law. *Board v. Catlett*, 86 Va. 158, 9 S. E. 999.

Mandamus will not lie against the mayor, recorder, and city council, to compel the admission of persons elected councilmen, but whom the

council has decided to be disqualified because they are not freeholders, the council being invested with quasi judicial powers to judge of the election and qualification of its members. Section 23, ch. 47, W. Va. Code; *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, Brannon, J., dissenting.

## VI. Admission or Restoration to Office.

### A. GENERAL CONSIDERATION.

The scope of the writ of mandamus in controversies concerning the title to office has not been very clearly defined in West Virginia, though there are several cases illustrating such use of it. See *Bridges v. Shallcross*, 6 W. Va. 562; *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26; *Schmulbach v. Speidel*, 50 W. Va. 553, 40 S. E. 424; *Dew v. Judges*, 3 Hen. & M. 1.

It is the proper remedy to compel the admission as well as restoration of the party applying to any office or franchise of a public nature. *Dew v. Judges of Sweet Springs*, 3 Hen. & M. 1; *Lewis v. Whittle*, 77 Va. 415. See also, *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

And to compel the occupant of an office, whose term has expired, to surrender the office to his successor, and turn over to him all the property pertaining to such office, mandamus is the proper remedy. *Bridges v. Shallcross*, 6 W. Va. 562.

### B. OTHER REMEDY.

It has often been judicially declared that mandamus is a proper remedy for the trial of title to office, and will lie where there is another remedy, because it is more speedy, and therefore a more adequate remedy. *Dew v. Judges*, 3 Hen. & M. 1.

It is no bar to mandamus in such case that the applicant may have another remedy, if such remedy is obsolete like assise. *Dew v. Judges of Sweet Springs*, 3 Hen. & M. 1. Or less convenient and effective as quo war-

ranto. *Dew v. Judges*, 3 Hen. & M. 1; *Lewis v. Whittle*, 77 Va. 415.

Chapter 145 of the Virginia Code in relation to quo warranto does not take away the right to try the title to a public office by mandamus. *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907.

### C. OFFICE FULL DE FACTO.

It is no bar to the remedy by mandamus in such case that the office is already full de facto. *Dew v. Judges*, 3 Hen. & M. 1; *Lewis v. Whittle*, 77 Va. 415; *Schmulbach v. Speidel*, 50 W. Va. 553, 40 S. E. 424.

### D. PARTICULAR INSTANCES.

#### 1. Clerk of County Court.

Mandamus is the proper remedy to restore a clerk of the county court to his office, from which he has been ousted by the appointment of another person. *Smith v. Dyer*, 1 Call 562.

The writ of mandamus is the proper remedy to restore a clerk of a court ousted from his office by the illegal appointment of another person. *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

#### 2. Judgeship.

In *Fitzpatrick v. Kirby*, 81 Va. 467, a mandamus was awarded to compel a judge of a county court to surrender the office to his successor.

Pulaski county having less than 8,000 inhabitants, and being therefore attached to Wythe county, one judge was elected to hold the office of judge in both of these counties for a term of six years, which began January 1, 1880, and ended December 31, 1885. When Pulaski was separated from Wythe in 1882, only a portion of that term had expired. X was elected to hold the office of county judge of Pulaski for the remainder of that term, and Y was elected to hold that office for the next ensuing term of six years. Upon petition of X filed after 31st of December, 1885, for a peremptory mandamus to compel Y to surrender that office to

the petitioner, it was held, that mandamus must be denied. *Jameson v. Hudson*, 82 Va. 279.

A was elected judge of X county for six years, commencing 21st of January, 1874. He died 10th of March, 1878. B was elected 13th of March, 1878, to fill the judgeship made vacant by A's death. C was elected 21st of January, 1880, to that judgeship for six years, commencing 1st of January, 1880. B and C each essayed to exercise the functions of the office. The former arrested D, the deputy sheriff, for contempt, in refusing to obey an order made by him; latter arrested E, the commonwealth attorney, for contempt, for his refusal to proceed with the prosecution of a prisoner on trial before him. Both applied to the court for writs of habeas corpus. The real controversy was between B and C for the judgeship. The supreme court decided that B was elected, and was entitled to hold that judgeship for the full term of six years from the 10th of March, 1878. (See *Ex parte Meredith* and *Ex parte Harrison*, 33 Gratt. 119.) Before the expiration of that term, C filed his petition to the supreme court for a mandamus to compel B to surrender to him the said judgeship. Held, that if not actual parties to the controversy decided by the supreme court in *Ex parte Meredith* and *Ex parte Harrison*, B and C were privies thereto, and however erroneous, that decision not having been reversed, was binding and conclusive on them, and could not be collaterally assailed, and the mandamus must be denied. *Howison v. Weeden*, 77 Va. 704.

### 3. For Removal of Special Judge.

See W. Va. Code, 1906, § 3630.

### 4. Director of Railroad Company.

A mandamus, not quo warranto, is the proper remedy to compel admission to office of a director of a railroad company, where such office is wrongfully withheld. *Cross v. West Vir-*

*ginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

On the 4th of September, 1890, C. obtained in a proceeding by mandamus an order for a peremptory writ commanding a railway company to forthwith receive and recognize him as a director of the railroad company for the year for which directors were elected at the last general meeting of stockholders of the company, held to elect directors for the company for the year, 1890, in the place of T., who was an acting director for that year under a claim of right, T. being named as a party in the alternative writ, but not served with process or in any way brought before the court. Held, that the acting director must have an opportunity to be heard before his right was passed upon and determined. *Cross v. West Virginia, etc., R. Co.*, 34 W. Va. 742, 12 S. E. 765.

### 5. Directors of Bank.

A mandamus is the proper remedy to compel the directors of a bank to admit the petitioner to the office of president. *Booker v. Young*, 12 Gratt. 303.

### 6. Board of Public Works.

In *Schulbach v. Speidel*, 50 W. Va. 553, 40 S. E. 424, it was said that mandamus was the proper remedy to restore the members of the board of public works to their offices, where they have been wrongfully deprived thereof, though it is necessary to inquire into the legality of the election of their successors, but in this case the writ was denied on the ground that the respondents had been lawfully elected.

### 7. Chief Executive.

While mandamus is the proper remedy to compel the admission to the office of governor of a person who is entitled thereto, yet where the result of an election for governor has not been declared by the speaker of the house of delegates or by the joint assembly of both houses, mandamus will not lie on behalf of any of the can-

didates to compel the incumbent to deliver to him the office and its insignia. *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26.

"It is conceded and it is unquestionably true that, if the petitioner is entitled to the office of governor, he may obtain it by mandamus." *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26; *Dew v. Judges*, 3 Hen. & M. 1; *Bridges v. Shallcross*, 6 W. Va. 562.

### 8. County Treasurer.

Mandamus will not lie to compel the board of supervisors to allow a certain person to qualify and give bond as treasurer of the county, said board having a discretion and having exercised it adversely to the petitioner. In such case, in the absence of statute, certiorari is the proper mode of review. *Board v. Minturn*, 4 W. Va. 300.

### 9. City Council.

In *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, the writ was refused where it was sought to compel the admission of members elect of a city council, on the ground that the council was acting judicially in determining the election and qualification of its members and the council having decided that the petitioners were not qualified, such action could not be controlled by mandamus, certiorari being the proper mode of review.

### 10. Justices of the Peace.

Mandamus will not lie to compel the county court to permit a justice to resume his seat when he has accepted the incompatible office of deputy clerk, since the writ would be unavailing, the old office being either vacated or his tenure rendered voidable. *Amory v. Justice*, 2 Va. Cas. 523.

Where a justice has removed from the county. *Chew v. Justices*, 2 Va. Cas. 208. See also, *Poulson v. Justices*, 2 Leigh 743.

### 11. Sheriff.

Where the applicant for the office of sheriff is disqualified by reason of hold-

ing an incompatible office under the United States government. *Bunting v. Willis*, 27 Gratt. 144.

### 12. Restoring Disbarred Attorney.

See generally, the title ATTORNEY AND CLIENT, vol. 2, p. 145.

Quære, does mandamus lie from the supreme court to the circuit court in a case disbarring an attorney for acts done in court as attorney; as for a contempt, to restore the disbarred attorney. *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

### E. DELIVERY OF BOOKS, RECORDS AND INSIGNIA OF OFFICE.

Mandamus, not detinue, is the proper remedy to compel a former electoral board to deliver to their successors the books, seal and papers pertaining to such board. *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907; *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26; *Bridges v. Shallcross*, 6 W. Va. 562.

## VII. Corporations.

See generally, the titles CORPORATIONS, vol. 3, p. 510; MUNICIPAL CORPORATIONS; RAILROADS; STREETS AND HIGHWAYS; STREET RAILWAYS.

### A. IN GENERAL.

It seems that mandamus is the appropriate remedy to enforce performance of duties by artificial bodies. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514.

### B. PRIVATE ELEEMOSYNARY CORPORATIONS.

Mandamus will not lie in the case of a private eleemosynary institution where there are visitors, to restore a petitioner to the position of grammar master and professor of humanity. *Bracken v. Visitors of William and Mary College*, 3 Call 573.

### C. QUASI PUBLIC CORPORATIONS.

For statutory provision relative to mandamus against public service cor-

porations, see Va. Code (1904), § 1294d (clause 19).

### 1. Transfer of Passengers.

Mandamus is the proper remedy to compel a street railway company to transfer a passenger free of charge in accordance with the provisions of its charter. *Richmond R. etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

### 2. Operation of Road.

Where the charter of a railroad company does not require it to construct a branch road, the fact that it has constructed and operated it does not impose a duty upon it to continue to operate it, hence mandamus will not lie to compel it to do so. *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291, 26 S. E. 946.

### 3. Compliance with Ordinance.

Mandamus will lie to compel a street railroad company to replace its rails with rails of an improved pattern, in pursuance of a city ordinance to that effect, where such ordinance is reasonable. *Washington, etc., R. Co. v. Alexandria*, 98 Va. 344, 36 S. E. 385.

### 4. To Restore Street to Practicable Condition.

Mandamus will lie to compel a railroad company occupying a street with both main track and siding, to remove the siding where such siding interferes with the use of the street by the public, and to prevent the railroad from unnecessarily blocking crossings by stopping cars upon them, and generally to restore the street to such a condition as not to hinder travel unnecessarily. *Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418.

License from a city council to a railroad company to build its road across, along, or upon a public street gives it no power to destroy the street, and the company is bound to restore the street to its former state, or to such state as not unnecessarily to have impaired its usefulness for the public, and also to

build proper crossings over the railroad, and keep them in good repair. If it fails to do so, the company may be compelled to do so by mandamus; and, as the company is guilty of maintaining a nuisance, equity may entertain a bill to abate such nuisance, and may compel the company to perform its duty. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514.

### 5. To Compel Erection of Railroad Fence and Cattle Guards.

See the titles FENCES, vol. 6, p. 24; RAILROADS. See also, Va. Code (1904), § 1258 (clause 12), § 1294d.

### 6. Construction of Road Pursuant to Charter.

It seems that a mandamus is proper to compel a railroad company to construct a railroad pursuant to charter in crossing navigable streams, so as not to obstruct navigation, though indictment lies for the nuisance. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514.

### 7. To Construct Roads, Level and Grade Property.

It seems that mandamus lies to require a railroad company having a track upon, along and over a street, to so build its road and level and grade the street its full width as to render the street crossing convenient for the public. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514.

## D. MUNICIPAL CORPORATIONS.

See generally, the titles MUNICIPAL CORPORATIONS; MUNICIPAL STATE AND COUNTY SECURITIES.

## E. RIGHT TO OFFICE.

Mandamus is the proper remedy to compel the directors of a bank to admit petitioner to the office of president. *Booker v. Young*, 12 Gratt. 303.

Or to compel admission to the office of director of a railroad company, where such office is wrongfully withheld. *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

## VIII. Legislative Bodies and Officers.

### A. IN GENERAL.

The judiciary pretends to no direct control over actions of the legislature. *Arkle v. Board of Com'rs*, 41 W. Va. 471, 23 S. E. 804.

### B. PUBLICATION OF ACT OF LEGISLATURE.

Where a bill has passed both houses of the legislature and is sent to the governor, but was returned by him, without specifying objections, to the senate, merely in response to a joint resolution, and more than five days elapsed after the bill was sent to the governor before the legislature adjourned, mandamus is the proper remedy to compel the clerk of the house of delegates and keeper of the rolls, to furnish petitioners with a copy of such act, and to have it printed with other acts of the legislature. *Wolfe v. McCaull*, 76 Va. 876.

### C. STRIKING ACT FROM ROLLS.

A mandamus will not be granted commanding the clerk of the house of delegates to strike from the rolls an act of assembly on the ground that it was not lawfully passed, where the legislative journal shows that it was lawfully passed, the evidence of such journal being conclusive. *Wise v. Bigger*, 79 Va. 269.

## IX. Jurisdiction of Courts.

### A. SUPREME COURT.

#### 1. Original Jurisdiction.

##### a. General Rule.

The constitution confers upon the supreme court original jurisdiction to issue writs of mandamus. Va. Const., 1902, art. 6, § 87; W. Va. Const., 1872, art. 8, § 3; W. Va. Code (1906), § 3657; Va. Code (1904), §§ 3058, 3218, 3086; *Price v. Smith*, 93 Va. 14, 24 S. E. 474; *Page v. Clopton*, 30 Gratt. 415; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262; *Kent v. Dickinson*, 25 Gratt. 817; *Hotchkiss v. Grattan*, 90 Va. 642, 19

S. E. 165; *Barnett v. Meredith*, 10 Gratt. 650; *Buskirk v. Judge*, 7 W. Va. 91; *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348; *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. County Court*, 28 W. Va. 158; *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. 267.

##### b. Constitutional Provisions Not Self-Executing.

The clauses of the constitution providing for the jurisdiction of the supreme court in mandamus cases, whether original or appellate, are not self-executing but require to be carried into effect by act of the legislature. *Price v. Smith*, 93 Va. 14, 24 S. E. 474.

**Virginia Constitution, 1850.**—Under the constitution of 1850, in the absence of statute conferring such jurisdiction, the supreme court of appeals had no original jurisdiction to award a writ of mandamus to compel a judge of the circuit court to try a cause depending in his court. *Barnett v. Meredith*, 10 Gratt. 650.

##### c. Statutory Provisions Giving Effect to Constitutional Provisions.

**Virginia Code (1902), § 3086.**—Original jurisdiction to issue writs of mandamus to the circuit and corporation courts, and the hustings court and chancery court of the city of Richmond, and in all other causes in which it may be necessary to prevent a failure of justice, in which a mandamus may issue according to the principles of the common law, is conferred upon the court of appeals by statute enacted pursuant to the constitution of the state; and it is provided that "the practice and proceedings upon such writs shall be governed and regulated in all cases by the principles and practice now prevailing in respect to writs of mandamus and prohibition, respectively." Va. Code (1873), ch. 156, § 4; Va. Code (1902), § 3086; *Page v. Clopton*, 30 Gratt. 415; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262; *Kent v. Dick-*

inson, 25 Gratt. 817. See also, W. Va. Code (1906), § 3657.

**d. Jurisdiction Co-Extensive with Scope of Common-Law Writ.**

The jurisdiction of the supreme court of appeals in mandamus cases is co-extensive with the scope of the writ at common law. The language of the Va. Code, giving the supreme court original jurisdiction to issue writs of mandamus in all cases in which it is necessary to prevent a failure of justice, is merely a definition of the remedy as it exists at common law, and is not a restriction on the jurisdiction of the supreme court. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

**e. Jurisdiction of Lower Court No Ouster.**

The fact that a lower court is open to the petitioner does not oust the supreme court of appeals of jurisdiction. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

**f. Discretionary.**

The granting of the writ is no more discretionary with the court of appeals than with any other court. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

**g. Application.**

**(1) To Whom Made.**

But by rule of court No. 13, 23 W. Va. 829, application is not to be made to that court in the first instance unless special cause be shown. *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

Where petitioner is seeking to be admitted to the office of director of a railroad company, the fact that it is not likely that he can get the case finally determined within the year, in the ordinary course of business, if the proceeding is commenced in the circuit court is a sufficient reason for applying immediately to the supreme court, the duration of such office being only one year. *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

**(2) Where Filed.**

Under the Virginia Code, § 3094, providing that "writs of prohibition and mandamus from the court of appeals to any court shall issue and be tried at the place of session of said court of appeals, at which writs of error to such court are tried," an application to the original jurisdiction of the court of appeals for a mandamus to the judge of the hustings court of the city of Staunton, to compel them to issue a writ for a special election on the question of granting or not granting liquor license in said city, must be filed to Staunton; nor will the fact that the respondent has filed an answer amount to a waiver of such requirement, where the answer was filed subject to the opinion of the court on the construction of such statute. *Hotchkiss v. Grattan*, 90 Va. 642, 19 S. E. 165. See also, Va. Code, 1904, § 3094.

**2. Appellate Jurisdiction.**

The supreme court of appeals has jurisdiction to review by supersedeas, the action of the circuit court in refusing to award a writ of mandamus. *Ex parte Morris*, 11 Gratt. 292. See also, *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

In Virginia appellate jurisdiction is conferred on the supreme court of appeals, irrespective of pecuniary amount by § 2, art. 6, of the constitution and §§ 3454, 3455, of the Va. Code, such proceeding being "a matter not merely pecuniary." *Price v. Smith*, 93 Va. 14, 24 S. E. 474; *Taylor v. Williams*, 78 Va. 422.

**B. CIRCUIT COURT.**

**1. In General.**

The circuit court of any county may, by writ of mandamus, enforce the performance of any legal duty of such court. W. Va. Code, 1906, § 1259.

The circuit court of the city of Richmond has jurisdiction of a writ of mandamus to compel a street railway company of that city to transfer a passenger, the alleged breach of duty

occurring in that city. It is of no importance that the obligation to perform said duty appears from a record of the county court of Henrico. Section 3218 of the Va. Code, providing that the jurisdiction of writs of mandamus shall be in the circuit court of the county wherein the record or proceeding is, to which the right relates, has no application. *Richmond Ry., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

Under the Virginia Code, 1873, ch. 155, requiring all suits in which it is necessary to make certain public officers, as representing the commonwealth, parties, to be prosecuted in the circuit court of the city of Richmond, mandamus proceedings against the acting treasurer of the state must be brought in that court and not in the hustings court and a judgment rendered by the hustings court will be void. *Taylor v. Williams*, 78 Va. 422. See also, W. Va. Const., art. 8, § 12, p. 71; W. Va. Code, 1906, § 3620.

## 2. Application.

**Time.**—The petition for a writ of mandamus to compel another county to contribute to the expense of building a bridge between the counties, may be presented to the judge of the circuit court in vacation, as well as to the court in term under § 3012 of the Virginia Code. *Gloucester Co. v. Middlesex Co.*, 88 Va. 843, 14 S. E. 660.

## C. LAW AND CHANCERY COURT OF NORFOLK.

See Va. Code (1904), § 3066a.

## D. LAW AND EQUITY COURT OF RICHMOND.

See Va. Co. (1904), § 3078a.

## E. CHANCERY AND HUSTINGS COURT OF RICHMOND.

See Va. Code (1904), § 3080.

## X. Parties.

### A. RELATOR.

#### 1. In General.

The great weight of American au-

thority is to the effect that where relief is sought in a public matter or a matter of public right, the people at large are the real parties, and any citizen is entitled to a writ of mandamus to enforce the performance of a public duty. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927; *Doolittle v. County Court*, 28 W. Va. 158; *Brown v. Randolph County Ct.*, 45 W. Va. 827, 32 S. E. 165; *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182.

One or more individuals may maintain mandamus to compel the doing of an act, in which the public at large, including them, have a common interest. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

The petition may be brought in the name of a private individual, it is not necessary that it be brought in the name of an officer authorized to represent the commonwealth. *Richmond Ry., etc., Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

In West Virginia a writ of mandamus may be either in the name of the state at the relation of a named individual or merely in the name of that individual as plaintiff. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

#### 2. Special Interest Not Necessary.

Where the duty, whose performance is sought to be compelled, is a public duty, the relator need not show any special interest in the result; his interest as a citizen is sufficient. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

Citizens and taxpayers, merely by virtue of their interest as such, may maintain the writ of mandamus to enforce a public right. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

#### 3. County Court as Relator.

The county court is properly made the relator in mandamus proceedings to compel a commissioner to reassess certain land as town lots instead of by the acre as farming land. *State v. Herald*, 36 W. Va. 721, 15 S. E. 974.



#### 4. Joinder of Parties in Interest.

Those who have a common and joint interest may join in mandamus and should join. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

Thus several persons who make common application to a clerk of a county court for inspection of public records, and are refused it, if entitled to such inspection, may unite in mandamus to compel such inspection. *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

In *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, Brannon, J., in his dissenting opinion, said that although the rule was that where the interest of several relators were separate and independent, they can not join in one writ of mandamus, he was of opinion that two councilmen could join in such a writ to compel their admission to the council. The other judges did not pass upon the point.

#### 5. Person Occupying Office—Necessity.

The persons occupying that office ought to be made a party to the rule, or to the conditional mandamus, or such rule or mandamus ought to be served upon him, so as to enable him to defend his right before the peremptory mandamus issues; but if it appear from the record that he was apprised of the proceedings and defended his right, it is sufficient. *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

#### 6. Against Officer in Official Capacity after Term Expired.

A mandamus can not be brought against an officer in his official capacity after his term of office has ended. *Dent v. Board of Com'rs*, 45 W. Va. 750, 32 S. E. 250.

### B. RESPONDENT.

#### 1. Persons Subject to Writ.

##### a. Officer or Department of State.

The state being exempt from suit by const. art. 6, § 35, mandamus will not be against the state or any officer or department of the state, such as the board of agriculture. *Miller v. State*

*Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007; *Johnston v. State Board of Agriculture*, 46 W. Va. 196, 32 S. E. 1039.

##### b. Private Persons.

Mandamus lies only to a public officer, not to a private person, or the mere employee of a public officer. *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980.

Hence it will not lie to compel a school teacher to use a particular textbook, the use of which was prescribed by statute, the remedy, if any, would be against the county superintendent of schools. *Heath v. Johnson*, 36 W. Va. 782, 15 S. E. 980.

## XI. Proceedings in Mandamus.

### A. GENERAL OUTLINE.

#### 1. At Common Law.

The mode of proceedings at the early common law to obtain a writ of mandamus was by a motion based upon an affidavit for a rule to show cause, why a writ of mandamus to perform a specified act should not be issued. The hearing of this motion was usually ex parte, no notice thereof being given to the other party. If the motion was sustained, an order was made directing the rule to show cause to be issued. It was provided in the order, that the rule should be served by delivering to the defendant a copy of the order, which required him to appear at a certain time and show cause against the issuing of the writ of mandamus described, and on the return day the defendant was heard, and any counter-affidavits filed by him were considered. The affidavits in support of the motion should according to this old practice contain a precise statement of the facts constituting the relator's right to the writ, and the allegations were required to be stated in this affidavit so positively, that if false, the relator could be successfully prosecuted for perjury. Such affidavits should also show, that the relator was entitled to the relief

he asked; that he had complied with all the necessary forms to constitute his right; and that he had applied to the defendant to do that which he asked, and that he had refused or neglected to do it. If by the counter-affidavits of the defendant it was perfectly apparent that the relator was not entitled to the writ, the rule was discharged; but if the relator's right to the writ after the receiving of the counter-affidavits was doubtful, the rule was made absolute, in order that the right might be formally tried, and an order was entered directing an alternative writ, or mandamus nisi, to be issued. *Fisher v. Charleston*, 17 W. Va. 595.

In this writ it was absolutely necessary to set forth the facts, which entitled the prosecutor to the relief prayed for. It was addressed to the person or persons, whose duty it was to perform the act, and it commanded him or them to do the thing required, which was accurately specified, or show some cause why he or they should not do it. To this writ the defendant was required to make a written return either denying the facts stated in the writ or setting forth other facts sufficient to defeat the relator's claim. If the alternative writ or mandamus nisi was defective in form merely, the defendant could move to quash it, before he made his return; but for such defect he could not move to quash, after he made his return; but for a defect of substance the writ of mandamus nisi would be quashed at any time, before a peremptory mandamus was awarded. If the return of the defendant was adjudged as insufficient answer or if he made no return, a peremptory mandamus was awarded commanding absolutely the defendant to do the thing required; and if this writ was disobeyed, an attachment issued against the defendant. If the return was sufficient in law but false in fact, the relator could not traverse it but was forced to resort to his action against

the defendant for a false return. *Fisher v. Charleston*, 17 W. Va. 595.

If in such action the return was falsified, a peremptory mandamus issued. *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. 722.

## 2. The Present Practice.

The proceedings in mandamus have been generally modified by statutory provisions. The statute of 9 Anne, ch. 20, conforming the proceedings in mandamus to those in ordinary actions at law, is the most important. Both Virginia and West Virginia have enacted similar statutes. *Fisher v. Charleston*, 17 W. Va. 595.

But these statutes are simply declaratory of the common law, in relation to the scope of the remedy. *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262; *Douglass v. Loomis*, 5 W. Va. 542.

The usual practice in West Virginia, and the most usual practice in this country, is to begin the proceedings by presenting to the court an application in the form of a petition setting forth in detail the grounds, upon which the petitioner asks a writ of mandamus. *Goshorn v. Supervisors*, 1 W. Va. 312; *Board v. Minturn*, 4 W. Va. 300, 302; *Shields v. Bennett*, 8 W. Va. 74; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. County Court*, 28 W. Va. 158; *Fisher v. Charleston*, 17 W. Va. 595; *Com. v. Justices*, 2 Va. Cas. 9; *Sights v. Yarnalls*, 12 Gratt. 292; *Barnett v. Meredith*, 10 Gratt. 650, 651.

This petition in this state is usually ex parte, no notice that it will be used being given to the defendants, and it is always supported by affidavit, when presented by a private person. *Goshorn v. Supervisors*, 1 W. Va. 312; *Board v. Minturn*, 4 W. Va. 300, 302; *Shields v. Bennett*, 8 W. Va. 74; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. County Court*, 28 W. Va. 158; *Fisher v. Charleston*, 17 W. Va. 595; *Com. v. Justices*, 2 Va. Cas. 9; *Sights v. Yarnalls*, 12 Gratt. 292; *Barnett v. Meredith*, 10 Gratt. 650, 651.

If a *prima facie* case is presented by this petition warranting the relief sought, the court frequently issues a rule, which is served on the opposite party, requiring him to show cause, why a mandamus should not issue. *Goshorn v. Supervisors*, 1 W. Va. 312; *Board v. Minturn*, 4 W. Va. 300, 302; *Shields v. Bennett*, 8 W. Va. 74, 76; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. County Court*, 28 W. Va. 158; *Fisher v. Charleston*, 17 W. Va. 595; *Bridges v. Shallcross*, 6 W. Va. 562; *State v. Long*, 37 W. Va. 266, 16 S. E. 578; *Ohio Valley Iron Works v. Moundsville*, 11 W. Va. 1, 11; *Harrison v. Emmerson*, 2 Leigh 764; *Smith v. Dyer*, 1 Call 562, 563; *Dew v. Judges*, 3 Hen. & M. 1; *Barnett v. Meredith*, 10 Gratt. 650, 652; *Com. v. Justices*, 2 Va. Cas. 9; *Sights v. Yarnalls*, 12 Gratt. 293.

But in this state the issuing of this rule is frequently dispensed with; and the most usual practice is to issue the alternative writ immediately on the filing of a proper petition supported by affidavit. *Goshorn v. Supervisors*, 1 W. Va. 312; *Board of Supervisors v. Minturn*, 4 W. Va. 300, 302; *Shields v. Bennett*, 8 W. Va. 74, 76; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. County Court*, 28 W. Va. 158; *Fisher v. Charleston*, 17 W. Va. 595; *Bridges v. Shallcross*, 6 W. Va. 562; *State v. Long*, 37 W. Va. 266, 16 S. E. 578; *Harrison v. Emmerson*, 2 Leigh 764; *Com. v. Justices*, 2 Va. Cas. 9; *Sights v. Yarnalls*, 12 Gratt. 293; *Barnett v. Meredith*, 10 Gratt. 650.

Where the court thinks proper to issue a rule, and it has been served, if the defendant fails to answer it or files an insufficient answer, the court either issues a peremptory writ of mandamus, enlarges the rule or compels an answer, as may be proper in the particular case. But if the answer denies the facts stated in the petition or shows sufficient cause, why the rule should not issue, so that it appears, that there is a dispute of fact between the parties,

an alternative writ of mandamus is ordered to be issued, in order that by the return to such alternative writ of mandamus a formal issue may be made up and tried. This alternative writ of mandamus, whether issued immediately on the filing of the petition or after the return of such a rule, here as elsewhere stands in lieu of a declaration in an ordinary suit. The facts, however, alleged in this alternative writ, may be alleged by way of recital; but it being in the nature of a declaration as well as of a writ, the sufficiency of these facts to entitle the plaintiff to the redress he seeks is called in question by a motion to quash the alternative writ or by a demurrer to it, and any defect in the recitals or allegations of this alternative writ can not be aided by the petition or affidavit thereto, for though they be the foundation, on which the writ was issued, they constitute no part of the pleadings in the case. If the petition does not state the necessary facts to justify the issuing of an alternative writ or a rule, neither ought to be issued, and if issued, on the return day this fatal defect should be taken advantage of not by demurrer but by a motion to quash the alternative writ or to discharge the rule as improvidentially awarded. The petition and affidavit bear to the mandamus nisi a relation similar to that which an affidavit bears to an attachment. *Goshorn v. Supervisors*, 1 W. Va. 312; *Board v. Minturn*, 4 W. Va. 300, 302; *Shields v. Bennett*, 8 W. Va. 74, 76; *Morgan v. Fleming*, 24 W. Va. 186; *Doolittle v. County Court*, 28 W. Va. 158; *Fisher v. Charleston*, 17 W. Va. 595; *Com. v. Justices*, 2 Va. Cas. 9; *Sights v. Yarnalls*, 12 Gratt. 292; *Barnett v. Meredith*, 10 Gratt. 650, 651.

When the alternative writ of mandamus has been issued, if the defendant does not do the act required, and the writ be not quashed on motion or dismissed on demurrer, the defendants, to whom it is addressed, and none others must make a return thereto.

This return under our statute is in the nature of a plea in an ordinary action at law, and it must be tested by the ordinary rules of pleading both as to its form and substance. It must therefore be in the nature of a traverse or a plea in confession and avoidance; and if insufficient in law, it may be demurred to by the complainant, or he may reply thereto; and so the pleadings proceed as in an ordinary common-law suit, till the parties are at issue in fact or law, which issues are tried as in an ordinary action at law. *Fisher v. Charleston*, 17 W. Va. 595; *Com. v. Justices*, 2 Va. Cas. 9; *Doolittle v. County Court*, 28 W. Va. 158; *Morgan v. Fleming*, 24 W. Va. 186.

## B. PROCEEDINGS IN DETAIL.

### 1. Petition.

#### a. Primarily Should Be Presented to Circuit Court.

Rule 13 of the court contained in 23 W. Va. 829, requires petitions for mandamus, where it is at all practicable, to be first presented to the circuit court. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348.

#### b. Allegations.

The petition must set forth a prima facie case, if it does not, no alternative writ should issue. *Wintz v. Board*, 28 W. Va. 227.

But it is only necessary for the petition to set forth a prima facie case. The petition not being a part of the pleadings, the strict rules of pleading do not apply to it. *Fisher v. Charleston*, 17 W. Va. 595; *Fisher v. Charleston*, 17 W. Va. 628; *Welty v. County Court*, 46 W. Va. 460, 33 S. E. 269. See also, Va. Code (1902), §§ 3011, 3012.

#### c. Verification.

Though the petition for mandamus is not verified by oath, or affidavit, if the respondents appear and move the court to dismiss the rule, on the ground that the court was without jurisdiction, this amounts to a waiver of the want

of an affidavit to the petition. *Board v. Minturn*, 4 W. Va. 300.

### 2. Rule to Show Cause.

**Necessity.**—Although in the older cases, it is laid down that a rule to show cause is necessary (*Dinwiddie Justices v. Chesterfield Justices*, 5 Call 556; *Com. v. Fairfax Justices*, 2 Va. Cas. 9), the modern practice seems to be to issue the alternative writ immediately upon the filing of the petition, without any rule to show cause, as was said in a late West Virginia case. *State v. Long*, 37 W. Va. 266, 16 S. E. 578.

"The better practice is, when a petition for a mandamus is filed, to award an alternative writ of mandamus, stating all the facts therein calling for a mandamus, as would be stated in a declaration; for this alternative writ is treated as a declaration in the action called mandamus. It is not necessary to issue a rule, for, where matters of fact come in and answer to it, it necessitates an alternative mandamus, and after that a peremptory mandamus, making three processes or awards instead of two. There is no use of a rule. The alternative writ should be resorted to in the first instance." *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187; *Fisher v. Charleston*, 17 W. Va. 628; *Doolittle v. County Court*, 28 W. Va. 158; *Sights v. Yarnalls*, 12 Gratt. 292.

"Though doubtless the court may, if it deem it proper, in a particular case to decline to issue an alternative writ of mandamus, until a rule to show cause has been first issued and returned." *Fisher v. Charleston*, 17 W. Va. 628; *Doolittle v. County Court*, 28 W. Va. 158.

Even where such a rule is held necessary, it is admitted that the respondents may waive it, and a voluntary appearance and return to the alternative writ amount to such a waiver, though an insufficient return; e. g., a return by attorney, being equivalent to no return, will not constitute such waiver. *Din-*

widdie Justices *v.* Chesterfield Justices, 5 Call 556.

### 3. Answer to Rule.

**Sufficiency.**—The sufficiency in law of an answer to a rule should be tested by motion for a peremptory mandamus, not by demurrer, while its truth in fact should be tested by the issuance of an alternative writ. *Fisher v. Charleston*, 17 W. Va. 595; *Wells v. Mason*, 23 W. Va. 456.

But if the court sustains the demurrer and orders the peremptory writ to issue, the respondents can not complain of such irregularity. *Wells v. Mason*, 23 W. Va. 456.

Whether it be proper or not to treat the answer to the rule to show cause as if it were the return to the mandamus nisi, by demurring and filing a replication thereto, the propriety of such pleading can not be inquired into, where the respondent does not complain, the petitioner not being in a position to object to his own pleading. *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742.

### 4. The Alternative Writ.

#### a. Necessity.

Where upon the answer to the rule to show cause the applicant's right to the writ appears doubtful or disputed, the writ should not be refused, but an alternative writ should be issued, in order that upon the return to such writ, the right might be tried. *Dew v. Judges*, 3 Hen. & M. 1.

Where there is no answer to the rule raising an issue of fact, and the rule and the petition state facts warranting a peremptory mandamus, a peremptory mandamus issues at once without an alternative mandamus. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

Where the answer to the rule to show cause is sufficient in law, the peremptory writ should issue at once, such answer being equivalent to no answer. There is no necessity in such case for an alternative writ, this being necessary only when there is a dispute

about material facts. *Wells v. Mason*, 23 W. Va. 456.

As a matter of convenience it is sometimes stipulated, that the petition may stand for the alternative writ, or that the rule for a mandamus nisi shall stand for the alternative writ, and then, of course, by consent of parties and with the assent of the court this petition or rule, as the case may be, is regarded as in lieu of a declaration, and the ordinary rules of pleading are applied to them, which without such stipulation would not be the case. Regularly this stipulation or agreement should be entered or noticed on the record. But without any such formal stipulation, cases occur, where the court has treated the petition or the rule, as though it has been the alternative writ, but in these cases no objection appears to have been made to this informal mode of proceeding, and it may be inferred, that though no assent was entered of record, yet there was really an assent thereto by the parties. But such precedents should be avoided as tending to confusion and difficulty. *Fisher v. Charleston*, 17 W. Va. 595; *Dinwiddie Justices v. Chesterfield Justices*, 5 Call 556; *Goff v. Wilson*, 32 W. Va. 393, 9 S. E. 26; *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

Without an agreement to that effect, however, express or implied, the petition or the rule to show cause why a mandamus should not issue can not be treated as an alternative writ, hence the action of a court in allowing the plaintiff to reply generally to the answer to such rule, where there is a dispute of fact between the parties, as if it were the return to an alternative writ, instead of issuing an alternative writ, and all subsequent proceedings are irregular and will be set aside, and the cause remanded, with direction to issue an alternative writ. *Fisher v. Charleston*, 17 W. Va. 595.

#### b. Form and Allegations.

An alternative writ of mandamus

answers two distinct ends: First, it is a writ; and secondly, it is the plaintiff's declaration. In form it is a writ, but is distinguishable from an ordinary writ of any other sort in this, that the inducement must set out all the facts on which plaintiff's demand rests, as clearly as it must be done in a declaration, with this difference, however, that in the alternative writ of mandamus these facts are set out as a preamble to the writ, and therefore by way of recital; whereas in a declaration they can not generally be set out by way of recital. *Fisher v. Charleston*, 17 W. Va. 628; *Doolittle v. County Court*, 28 W. Va. 158.

At common law, the case being determined entirely upon the alternative writ, and the return thereto, such return not being traversable, the utmost certainty and accuracy was required in these, even greater than in the pleadings in an ordinary suit at law, but by the statute of Anne, 9 Anne, ch. 20, and ch. 109, W. Va. Code, which are practically identical, the return to the alternative writ being traversable, the same rules of pleading applicable to an ordinary action at law apply to the pleadings in mandamus, neither greater nor less strictness being required. *Fisher v. Charleston*, 17 W. Va. 595; *Doolittle v. County Court*, 28 W. Va. 158.

Where the alternative writ does not state a necessary fact it should be quashed. *Wintz v. Board*, 28 W. Va. 227.

A mandamus nisi will not be quashed for a mere formal defect, which the court would have allowed to be amended at the bar and which could have been amended truthfully. *Doolittle v. County Court*, 28 W. Va. 158.

The alternative writ must set forth by distinct recital and not by reference to the petition all the facts necessary to show the plaintiff's right to the writ, since no reference can be made to the petition to eke out the allega-

tions of the writ. *Doolittle v. County Court*, 28 W. Va. 158.

Where the alternative writ fails in its inducement to state any of the facts on which the plaintiff bases his demand, and simply states, that, whereas the plaintiff had filed a petition for a mandamus and the judge had ordered it to be issued, therefore we command you, etc., no issue can possibly be made on such an alternative writ, no facts are stated, it is simply a writ and can not serve, as it must, the further purpose of a declaration and should be quashed. Such error, however, may be corrected by amendment, if the proper facts are stated therein. *Fisher v. Charleston*, 17 W. Va. 628.

But in *Welty v. County Court*, 46 W. Va. 460, 33 S. E. 269, it was held, that though the petition and rule constitute no part of the pleadings in mandamus, and to these the strict rules of pleading are not applied, yet the allegations of the petition may be resorted to for the purpose of showing that the relator has made a prima facie case, such as would entitle him to the alternative writ. See also, *Doolittle v. County Court*, 28 W. Va. 158; *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

### c. Command.

The alternative mandamus must require only that to be done which the petitioner has a right to have done, since the peremptory writ must follow the alternative strictly, and can not be varied, or modified, hence if all that is acquired in the alternative can not be compelled, nothing can be compelled and the writ should be quashed. *Fisher v. Charleston*, 17 W. Va. 628.

The alternative writ must command the doing of everything necessary to give the desired relief, since the peremptory writ can not command anything additional to be done. So where the alternative writ merely commands the county court to allow a petition for the relocation of a county seat to be filed,

instead of ordering the said court to make an order for the submission of the question to the voters of the county, it is defective, since the peremptory writ should have to follow the alternative writ and would be entirely inadequate. *Doolittle v. County Court*, 28 W. Va. 158.

Since the petition forms no part of the pleadings in a mandamus case, but is merely the basis on which the alternative writ is issued, though the petition asks for an alternative writ to which the petition is not entitled, yet if the facts disclosed in the petition show that he is entitled to some writ, though different from the one asked for, the court will award him such an alternative writ as he is really entitled to. *Fisher v. Charleston*, 17 W. Va. 628.

It is not necessary for the writ of mandamus to conform strictly to the terms of the rule to show cause; if the return to the rule shows that the circumstances of the case require, in order to do strict justice between the parties, that the terms of the writ vary somewhat from those of the rule, such change may be made. *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639.

On the 4th of September, 1890, C. obtained in a proceeding by mandamus an order for a peremptory writ commanding a railway company to forthwith receive and recognize him as a director of the said railway company for the year for which directors were elected at the last general meeting of stockholders of said company, held to elect directors for said company for the year 1890, in the place of T., who was an acting director for that year under a claim of right, T. being named as a party in the alternative writ, but not served with process or in any way brought before the court. Held, that the writ of mandamus from its nature and subject matter must not leave its range of action to indeterminate outside ascertainment, but must indicate

with reasonable certainty the precise thing to be done. *Cross v. West Virginia, etc.*, R. Co., 34 W. Va. 742, 12 S. E. 765.

#### d. Motion to Quash and Demurrer.

A motion to quash puts in issue not only the sufficiency of the alternative writ, but also the sufficiency of the petition on which such writ is based; and, therefore, if the defect, which the defendant seeks to take advantage of, is in the alternative writ itself, and not in the petition, the formal mode of pleading is to demur, and not move to quash, and vice versa, if the defect is in the petition; but, while this is the technical and formal mode of proceeding, the court will nevertheless treat a motion to quash the alternative writ as the equivalent of a demurrer to such writ. The motion to quash in such case is not only the equivalent of a demurrer, but it reaches defects in the petition in like manner as such motion does the affidavit in an attachment. The motion to quash in this case, therefore, having all the effect of a demurrer and more, it is wholly immaterial whether there was or not, in fact, a demurrer in the record. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72.

A motion to quash the alternative writ in mandamus proceedings should be made before a return is made to the writ, but such an irregularity will not prevent the court from quashing the writ if it is defective in substance. *Poteet v. County Com'rs*, 30 W. Va. 58, 3 S. E. 97.

#### e. Service of Writ.

It is not necessary for all the justices composing the county court to be served with a mandamus nisi, it is sufficient if it be served upon those sitting. *Smith v. Dyer*, 1 Call 562. See also, Va. Code (1902), § 3020; W. Va. Code (1906), § 3796.

The alternative writ may be served on nonresidents by publication, just as well as the process in any other suit.

*Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

The court may order that the service of a copy of the order for the issuance of the writ of mandamus nisi on the respondent, shall have the same effect as the service of the writ itself. *Cowan v. Doddridge*, 22 Gratt. 458; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

#### f. Amendment.

The alternative writ may be amended, and it is not necessary for the amended writ to be served upon the respondents, since the alternative writ serves the double purpose of process and declaration, and an amended declaration does not have to be served. *Town of Mason v. Ohio River R. Co.*, 51 W. Va. 183, 41 S. E. 418. See also, *Fisher v. Charleston*, 17 W. Va. 628.

#### g. Review of Refusal to Allow.

As a general rule a refusal to allow an alternative writ of mandamus is not reviewable on error. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348.

The remedy of the relator is by application to the supreme court for the allowance of the writ after its refusal by the district court. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348.

If, however, the petitioner has no other remedy, then a writ of error would be proper. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. 348.

### 5. Return of Alternative Writ.

#### a. By Whom Made.

The return to a writ of mandamus must be by the person or persons to whom it is directed, not by an attorney, otherwise the return is insufficient. *Dinwiddie Justices v. Chesterfield Justices*, 5 Call 556.

#### b. Insufficient Return or No Return.

Where no return is made to the alternative writ, if sufficient cause is not shown or not properly shown, a peremptory writ will issue. *Dinwiddie*

*Justices v. Chesterfield Justices*, 5 Call 556. See also, W. Va. Code, 1906, § 3586.

Where no return is made to an alternative writ of mandamus, the court may, in its discretion, order a pre-emptory writ to issue without compelling a return and extending the time for such return, where the respondents have already had a sufficient time to make their return and the proceedings indicate clearly that they have no substantial defense to make. *Fisher v. Charleston*, 17 W. Va. 628.

All the material averments of the alternative writ, not denied by the return, are to be taken as true. *Cross v. West Virginia, etc., R. Co.*, 35 W. Va. 174, 12 S. E. 1071.

#### c. Purging Return.

A motion to purge the return to a rule nisi from alleged "unfit, impertinent, and scandalous matter," will not be granted, where it seems that such matter was provoked and warranted by allegations and insinuations of the petition. *Moon v. Wellford*, 84 Va. 34, 4 S. E. 572.

### 6. Defenses.

See Va. Code (1904), § 3014.

### 7. Replication.

So far as the return to the alternative writ merely denies the allegations of the writ, no replication is necessary. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959. See also, W. Va. Code (1906), § 3588.

But where the return sets up new matter in bar of the writ, if such matter constitutes a good defense to the writ, as where a demurrer has been filed and overruled, a replication is necessary, since in the absence of such replication denying the truth of the new allegations, they must be taken as true, and the writ should be dismissed. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Page v. Clopton*, 30 Gratt. 415.

To submit the truth of such new allegations to a jury is error, there be-



ing no issue as to them; so that if they find a verdict contrary to the admitted allegations, the verdict must be set aside by the higher court and the writ dismissed. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

While the allegations of a sufficient return may be traversed, no traverse should be tendered to an insufficient return. *Com. v. Justices*, 2 Va. Cas. 9.

#### 8. Demurrer to Return.

Upon a demurrer to the return to a mandamus nisi, the court will go back to the first error committed in the pleading, according to the general rule of pleading, and will give judgment against the party making the first error, hence a motion to quash the writ in such case is unnecessary. *Doolittle v. County Court*, 28 W. Va. 158; *Morgan v. Fleming*, 24 W. Va. 186. See also, W. Va. Code (1906), § 3587.

A demurrer to an answer in mandamus proceedings, as in other cases, admits the truth of all facts sufficiently pleaded. *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742; *Morgan v. Fleming*, 24 W. Va. 186.

#### 9. Peremptory Writ.

The peremptory writ must follow strictly the command contained in the alternative writ. *Doolittle v. County Court*, 28 W. Va. 158; *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187; *Fisher v. Charleston*, 17 W. Va. 628.

But while the command in the alternative writ must be strictly followed in the peremptory writ, still the mere fact that the alternative writ commands the ballot commissioners to assemble and recount the votes, while the peremptory writ, in addition, commands them to declare the true result according to the recount, and issue a proper certificate of election, is no ground of objection, since this addition does not modify the rule in a legal view, since it only requires the respondents to do that which would follow as a necessary consequence, from the com-

mand in the alternative writ. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

Though the peremptory writ uses the expression "county clerk" instead of "clerk of the county court" this is not a fatal defect where the meaning can be plainly gathered from the rest of the record. *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187.

Where the petition fails to show that the tax sale was made under ch. 31, W. Va. Code, and that petitioner had complied with §§ 18, 19, and that the land had not been redeemed as provided for in §§ 15, 16, 24, of said ch. 31, or same sections of ch. 117, acts, 1872-73, the circuit court, or the judge thereof in vacation, should refuse to appoint a commissioner to make a deed under § 22, and under such circumstances a peremptory mandamus does not lie to compel the said court, or judge in vacation, to appoint such a commissioner. *Davis v. Jackson*, 14 W. Va. 227.

#### C. EVIDENCE.

A motion for a peremptory writ of mandamus, notwithstanding the answer, is the proper method of raising the question of the competency of evidence. *Roe v. Philippi*, 45 W. Va. 785, 32 S. E. 224.

#### D. REVIVAL OR CONTINUATION OF WRIT.

Where the parties against whom a peremptory writ of mandamus has been awarded, have ceased to occupy their official positions, the case must be revived against their successors in office, and another writ awarded against them. *Wells v. Mason*, 23 W. Va. 456.

In *State v. County Court*, 47 W. Va. 672, 35 S. E. 959, where the prosecuting attorney sued out a writ of mandamus in the name of the state on behalf of himself as such, and as a citizen and taxpayer, and also in behalf of other citizens and taxpayers, to compel the county court to build a new courthouse, and afterwards dismissed the writ, he being the only person named as plain-

tiff, the court was of opinion that other citizens and taxpayers had no right to have the suit continued in their names, the state in such case being a mere nominal party, the relator being the real plaintiff, but the writ was quashed because the writ was continued without notice to the respondent.

**Notice.**—Where a writ of mandamus abates, in order to revive or continue the suit in the name of another party, it is necessary to give notice to the respondent, in order that he may contest the right of such party to maintain the writ, and in the absence of notice the writ should be quashed. *State v. County Court*, 47 W. Va. 672, 35 S. E. 959.

Where the proceedings are revived against a city council elected since the institution of the proceedings, such new respondents must have notice. *Fisher v. Charleston*, 17 W. Va. 595; *Fisher v. Charleston*, 17 W. Va. 628.

#### **E. DISCHARGE OF WRIT.**

A mandamus was awarded to compel a town council to "assess and collect taxes for corporation purposes on the property of a terminal company, as upon the property of other persons and corporations in the said town." The answer averred that the property of the company was duly assessed for taxes for municipal purposes for the year 1892. Held, that the averments of the answer being taken to be true, they showed that the mandamus had been complied with, the town having no authority to levy back taxes, and the mandamus not requiring it. *Whiting v. West Point*, 89 Va. 741, 17 S. E. 1.

#### **F. REVIEW.**

**Error to County Court.**—The provision of § 12, art. 8, of the constitution of 1872 of West Virginia, which declares that "the circuit courts shall have supervision of all proceedings before the county courts, and other inferior tribunals, by mandamus, prohibition

and certiorari," is restrained and limited in civil cases cognizable by a justice, with certain specified exceptions, by § 29 of the same article of the constitution, which provides, that the decision of the county court shall be final in all cases of appeals from the judgment of a justice. By this inhibition it was intended not only that the circuit court should not supervise such cases by appeal or writ of error, but that all remedy should be denied by that court in such cases. *Poe v. Machine Works*, 24 W. Va. 517.

**Necessity of Bill of Exceptions.**—See generally, the title EXCEPTIONS, BILL OF, vol. 5, p. 357.

It is not necessary to except to the action of the lower court in awarding a writ of mandamus, in order to make the pleadings and exhibits part of the record and available in the supreme court of appeals, they being already a part of the record. *Board v. Catlett*, 86 Va. 158, 9 S. E. 999.

#### **XII. Enforcement of Mandate.**

Where the respondent refuses to obey a peremptory writ of mandamus, he is guilty of a contempt, and obedience may be enforced by attachment. *Fisher v. City of Charleston*, 17 W. Va. 595. See also, Va. Code, 1904, § 3020.

In contempt proceedings for refusal to obey a peremptory writ of mandamus, the jurisdiction of the court to issue the writ is *res adjudicata*, and can not be questioned. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

Contempt proceedings for refusal to obey a peremptory writ of mandamus can not be reviewed on an application for a writ of habeas corpus by the party in contempt, where the court acted within its jurisdiction, in awarding the writ of mandamus. *Cromwell v. Com.*, 95 Va. 254, 28 S. E. 1023.

A contempt of court is a criminal offense, and the imposition of a fine for contempt is a judgment in a crim-

inal case. Therefore the same principles of evidence apply as in other criminal trials, and the guilt of the respondent must be proved beyond a reasonable doubt. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

### **XIII. Costs.**

See generally, the title COSTS, vol. 3, p. 604.

Ordinarily in a mandamus against public officers in respect to matters judicial, or quasi judicial, costs are not allowed. *Judy v. Lashley*, 59 W. Va. 628, 41 S. E. 197; *State v. Supreme Court*, 5 Wash. 518; *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176. See also,

W. Va. Code (1906), §§ 3589, 3590; *Com. v. Offner*, 2 Va. Cas. 17.

### **XIV. Dismissal.**

Where a receiver has been appointed by an appellate judge, and the circuit court has declined to enforce the order, and the supreme court has issued a mandamus to compel its enforcement, and "contempt proceedings" have been instituted against said circuit judge, an appeal from the order appointing such receiver stays all proceedings under said order, and said mandamus and "contempt proceedings" should be dismissed. *Virginia, etc., Iron Co. v. Wilder*, 88 Va. 942, 14 S. E. 806.

## **MANDATE AND PROCEEDINGS THEREON.**

### **I. Issuance of Mandate, 553.**

### **II. Form, 554.**

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### **IV. Proceedings of Lower Court after Reception of Mandate, 555.**

#### **A. Effect of Mandate as Deciding the Law of the Case, 555**

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##### **1. In General, 558.**

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##### **7. Admission of New Parties, 562.**

##### **8. Withdrawal of Waiver, 563.**

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### **V. Power of Appellate Court after Issuance of Mandate, 564.**

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### **CROSS REFERENCES.**

See the titles AMENDMENTS, vol. 1, p. 352; APPEAL AND ERROR, vol. 1, p. 418; BILL OF REVIEW, vol. 2, p. 390; DEMURRERS, vol. 4, p. 456; EXCEPTIONS, BILL OF, vol. 5, p. 357; JUDGMENTS AND DECREES, vol. 8, p. 161.

## I. Issuance of Mandate.

### When Retained in Appellate Court.

—A former statute provided that, "When any judgment, decree, or order of a county court is reversed or affirmed, the cause shall not be remanded to said court for further proceedings, but shall be retained in the circuit court, and there proceeded in, unless by consent of the parties, or for good cause shown, the appellate court direct otherwise." Code, 1873, ch. 178, § 25. *Wynn v. Heninger*, 82 Va. 172, 173.

**Superior Court Created While Suit Pending in Supreme Court of United States.**—Where an appeal was pending in the United States supreme court in a cause begun in the circuit court of the District of Columbia for the county of Alexandria, when that county was retroceded to Virginia, it was held, that the cause was properly retained by the United States supreme court and decided by it, and that its decision was properly sent down to the superior court for the county of Alexandria established by the laws of Virginia, and ought to be enforced by that court. *McLaughlin v. Bank*, 7 Gratt. 68.

**Remand to Circuit Court.**—Where, in pursuance of the act of 1869-70, ch. 171, § 5, p. 257, the supreme court sent a cause, as having been pending in a district court of appeals, to a circuit court, that was a decision of this court that the cause had been pending in the district court, and that the circuit court had jurisdiction to rehear and decide it. *Kent v. Dickinson*, 25 Gratt. 817.

**Disregard of Report.**—When a circuit court wholly disregards a commissioner's report, and numerous exceptions thereto, and enters a decree on an entirely different basis from that presented in such report, and the supreme court, on appeal, reverses such decree, it will remand the cause to the circuit court, with directions to pass upon and dispose of such exceptions seriatim, and either to reform or re-

commit such report. *Holt v. Holt*, 46 W. Va. 397, 35 S. E. 19.

### When Necessary to Attain Justice.

The court of appeals will direct their clerk to grant a certificate of their judgment, during term time, if it be absolutely necessary to attain the justice of the case. *Brown v. Crippin*, 4 Hen. & M. 173.

**Cause Retained by Consent.**—When, upon the reversal of a county court judgment, a cause has been retained in the district court, by consent; if, at a subsequent term, the order for retaining the cause be set aside, an appeal can not then be taken, to the court of appeals, even by consent of parties, but the cause should be sent back to the county court for further proceedings. *Norris v. Tomlin*, 2 Munf. 336.

### Revocation of Former Judgment.

After the court of appeals had reversed a judgment and remanded case to the court below for further proceedings there, and a certificate of that judgment had been sent by the clerk to the court below, a rehearing was, on motion of defendant in error, directed in the court of appeals whereupon the court revoked the certificate of its former judgment, and directed court below to surcease proceedings till further order. *Wynn v. Wyatt*, 11 Leigh 584.

**Action against Partnership.**—Plaintiff in equity sets up claim against a mercantile house, and only question put in issue is, whether the house is liable, or only an individual member of it; plaintiff obtains a decree against the house; and, on appeal, decree reversed, because, in opinion of appellate court, there is no proof of the liability of the house, but only of the individual partner; the appellate court will not remand the cause as to the parties, in order to give plaintiff opportunity to adduce further proof of liability of the house, but will dismiss the bill as to the partners held not liable, and remand the cause for proceedings against the

partner only who is liable. Nor will the court retain the partners, so held not liable in the actual state of the case, still in court, for the purpose of having a settlement of the partnership accounts, and having any balance found due thereon to the partner who is liable, he being an absent defendant, applied to satisfaction of plaintiff's demand; the bill not having been framed with that view, and not having asked such settlement of the partnership accounts. *Cunningham v. Smithson*, 12 Leigh, 32.

**Decree Contrary to Decision of Appellate Court.**—If, in a case which has been remanded by an appellate court to an inferior court, the court below allows the cause to be reopened by new pleadings and evidence, and pronounces a decree contrary to the decision of the appellate court, the party aggrieved thereby may appeal from the decree and have the same set aside, and, on the second appeal, a mandate will go to the court below to enter a decree in conformity with the decision on the first appeal. *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174.

## II. Form.

**Must Show How Remanded.**—On reversal or affirmance of judgment of county court, the cause must be retained by the circuit court and not remanded, except by consent or for cause, as a remanding order must show on its face that it was remanded by consent or for cause. *Smith v. Hutchinson*, 78 Va. 683; *Wynn v. Heninger*, 82 Va. 172.

"In *Smith v. Hutchinson*, 78 Va. (3 Hans.) 683, Richardson, J., delivering the opinion of this court, said: 'We do not decide that the circuit court should, where a cause is remanded for trial in the county court, spread in its order at large the character of the cause shown for so doing; for to do so would in many cases be inconvenient, and would unnecessarily cumber the rec-

ord. It is necessary and proper, however, that the judgment in all such cases show, either that it was done for good cause shown, or else by agreement of the parties.'" *Pettit v. Cowherd*, 83 Va. 20, 23, 1 S. E. 392.

**Conclusion of Mandate.**—Decree on former appeal remanding cause to circuit court with direction to assign to appellant (then) as his homestead the proceeds of the certain property embraced in a deed that has been annulled as fraudulent, concludes with the words "unless he appears not entitled to the same on other grounds;" and the circuit court disregarded the new objections presented by the creditor (the then appellee) to such assignment, did make the assignment. It was held, there is no error in the order of the circuit court, the intention of those words not being to open up the matter at large to new objections. *Sears v. Marshall*, 83 Va. 383, 2 S. E. 608.

## III. Entry of Mandate.

### From United States Supreme Court.

—The mandate of the supreme court of the United States reversing the judgment of the supreme court of appeals of this state for the cause aforesaid, being presented to the supreme court appeals of this state, and asked to be entered of record, and the supreme court of appeals of this state asked to reverse its judgment in the case and to conform its judgment to the judgment of the supreme court of the United States; it was held, that it is the duty of the supreme court of appeals of this state to cause the mandate from the supreme court of the United States in said case, to be entered of record, and to reverse its judgment, and conform the same to the judgment of the supreme court of the United States. *Peerce v. Carskadon*, 6 W. Va. 383, 384.

**Entry of Name of Counsel.**—A mistake of the clerk of this court, in not

entering the name of counsel on the argument docket, in consequence of which, the counsel was not heard (being absent, with leave of the court, when the cause was called), is not sufficient ground for re-instating the cause, after the decision has been regularly certified to the court below. *Beatty v. Smith*, 5 Munf. 39.

A judgment or decree of the supreme court takes effect, at latest, from its date, and not from the receipt and recordation of the mandate in the office of the court below. *Long v. Perine*, 44 W. Va. 243, 28 S. E. 701.

#### **IV. Proceedings of Lower Court after Reception of Mandate.**

##### **A. EFFECT OF MANDATE AS DECIDING THE LAW OF THE CASE.**

**Conclusiveness of Mandate.**—A decree of the supreme court of appeals upon a question decided by the court below is final and irreversible; and upon a second appeal in the cause, a question decided upon first appeal can not be reversed, being *res judicata*. *Turner v. Staples*, 86 Va. 300, 9 S. E. 1123; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223; *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

**Can Not Be Reopened by New Pleadings.**—When a question of law or fact is definitely determined by the supreme court, and the case remanded to the circuit court for further proceedings, a party can not, by new pleadings or evidence, reopen that question. *Windon v. Stewart*, 48 W. Va. 488, 37 S. E. 603.

**Regarded as Res Adjudicata.**—Points adjudicated by the supreme court on a former appeal must be regarded as *res adjudicata* during the further progress of the cause. *Wick v. Dawson*, 48 W. Va. 469, 37 S. E. 639; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

**Concludes All Questions.**—Upon an appeal from a final decree made upon a report of a commissioner, to which there were various exceptions by the appellant, the appellate court holds that the court below erred in not sustaining one of the appellant's exceptions to the report; and the decree is reversed and the cause remanded for the necessary inquiries to be made in relation to the subject of that exception. It was held, the decree concludes all other questions. *Deneufville v. Travis*, 5 Gratt. 28.

The special court of appeals having decided a case regularly sent to that court, and having reversed the decree of the court below, and sent the cause back for further proceedings, there can afterwards be no complaint of error in the decree of the special court or in the proceedings before that decree. *Bolling v. Lersner*, 26 Gratt. 36.

A joint judgment, in a suit in which an attachment had issued against all the defendants as nonresidents, having been rendered against several of the defendants, one of them, who had plead, took an appeal, and the court of appeals affirmed the judgment. Another of the defendants against whom this joint judgment was rendered, a non-resident, who had not plead, after due notice, then moved the circuit court who had rendered the judgment to reverse and annul the same, because the order of publication against him had not been made in the manner required by law, and because there had been a personal judgment against him, though he had never been served with process, and for other errors apparent on the face of the record. It was held, that the circuit court properly overruled his motion, as after the affirmance of the judgment by the court of appeals, no defendant could make a motion in the circuit court to reverse or modify the judgment, though the record of the case in the court of appeals fails to show that the defendant making the motion was notified

of the appeal, it being conclusively presumed he was so notified, and that all the questions raised by his motion had been considered and decided by the court of appeals when it affirmed the joint judgment. *Newman v. Mollohan*, 10 W. Va. 488.

**From Final or Interlocutory Decree.**

—In such a case the conclusiveness of the decree of the court of appeals is the same, whether the first appeal was from a final or interlocutory decree of the court below. All the decrees of the appellate court are in their nature final; except possibly where that court disposes only of a part of the case at one term, and reserves it for further and final action at another. *Campbell v. Campbell*, 22 Gratt. 649; *Henry v. Davis*, 13 W. Va. 230.

**Things Considered Settled.**—Where a case has been decided by the supreme court of appeals, whatever was before the court and disposed of, is considered finally settled. The inferior court is bound by the decree as the law of the case, and must be carried into execution according to the mandate. They can examine for no other purpose than execution, or give any or further relief or review it on any matter decided on appeal for error apparent, or intermeddle with it further than to settle so much as has been remanded. *Henry v. Davis*, 13 W. Va. 230; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Whatever is contained in the record on an appeal is supposed to have been passed upon, and whatever is passed upon here, and whatever might have been passed upon, in consideration of the record, is concluded and settled, and can not be reopened by the lower court. *Campbell v. Campbell*, 22 Gratt. 649; *Krise v. Ryan*, 90 Va. 711, 19 S. E. 783.

**Questions Involved in Decision.**—

Questions necessarily involved in the decision of an appeal or writ of error are finally determined by such decision, and are not thereafter open to

debate in the trial court, nor generally subject to re-examination in this court on a second appeal, or writ of error, in the same case. The decision on the first appeal, or writ of error, becomes the law of the case. *Rosenbaum v. Seddon*, 94 Va. 575, 27 S. E. 425.

**The fact that additional evidence** was taken after the case was remanded, does not affect the conclusiveness of the decree whereby the principles of the case were settled. *Turner v. Staples*, 86 Va. 300, 9 S. E. 1123.

**Matters Which Could Have Been Adjudicated.**—

Matters once determined on appeal in this court can not be reopened; and this is true whether those matters were actually adjudicated or not. If they could have been adjudicated in that suit, they are equally settled. *Carter v. Hough*, 89 Va. 503, 16 S. E. 665.

Where a question of law or fact is once definitely settled and determined by a decree of this court, and the cause is remained for further proceedings, a party to said suit can not by subsequent pleadings call in question the conclusiveness of the questions determined by said decree. *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. 265.

When the appellate court makes a decree and sends the cause back for further proceedings, there can not be a bill of review to correct the decree of such court for error apparent. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223; *Henry v. Davis*, 13 W. Va. 230; *Campbell v. Price*, 3 Munf. 227.

**Power to Rehear.**—The supreme court affirmed an interlocutory decree of the circuit court. Afterwards in the circuit court a petition was filed to rehear said decree, and was dismissed, and the petitioners appealed. It was held, such a decree, under such circumstances, can not be reheard. *Woodson v. Leyburn*, 83 Va. 843, 3 S. E. 873; *Lore v. Hash*, 89 Va. 277, 15 S. E. 549.

The general court having, upon a

writ of error to that court, reversed the judgment of the court below, and directed a new trial, that judgment is conclusive, and neither the court below, nor the general court on a second writ of error, can inquire into the correction of the first decision. *Marshall's Case*, 5 Gratt. 693.

**How Corrected.**—When the court of appeals makes a decree and send the cause back for further proceedings, there can not be a bill of review to correct the decree of the court of appeals for errors apparent on the face of the record. But there may be such a bill to correct the decree on the ground of after-discovered evidence. *Campbell v. Campbell*, 22 Gratt. 649.

**On Lien.**—It is familiar doctrine that where a decree is reversed in part, and affirmed as to the residue, such reversal does not destroy the lien of so much of the decree as is affirmed. But it applies not to a reversal of judgment and award of new trial. *Shepherd v. Chapman*, 83 Va. 215, 2 S. E. 273.

**Erroneous Instruction.**—Where an instruction given, or a verdict rendered, at trial in court below, is on appeal pronounced erroneous, it is improper at subsequent trial, the evidence being the same, to give the same instruction, or to enter up judgment on the same verdict. *Smith v. Snyder*, 82 Va. 614.

**Right to Dispute Debt.**—When there has been in a foreign attachment suit in equity an ascertainment of the amount of the indebtedness due from the defendant to the plaintiff, and the debtor appeals from the decree so ascertaining the amount, which is affirmed, and the court below is proceeding to execute the decree by selling the attached property, it is too late for a claimant of the property to dispute the debt. *Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 324.

**Rent of Land.**—The supreme court of appeals decided, in this cause, that the circuit court had no right to make

a decree to rent the land of the defendants, without their consent, for the year 1871—the circuit court not having first determined, by its decree, that there was a lien or liability upon the said land, or the rents and profits thereof, for the payment of some debt or liability. It was held, as the legitimate effect of said decision, that a similar order, directing the land to be rented for the previous year of 1870, is, for the same reason, erroneous, and when coming in conflict with the rights of said defendants, as subsequently settled by said decision of the supreme court of appeals, must be regarded as of no validity. *Hollingsworth v. Brooks*, 7 W. Va. 559.

**Copies of certain deeds** offered by the plaintiffs are admitted, and the defendant objects to them, because their acknowledgment and certificate of recordation are insufficient, and on a writ of error they are decided by this court to have been properly received in evidence, and the case being for other reasons remanded, on the second trial thereof copies of the same deeds with the same acknowledgments and certificates are again offered in evidence, the court below is bound to admit them; and this court on a writ of error will not review its action, though the case, when formerly before this court, was decided by only two judges. *Postlewaite v. Wise*, 17 W. Va. 1.

**Memorandum from Colonial Records.**—Where a certain memorandum from the colonial record was held by the circuit court to be a patent, and the supreme court held that such paper was not a patent, and the case was reversed for this reason; it was held, that the legal character and effect of the memorandum or entry was *res adjudicata*, and not open for further question, that the decision of the supreme court was a mandate to the lower court, and the paper could not thereafter be treated as a grant or patent. *Holleran v. Meisel*, 91 Va. 143, 148, 21 S. E. 658.



**Sale of Land.**—The action of the supreme court of appeals in prescribing, on appeal, the order in which the property sought to be reached in a creditors' bill shall be sold in case a sale shall be decreed, is binding upon, and must be observed by, the circuit court, in subsequently decreeing such sale, notwithstanding that it may be of opinion that the lands to be sold are inadequate to satisfy the demands ascertained to exist against them, and that a just regard for the interest of all parties forbids further delay in the sale. *Strayer v. Long*, 83 Va. 715, 3 S. E. 372.

## **B. OBEDIENCE TO MANDATE.**

### **1. In General.**

#### **From United States Supreme Court.**

—The court of appeals of Virginia will consider whether a mandate issued by the supreme court of the United States, directing this court to enter a judgment reversing one which it heretofore pronounced, be authorized by the constitution, or not; and, being of opinion, that such mandate is not so authorized will disobey it. *Hunter v. Martin*, 4 Munf. 1.

Where the supreme court of the United States reversed the judgment of the supreme court of appeals of West Virginia, it was held, it was proper for the supreme court of appeals of West Virginia to render judgment against the appellees for the amount of cost recovered by them against the appellees in the supreme court of the United States, and also for their cost expended in this court, and also to reverse the judgment of the court below and remand the cause to the court last named with direction to receive the said petition for a rehearing of the case without affidavit, and to grant the rehearing in the petition without affidavit unless legal and sufficient reason other than the want of such affidavit be shown why the prayer of the petition should not be granted, and further to perceive in the same as justice requires

and the law directs. *Peerce v. Carskadon*, 6 W. Va. 383.

**Duty as to Instructions.**—Where on appeal a new trial has been granted, it is the duty of the circuit court, at the second trial, to adopt the views set forth by the supreme court of appeals in its opinion, and instruct the jury in accordance therewith, provided the facts are the same and the instructions are asked for. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474.

#### **Will Send Decree to Court Below.**

When the supreme court of appeals has executed its power in a cause before it, and its final decree or judgment requires some further act to be done, it will send its decree or judgment to the court below to be executed. Whatever was before the court and disposed of is considered finally settled. The inferior court is bound by the decree or judgment as the law of the case and must carry it into execution. The court can not examine it for any other purpose than to execute it, nor give further relief. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223, 230; *Henry v. Davis*, 13 W. Va. 230; *Wynn v. Heninger*, 82 Va. 172.

#### **Decision against Certain Parties.**

Where the supreme court has decided against the right of certain persons to become parties, upon remand those persons can not come into the court below as parties and litigate anew the questions already determined. *Robinson v. Crenshaw*, 84 Va. 348, 5 S. E. 222.

#### **Must Execute According to Mandate.**

—Whatever was before the appellate court, and is disposed of, is considered finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate; they can examine it for no other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it fur-

ther than to settle so much as has been remanded. After a mandate, no rehearing will be granted; and, on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate. *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174.

Where the supreme court of appeals reverses a decree upon the merits, and remands the cause to the circuit court "for further proceedings therein to be had according to the rules and principles stated in the written opinion" filed in the cause, the findings of fact set forth in the opinion are binding upon the court below, and that court can not permit new pleadings and further evidence to be filed touching any matter involved in the decision of the appellate court, but must enter a decree in accordance with the opinion. *Butler v. Thompson*, 52 W. Va. 311, 43 S. E. 174.

**Mandamus** is the proper remedy to compel the circuit judge or court to comply with the mandate of the supreme court. *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

## 2. Restitution.

See the title **RESTITUTION**.

## C. AUTHORITY OF LOWER COURT AFTER REMAND.

### 1. In General.

**Does Not Change Terms.**—An interlocutory decree being affirmed by the court of appeals, does not change its terms; but it remains to be executed here in the same manner as it did before the appeal; therefore, in this case, the appeal being affirmed without a deduction of war interest on a British debt, such deduction will be made in this court; especially as the plaintiff is asking the aid of the court to carry that decree into effect. *Wilson v. Triplett*, 4 Hen. & M. 433.

**Damages.**—If there be judgment against a sheriff, for the amount of money levied on an execution with the fifteen per cent. interest and he appeals; the appellee, by waiving the ten

per cent. damages for retarding the execution and taking a simple affirmance of the judgment, may still have his fifteen per cent. damages, according to the judgment of the court below. *Guerrant v. Tayloe*, 2 Call 208.

**Execution May Issue.**—If proceedings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved; and on appeal taken to a court of appeals, the order of dissolution is affirmed in omnibus; an execution may be sued out on the judgment at law, before the decree of affirmance is entered up in the court of chancery. *Epes v. Dudley*, 4 Leigh 145.

**May Appoint Commissioner to Ascertain Rent.**—The assignees of the lessees of the salt works hold under the lease by the court to P at \$22,000 per annum, which terminated January 1st, 1861; and in 1859 P leases to the assignees for ten years, commencing in 1859 at \$20,000. The assignees hold over after January 1861, until 1869. In the suit by the assignees to enjoin the part owner from interfering with their possession, on appeal to the special court of appeals at Abington, that court after reinstating the injunction, and directing the cause to be heard with the case between the joint owners, says that the circuit court may determine whether the assignees shall be charged according to the lease to P or P's lease to them, or hold them responsible for such other reasonable rent for the property as the court may determine to be right. It was held, the decree of the special court of appeals not having been appealed from, the parties are bound thereby; and the circuit court may direct a commissioner to ascertain and report what would be a reasonable rent of the property from January 1st, 1861, to January 1st, 1869. *Stuart v. White*, 25 Gratt. 300.

### 2. Alteration of Decree.

The court of chancery can not, upon

the same facts, alter a decree of the court of appeals. *Prite v. Campbell*, 5 Call 116.

The court of chancery can not make any alteration in the terms of a decree of this court certified thither in order that a final decree may be made in the cause. *White v. Atkinson*, 2 Call 376.

The circuit court can not review or make any alteration in the provisions or requirements of a decree of the appellate court certified back for further proceedings in order to a final decree, but such further proceedings may be matter of decision for the first time in the lower court and of review in this court. *Atkinson v. Beckett*, 36 W. Va. 438, 15 S. E. 179.

**Increase of Injunction Bond.**—A judge of a lower court has no power when the case is at rules and that court is not in term, to increase the bond upon an injunction granted by a judge of the supreme court after its refusal by the lower court, and its return and recordation therein, although it becomes in effect an order of that court, which might be acted upon as such by that court in term. *Ruffin v. Commercial Bank*, 90 Va. 708, 19 S. E. 790.

**Interlocutory Decree.**—Where the decree affirmed, on its face, orders that the cause be referred to a master to take a further account and report, etc., such decree is interlocutory. Upon the cause being remanded to court below for further proceedings, such interlocutory decree may be modified upon exceptions to the master's report on motion or otherwise. *Miller v. Cook*, 77 Va. 806.

**Rejection of Name.**—An inferior court can not alter a decree of the supreme court, nor can that court alter its own decree after the period for rehearing has passed, but where the mandate of the supreme court to an inferior court practically makes the opinion in the case a part of the mandate, the opinion and mandate should

be read together, and if, when so read, the mandate is clear and free from all difficulty, and it is manifest that a name which was not necessary to the completeness of the mandate was inserted by mistake, the trial court may reject the name as surplusage. This is not alteration, but construction. The court, in deciding this case, said: "In the mandate of this court on the former appeal, the name of the trustee was inadvertently and erroneously recited, as 'W. W. Glenn,' instead of 'John Glenn.' It is contended that this error renders the mandate void as against the estate of John Glenn, trustee; that for the circuit court to make the mandate operative against the estate of the trustee, John Glenn, would be for that court to amend the mandate of this court, which it has no power to do. It is not competent for the circuit court to amend or correct the mandate of this court. We are, ourselves, powerless to amend or correct our own mandate after the term at which it was rendered has passed, and the time for a rehearing has expired. The question involved, however, is not the right of the court to amend, but its power to construe the mandate, and declare its meaning. From a casual reading of the mandate, it is manifest that the recital of the name of the trustee was wholly unnecessary. The presence of the name of 'W. W. Glenn' in the mandate takes nothing from its force; the order would have been complete and effective without it. The name 'W. W. Glenn,' may, therefore, be regarded as surplusage which does not vitiate that which is otherwise good." *Southern R. Co. v. Glenn*, 102 Va. 529, 531, 46 S. E. 776.

### 3. To Try Question of Title.

The court of appeals having reversed the decree for partition and sent the cause back, the circuit court has authority now under the act to try the question of title; and after allowing

the parties a reasonable time for trial, should proceed to decide the question, observing the general rules of practice in courts of equity for the purpose of ascertaining facts, either by a jury or otherwise, as may be most proper. *Curran v. Sprauell*, 10 Gratt. 145.

"I am further of opinion to remand the cause, with directions to the circuit court to allow the parties a reasonable time in which to prepare for trial, and then to decide the question of title between them; and that the general rules of practice observed in courts of equity shall be observed in this case, for the purpose of ascertaining facts by a jury or otherwise, as may be proper." *Curran v. Sprauell*, 10 Gratt. 145, 148.

Upon an appeal from a judgment of a circuit court refusing to grant a new trial in an action of ejectment, the appellate court looking alone to the documentary evidence and the parol evidence of the appellee, the plaintiff below was of opinion that the appellee had failed to prove adversary possession of the land in controversy, which was not embraced in his deed but was embraced in the deed of the appellant; and reversed the judgment and remanded the cause for a new trial. On the second trial the plaintiff introduces the same parol evidence as to his adversary possession, not making his case other or stronger than it was before the appellate court. It was held, that the defendant is entitled to an instruction to the jury to disregard all the parol evidence introduced by the plaintiff to prove his right to the land in controversy not embraced within the boundaries of the deed under which he claimed. *Pasley v. English*, 10 Gratt. 236, 245.

#### 4. May Proceed Anew.

Where a decree which fixes the amount of a debt, and directs the sale of real estate unless the debt is paid, is reversed on appeal because the amount of the debt is not properly as-

certain, this of necessity sets aside the sale, if one has been made, and reverses the decree directing the sale. The trial court should then proceed to ascertain the amount of the debt in accordance with the mandate of the appellate court, if any; and, if none, should proceed *de novo*, allowing all proper credits. If payments have been made on a judgment which has been reversed, they should be credited on the debt on which the judgment was rendered. *Effinger v. Kenney*, 92 Va. 245, 23 S. E. 742.

Where the supreme court has directed the court below to empanel a jury to try an issue it suffices that the issue tried substantially accords with that directed by this court. *Com. v. Mister*, 79 Va. 5.

#### 5. Allowance of Demurrer.

After the court of appeals have passed upon a case, and remanded the cause for a new trial upon the general issue, a demurrer to the declaration, or a plea in abatement upon the ground that the Christian names of the respective parties are not mentioned therein, ought not to be received. *Lanier v. Cocke*, 6 Munf. 580.

In covenant, issue being joined on the plea of covenants performed, and a demurrer to the evidence being filed by the plaintiff, judgment thereon is given for the defendant, which is reversed by this court, on the ground that the evidence does not show performance by the defendant, though the facts shown, if properly pleaded, may amount to a substantial defense to the action; and this court proceeds to enter judgment that the plaintiff recover his damages sustained by occasion of the breach assigned in the declaration, and remands the cause for a writ of inquiry of those damages to be executed. It was held, notwithstanding such judgment of this court, it was competent, and in this case it was proper, for the court below to set aside the demurrer to evidence, and

allow the defendant to file additional pleas. *Fairfax v. Lewis*, 11 Leigh 233.

#### 6. Allowance of Amendments.

See also, the title AMENDMENTS, vol. 1, p. 352.

When a defendant demurs to a bill and the demurrer is overruled and the defendant is ordered to answer, and he appeals, and the appellate court reverses the order, it remands the cause, with leave to the plaintiff, to amend the bill. *Capehart v. Hale*, 6 W. Va. 547; *Hansbrough v. Stinnett*, 25 Gratt. 495.

**The proof of a custom, and of knowledge and acquiescence therein by the plaintiff, having been introduced on the first trial of the cause under the general issue, without objection by the plaintiff, the defendant will be allowed to amend his pleadings on the return of the case from the appellate court, and plead the matter specially.** *Liggatt v. Withers*, 5 Gratt. 24.

**Direction as to Amendments in Decree.**—Where a demurrer to a bill in equity has been erroneously overruled by the circuit court, and upon appeal the demurrer is sustained, the decree reversed, and the cause remanded, "to be heard and finally determined according to the rules and principles of equity," although the decree contains no directions for leave to plaintiff to amend his bill, the judgment of the appellate court is not *res judicata*, and the bill may be amended. *Blue v. Campbell* (W. Va.), 49 S. E. 909.

#### Allowance of Defense Once Waived.

—Where a defendant has by his answer waived the statute of frauds and substantially admitted the agreement as set out in the bill, and, on appeal from a decision of the circuit court, this court decides that the plaintiff is entitled to relief founded upon said agreement, the defendant, when the case is sent back, should not be permitted to withdraw his waiver, and file a new plea setting up the statute of frauds. *Barrett v. McAllister*, 38 W. Va. 103, 12 S. E. 1106.

**As to Order of Publication.**—When a case is reversed by this court, and remanded to the circuit court, because it does not appear affirmatively that the order of publication in the cause had been posted as required by law, if said order of publication had been published and posted as required by law the defect may be cured, after the case is returned to the circuit court, by an affidavit of the party who posted said order being filed in the cause. *McCoy v. McCoy*, 33 W. Va. 60, 10 S. E. 19.

#### 7. Admission of New Parties.

After a decision by the court of appeals, remanding a cause to the court of chancery, new parties may be admitted. *Anderson v. Anderson*, 1 Hen. & M. 12.

When a chancery cause is remanded from this court to the circuit court for the want of necessary and proper parties, and after the cause is again docketed in the circuit court such necessary and proper parties appear, and file answers to the plaintiffs' bill, it is not necessary to send the case to rules for that purpose. *Darby v. Gilligan*, 43 W. Va. 755, 28 S. E. 737.

**Sale of Land.**—The court of appeals having reversed a decree of the court below for the sale of land, and another confirming the sale and distributing the proceeds, in the absence of the owners of one moiety of the land, and having sent the case back, that they may be made parties and have an opportunity to defend their interests; though the decree is in other respects confirmed, these absent owners, when made parties, have the right to except to the sale and its confirmation; and are not precluded by the affirmation of the decree in other respects than those on which it was reversed. *Crockett v. Sexton*, 29 Gratt. 46.

**Action against Personal Representative.**—A husband of one distributee who was also one of the personal representatives, and guardian of the other distributee, files a bill in his own name as guardian of the infant distributee,

against the other personal representative and the sureties, charging that the personal representative was indebted to the estate and insolvent; and asking a decree against the sureties. There is a decree accordingly in the court below. Upon appeal the decree is reversed for want of proper parties; but the husband having an interest in right of his wife, the bill is not dismissed, but is sent back, that he may amend his bill and make proper parties. *Sillings v. Bumgardner*, 9 Gratt. 273.

#### 8. Withdrawal of Waiver.

Where a defendant has by his answer waived the statute of frauds and substantially admitted the agreement as set out in the bill, and, on appeal from a decision of the circuit court, this court decides that the plaintiff is entitled to relief founded upon said agreement, the defendant, when the case is sent back, should not be permitted to withdraw his waiver, and file a new plea setting up the statute of frauds. *Barrett v. McAllister*, 35 W. Va. 103, 12 S. E. 1106.

#### 9. Judgment.

**From Date of Election.**—Appellee filed its bill against appellant to recover certain water rents under a contract made in 1846, and to ascertain the exact nature, status, and extent of the water rights and privileges pertaining to the property of the appellant. It appearing that appellee owned property above the premises of appellant and had been compelled to largely increase its supply of water since the contract of 1846, which water flowed through the premises of appellant, the trial court gave a decree for the rent due according to the rate fixed by the contract of 1846, and decided that appellee might divert the excess, and use it as its own, free from any claim of appellant. On appeal it was held, that appellee could not divert the excess without first giving appellant an opportunity to elect if he chose, to take the whole flow, upon condition of pay-

ing for the same, and the case was remanded to the trial court. Thereupon appellant served upon appellee a written notice of his election to take the whole flow from and after the date of his election. The trial court decided that appellant should pay for the increased flow from the date of the new contract made by appellee for an increased supply. It was held, that this was error. The appellant was, by the terms of the former decree of this court, only bound to pay for the increased flow from the date of his election. *Stearns v. Richmond Paper Mfg. Co.*, 92 Va. 408, 23 S. E. 769.

#### Failure to Comply with Conditions.

—A circuit court by a decree directed B. to make and acknowledge a deed conveying certain land to H. upon H. paying to B. \$5.29, with interest thereon from November 15, 1833, which decree the supreme court of appeals affirmed. H., without having paid the \$5.29, and interest as decreed (because B. was indebted to him in a larger sum, being costs adjudicated to him in the same suit) applied to and obtained from the circuit court a rule against B. to show cause why said deed had not been made. B. answered the rule, stating that he had not made the deed, because the \$5.29 and interest decreed to him had not been paid; and also set up in his answer that H. owed him certain taxes amounting to the sum of \$65, including interest, and claimed that it was a lien upon the land, and also that H. owed him for an excess of twenty-six and three-fourths acres of land. The court directed an account, and upon the report thereof, confirmed the report and decreed that B. recover against H. the sum of \$261.98, with interest from August 2, 1875, and his costs in defense of said rule. It was held, the circuit court should have dismissed the rule at the costs of H., because he not having complied with the terms of the affirmed decree by paying the \$5.29 and its interest, was not entitled to the

rule; but, as stated in the opinion, the rule should have been dismissed without prejudice, etc. *Harmon v. Bowyer*, 15 W. Va. 538.

## V. Power of Appellate Court after Issuance of Mandate.

### When Retained by District Court.—

If the county court disregard the instruction of the district court, the latter court ought, upon the second appeal, to retain the cause for trial before themselves, and not send it back to the county court. *Fine v. Cockshut*, 6 Call 16.

Upon a writ of error to the circuit court a judgment was affirmed as to all the defendants except one, to whom a new trial was granted to be had in that court. The circuit court ought to have reversed the judgment of the county court as to all the defendants, set aside the verdict, granted a new trial, and retained the case in that court for further proceedings to be had therein. *Hall v. Ratliff*, 93 Va. 327, 331, 24 S. E. 1011.

In a special verdict all the facts which are necessary to enable the court to determine whether or not the plaintiff is entitled to recover must be found with certainty. A court can not infer any fact from those found. A verdict which falls short of these requirements, and only responds to certain questions propounded, but does not find all the facts necessary to enable the court to determine from the verdict the rights of the parties, should be set aside. If the case be in a circuit court, the circuit court should correct the proceedings in the county court, and retain the case for further proceeding to be had therein, as provided by § 3487 of the Code. *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011.

**Erroneous Order.**—A county court, upon the merits, refused to open a road. The circuit court reversed it in 1889, remanded the case, and gave costs. Afterwards, circuit court set

aside its previous order, and later, in October, 1890, made an order reversing the county court's order, and directing the road to be opened. It was held, the last order of the circuit court was erroneous, it being without jurisdiction over the case after its final order of 1889. *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. 181.

**On reversal or affirmance** of judgment of county court the cause must be retained in circuit court and not remanded, except by consent, or for cause, which consent or cause must be stated in the remanding order. Code, 1873, ch. 178, § 6. *Smith v. Hutchison*, 78 Va. 683; *Pettit v. Cowherd*, 83 Va. 20, 1 S. E. 392.

**Remand to Court Below.**—When the supreme court of appeals has executed its power, in a case before it, and its final decree or judgment requires some further act to be done, it can not issue an execution, but will send its decree to the court below to be executed. *Henry v. Davis*, 13 W. Va. 230, 253.

**After the decision of a caveat**, upon the merits, in favor of the caveatees, the caveatees obtain a patent for the land. And a supersedeas being awarded to the judgment on petition of the caveators, the caveatees rely on the patent as sufficient cause to dismiss the supersedeas. It was held, notwithstanding the emanation of the patent, the court should examine into the correctness of the judgment; and if the court should affirm the judgment, that is the end of the case generally, at law and in equity. But if the court should reverse the judgment, then a dismissal of the caveat must ensue, without prejudice to the caveators in equity. *Patrick v. Dryden*, 10 W. Va. 387.

**Conclusiveness of Judgment.**—Decision of the supreme court upon a question decided by the court below, is final and irreversible; and upon a second appeal in the cause, the question decided upon the first appeal can not be reversed, and such decision is alike

conclusive whether the decree appealed from was final or interlocutory. *Miller v. Cook*, 77 Va. 806.

## VI. Appeal from Mandate.

**From Mandate of Circuit Court.**—When, upon the reversal of a county court judgment, a cause has been retained in the district court, by consent; if, at a subsequent term, the order for retaining the cause be set aside, an appeal can not then be taken to the

court of appeals even by consent of parties, but the cause should be sent back to the county court for farther proceedings. *Norris v. Tomlin*, 2 Munf. 336.

### Cause Improperly Remanded. —

When a cause has been improperly remanded, objections need not be made in county court, but may be made upon appeal to the supreme court. *Wynn v. Heninger*, 82 Va. 172.

## Mandate (Bailment).

See the title BAILMENTS, vol. 2, p. 223.

## Mandatory Statutes.

See the title STATUTES.

## Mandatum.

See the title BAILMENTS, vol. 2, p. 224.

**MANNER.**—Devise of slaves to one for life, with power to give them, at his decease, among the children of the two brothers of the testatrix “in such manner and proportion as he shall think proper;” the trustee has full discretion, and may make unequal appointments. *Cowles v. Brown*, 4 Call 477. See also, the titles TRUSTS AND TRUSTEES; WILLS.

In *Goodwyn v. Myers*, 16 Gratt. 336, 338, it is said: “Chapter 136, § 11, says the value of the land shall be ascertained ‘in the manner’ hereinbefore provided, etc. Now the word ‘manner’ means ‘mode’ or ‘method.’ It is not a specific but a generic term. It requires only that such mode of trial shall be adopted as was previously mentioned; i. e., a trial by jury; and whether the same jury or another and entirely different jury make the inquiry, it would still be ‘in the manner’ provided for.”

Prescribing the “manner” in which public officers shall be elected and removed, as expressed in the 8th section of art. 4 of the constitution of the state of West Virginia, when read and considered in connection with art. 7, §§ 1, 8, and § 40 of article 6 and other sections of the same constitution, includes the agent or person who may appoint, as well as the formality with which it should be done. *Bridges v. Shallcross*, 6 W. Va. 562.

**Manner and Form.**—In *Low v. Settle*, 22 W. Va. 387, 397, it is said: “It is true that in *Hawley v. Twyman*, 24 Gratt. 516, where the declaration stated that the plaintiff was possessed in fee simple of a certain tract of land described by metes and bounds, and that the defendant entered on the premises and unlawfully withholds them and on the issue made upon a plea of ‘not guilty’ the jury found as follows: ‘We, the jury, upon the issue joined, find, that the defendant is guilty in manner and form as the plaintiff in his declaration hath complained and a new trial was asked, because the verdict did not specify the estate found in the plaintiff.’ A majority of the court held, that this verdict did find that plaintiff was entitled to a fee simple in the land



claimed, because the defendant by the verdict was found guilty in the **manner and form**, as the plaintiff had in his declaration complained, that the estate of the plaintiff as well as the unlawful withholding of the land was in issue, and therefore the verdict of the jury for the plaintiff in the **manner** named in the declaration was a verdict, not only that the defendant unlawfully withheld from the plaintiff the land named in the declaration, but also that the plaintiff's estate in it was a fee simple, because it was so claimed in the declaration and the verdict was that the defendant was guilty in the **manner and form** complained of in the declaration. One of the judges dissented in this case, and I must confess, that it seems to me, that by the words, guilty in **manner and form** as the plaintiff in his declaration has complained, the jury ought to be understood as finding simply, that the defendant was guilty of unlawfully withholding the premises specified in the declaration. That by the words the '**manner**' of withholding 'as the plaintiff in his declaration has complained' the jury meant, that as the plaintiff had complained that certain specified premises had been unlawfully withheld, so they found not only that the specified premises were withheld, but that they were withheld in the **manner and form** in which the declaration claimed that these premises were withheld; that is, unlawfully. It seems to me a very strained construction of this verdict to hold, that the jury had found everything with reference to the estate of the plaintiff in this land. The opinion of the majority of the court rendered by Judge Staples shows on its face, that they were aware, that they had placed on this verdict a strained construction of its language." See also, the title VERDICT

### Mansion House.

See the title DOWER, vol. 4, p. 790.

### Manslaughter.

See the title HOMICIDE, vol. 7, p. 121.

**MANUFACTORY.**—A tobacco factory is a **manufactory**. *Langhorne v. Com.*, 76 Va. 1012.

**MANUFACTURE—MANUFACTURING—MANUFACTURER, ETC.**—See the titles CORPORATIONS, vol. 3, p. 510; LIENS, ante, p. 325; MECHANICS' LIENS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCK AND STOCKHOLDERS; TAXATION; WAREHOUSES AND WAREHOUSEMEN.

In *Consumers' Brewing Co. v. Norfolk*, 101 Va. 171, 173, 43 S. E. 336, it is said: "A **manufacturer** is one who is engaged in the business of working raw materials into wares suitable for use." See also, the title INTOXICATING LIQUORS, vol. 8, p. 1.

It is not competent for the legislature, under the constitution, to single out owners and operators of mines, and **manufacturers** of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation can not be sustained as an exercise of the police power. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 283.

The third section of ch. 63, acts, 1887 (Code, 1887, p. 983), which prohibits persons engaged in mining and **manufacturing** from issuing for the payment of labor any order or paper, except such as is specified in the said act, is unconstitutional and void. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285.

## **Manumission of Slaves.**

See the titles SLAVES; WILLS.

## **Manure.**

See the title FERTILIZERS, vol. 6, p. 37.

## **Maps.**

See the titles BOUNDARIES, vol. 2, p. 594; DEDICATION, vol. 4, p. 358; DEEDS, vol. 4, p. 399; DOCUMENTARY EVIDENCE, vol. 4, p. 765.

## **MARINE INSURANCE.**

### **CROSS REFERENCES.**

See the titles FIRE INSURANCE, vol. 6, p. 60; GENERAL AVERAGE, vol. 6, p. 710; MARITIME LIENS; SALVAGE; SHIPS AND SHIPPING; SUBROGATION; USAGES AND CUSTOMS.

As to exemption of marine insurance companies from necessity of depositing securities with the treasurer of the state, see Va. Code, 1904, § 2271a. As to punishment for destroying ship or vessel with intent to defraud insurer, see Va. Code, 1904, § 3723.

**Definition.**—"Marine insurance is a contract, whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils or sea risks, to which his ship, freight and cargo, or some of them, may be exposed, during a certain voyage, or a fixed period of time." 3 Min. Inst. (2d Ed.) 1037.

**General Rule of Construction.**—"It was early held, with special reference to contracts of marine insurance, that the strictum jus or apex juris is not to be laid hold on, but they are to be construed largely for the benefit of trade and for the insured—a rule, which, under different forms of expression, has obtained with reference to all kinds of insurance to the present day." *Miller v. Insurance Co.*, 12 W. Va. 116.

**Construed According to Intent.**—Marine insurances are of vast benefit to commerce. By distributing losses, they fortify the merchants of small capital, and, encourage in a variety of ways commercial enterprise and adventure. They are therefore entitled to the favor of courts, and should be so construed as to sustain the fair intent

of the parties, neither enhancing on the one hand the risks of the insurer, nor on the other impairing the indemnities of the insured. *Merchants' Ins. Co. v. Edmond*, 17 Gratt. 138.

Where a policy of insurance is issued by an insurance company upon a steamboat for a year, with permission to navigate the Mississippi and tributaries, and on the trial of a cause to recover the value of the steamboat, it was lost in Cypress bayou, and that Cypress bayou was navigable by steamboat and that said bayou emptied into Red river, and that Red river emptied into the Mississippi, it was held, that said Cypress bayou was a tributary of the Mississippi, within the meaning of said policy. *Miller v. Insurance Co.*, 12 W. Va. 116.

**Insurable Interest.**—One person charters of another a barge to be employed by him in the conveyance of freight in a business trip for profit, and has the barge in his custody and possession. He has an insurable interest in the barge and may insure it in his own name, not only for his own protection, but also for the protection of the owner of the barge, and if his act

of so insuring it was authorized by the owner, or is ratified by him, suit may be maintained upon the policy in case of loss, and damages recovered to indemnify the loss of the owner of the barge, not merely the loss of the charterer. *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

**Waiver of Payment of Premium.**—A policy of insurance recites that "The company, having been paid, as a consideration for this insurance, Charles Muhleman's note for \$400, at nine months—the nine-sixteenths interest of said boat is hereby insured, being valued at \$18,000." Charles Muhleman, in fact, did not execute his note, but a few days after the date of the policy, and at the delivery thereof to him at the office of the insurer by its clerk, Charles Muhleman, who was the captain of said boat made and delivered to the clerk of the insurer, for the premium of insurance, the note of the "Steamer Potomac and Owners, per Charles Muhleman, Captain," and in lieu of giving his own note, and the same was accepted and received by the clerk for the premium of insurance in lieu of Charles Muhleman's note. It was held, that it was competent for the insurer, by its clerk, to receive and accept said note for the premium, in lieu of the note of Charles Muhleman, and should be thereby estopped from claiming any advantage in an action on the policy, from the fact that Muhleman did not make and deliver his note as recited in the policy, and also, that it is competent to prove such waiver by parol. *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

**Cause of Loss—Stress of Weather and Collision.**—In an action on a marine policy insuring a ship and its machinery against loss or damage occasioned by the breaking of machinery caused by stress of weather or collision, a declaration which charged that the ship collided with some

sunken or floating obstruction in the river, while proceeding on her journey; that there was a freshet and strong current in the river, and that the injuries to the machinery particularly set forth and enumerated in the declaration were caused by such collision with such obstruction in the then prevailing freshet and strong current, does not state a good cause of action. The proximate cause of the injury to the machinery was not the "stress of weather," and striking a "sunken or floating obstruction" was not a "collision" in the sense in which that term is used in marine insurance. *Cline v. Insurance Co.*, 101 Va. 496, 44 S. E. 700.

**Definition of Deviation.**—By deviation is meant a voluntary departure, without any necessity, from the usual course of the voyage insured. *Marine Ins. Co. v. Stras*, 1 Munf. 408.

**Effect of Deviation.**—From the moment this happens the voyage is changed, the contract of risk is determined, the insurer is discharged from all subsequent responsibility; yet he is entitled to retain the whole premium, for the effect of a deviation is not to vitiate or avoid the policy, but to determine the risk from the time of deviation. *Marine Ins. Co. v. Stras*, 1 Munf. 408, 417.

Thus a marine insurance, "at and from Norfolk to Curacao, with liberty of going to any other island in the West Indies, or any one port on the Spanish Main and at and from thence back to Richmond," must be understood as an insurance "at and from Norfolk to Curacao, in the first place, with liberty of going from Curacao to any other island." If, therefore, the vessel put into the island of St. Thomas, and thence return to Norfolk, without ever going to Curacao, it is a deviation from the voyage, and, there being no proof that such deviation was occasioned by stress of weather, or other unavoidable accident,

the person insured is entitled to no return of premium, such being the terms of the policy. *Marine Ins. Co. v. Stras*, 1 Munf. 408.

**Capture.**—The M. Co. issues to E. a policy of insurance in the usual form and at the usual rates, dated December 24, 1860, on a cargo of coffee to be shipped on board the S. from Rio to Richmond or some other Atlantic port in the United States. The cargo is shipped on the 10th of May, and in July is seized or captured some miles outside the capes of Virginia by a United States vessel. The owners of the ship, the insurers and insured are all citizens of Virginia. The policy is unaffected by the public events that had occurred; the capture and condemnation was as of enemy's property; and the insurer is liable upon the policy. *Merchants' Ins. Co. v. Edmond*, 17 Gratt. 138.

**Liability of Insurer for Loss by Fire after Capture.**—See *De Rothchilds v. Auditor*, 22 Gratt. 41, 48, for a dictum of Stapues, J., to the effect that an insurer would not remain liable for loss of vessel by fire after it had passed into the hands of captors.

**Notice of Loss—Place of Protest.**—

A protest before a notary public, by the master of the vessel, after his return to Virginia, is in evidence in an action to compel return of premiums on a marine insurance policy, where the vessel has made a deviation from her route; and quære, would such a protest, made at St. Thomas's have been any evidence; the person who made it being alive, and there being no impediment to prevent his deposition from being regularly taken. *Marine Ins. Co. v. Stras*, 1 Munf. 408.

**Sentence of Condemnation of Foreign Court of Admiralty.**—

The sentence of condemnation of a foreign court of admiralty, is not conclusive of the facts, that the property and owner were enemies, in a suit between the underwriter and the insured on a policy of marine insurance. *Bourke v. Granberry*, Gilmer 16.

**Purchase by Insured of Condemned Vessel as Affecting Right to Indemnity.**—

A purchase by the insured under a sentence of confiscation, does not take away the right of indemnification for the whole loss. *Bourke v. Granberry*, Gilmer 16.

## Mariner.

See the title SEAMEN.

## Marital Rights.

See the title HUSBAND AND WIFE, vol. 7, p. 178, and references given.

## Maritime.

See the title SHIPS AND SHIPPING, and references given.

## Maritime Liens.

See the titles ADMIRALTY, vol. 1, p. 182; SHIPS AND SHIPPING.

For statutory provisions as to maritime liens, see Virginia Code, 1904, § 2963; West Virginia Code, ch. 75, § 14. As to the right of a creditor who has furnished materials in equipping a boat to attach the boat, after a bill of sale of the boat has been executed by the owner to another party, see the title ATTACHMENT AND GARNISHMENT, vol. 1, p. 86.

## Marked Lines.

See the title BOUNDARIES, vol. 2, p. 586.

**MARKETABLE TITLE.**—A marketable title is one that is free from reasonable objection to a reasonable purchaser. *Morrison v. Waggy*, 43 W. Va. 405, 27 S. E. 314. See also, the titles **SPECIFIC PERFORMANCE**; **VENDOR AND PURCHASER**.

## **Market Quotations.**

See the title **HEARSAY EVIDENCE**, vol. 7, p. 51.

## **MARKETS.**

### **CROSS REFERENCES.**

See the titles **LICENSES**, ante, p. 305; **MUNICIPAL CORPORATIONS**; **NUISANCES**.

As to the admissibility of market quotations as evidence, see the title **HEARSAY EVIDENCE**, vol. 7, p. 48.

**Management.**—Though a town be entitled to erect market houses, yet they must be so managed as not to injure the rights and impair the comfort of the owners of adjacent property. *Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640. And see the titles **MUNICIPAL CORPORATIONS**; **NUISANCES**.  
**Slaughter House Not Nuisance Per Se.**—See the title **NUISANCES**.

## **Market Value or Market Price.**

See the title **SALES**.

## **Marks.**

See the titles **BOUNDARIES**, vol. 2, p. 607; **LOGS AND LOGGING**, ante, p. 470; **PATENTS AND TRADE MARKS**.

As to earmarking funds, see the title **BANKS AND BANKING**, vol. 2, p. 263, and references given. As to high and low watermarks, see the titles **BOUNDARIES**, vol. 2, p. 592; **NAVIGABLE WATERS**. As to marks on ballots, see the title **ELECTIONS**, vol. 5, p. 23.

## **MARRIAGE.**

### **I. Definitions and Distinctions, 571.**

### **II. Creation of Marital Relation, 572.**

A. In General, 572.

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### **IV. Marriage between White and Colored Persons, 576.**

## CROSS REFERENCES.

See the titles ALIMONY, vol. 1, p. 297; BASTARDS, vol. 2, p. 334; BIGAMY, vol. 2, p. 372; CONFLICT OF LAWS, vol. 3, p. 116; CURTESY, vol. 4, p. 148; DIVORCE, vol. 4, p. 734; DOWER, vol. 4, p. 782; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 607; HUSBAND AND WIFE, vol. 7, p. 226; ILLEGAL CONTRACTS, vol. 7, p. 248; MARRIAGE CONTRACTS AND SETTLEMENTS; PARENT AND CHILD.

## I. Definitions and Distinctions.

Marriage is a civil contract. *Womach v. Tankersley*, 78 Va. 242.

**Marriage is a contract sui generis**, and differing in some respects from all other contracts; so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions; it is the very basis of the whole fabric of civilized society. *Herring v. Wickham*, 29 Gratt. 628, 635.

**Rests on Consent of Parties.**—The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of the parties; but it differs from other contracts in this, that the rights, obligations or duties arising from it are not left entirely to be regulated by the agreement of the parties, but are to a certain extent matters of municipal regulation over which the parties have no control by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential rights, duties and privileges thence arising. It gives rise to the relations of consanguinity and affinity. In short, it pervades the whole system of civil society. Unlike other contracts, it can not in general, in any civilized country, be dissolved by mutual consent; and it subsists in full force, even though one of the parties should forever be rendered incapable as in the case of incurable insanity, or the like, from performing his part of the marital contract. *Herring v. Wickham*, 29 Gratt. 628, 635.

A contract for marriage is the mu-

tual agreement of a man and a woman to marry each other, or become husband and wife in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must. *Burke v. Shaver*, 92 Va. 345, 347, 23 S. E. 749.

**Distinguished from Other Contracts.**

—“As between marriage and other contracts the distinction in part seems to be this: That marriage is not technically a contract within the protection of the constitution of the United States; because in the language of Marshall, C. J., ‘that clause never was understood to embrace other contracts than those which respect property.’ Property is not primarily or solely the object of marriage. It is but an incident that may or may not attach.” *Noel v. Ewing*, 9 Ind. 37. If the clause in the constitution above referred to applied to marriage contracts, it would be violated by every divorce granted. *Thornburg v. Thornburg*, 18 W. Va. 522, 528.

Marriage is undoubtedly a civil contract, because consent is necessary to its legal validity; but in its nature, attributes, and distinguishing features it is *sui generis*. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word “contract,” employed in the common law or statutes. It may be entered into by persons during their minority, and can not, when consummated, be dissolved by the parties. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority.

upon principles of public policy, for the benefit of the community. The relation of the parties is essentially personal. Neither the rights, duties, nor obligations created by or flowing from it can be transferred, and an action for a breach of promise to marry, in its main features, has very little resemblance to other contracts. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33, 35.

## II. Creation of Marital Relation.

### A. IN GENERAL.

**Statutes Directory.**—While it is true statutes regulating marriages have generally and properly been construed as directory, and not mandatory, since marriage is a natural right, and one that existed independent of statutes, any commands which a statute may give concerning its solemnization should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof. *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36, 39.

**What Laws Govern.**—While the forms and ceremonies of marriage are governed by the laws of the place where the marriage is celebrated, the essentials of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. *Kinney v. Com.*, 30 Gratt. 858. See the title **CONFLICT OF LAWS**, vol. 3, p. 116.

**Marriage after Secession.**—A marriage contracted in Virginia after the secession of the state of Virginia and before the re-establishment of the government under the Alexandria constitution, is not invalid. *Oneale v. Com.*, 17 Gratt. 582.

### B. LICENSES.

**Necessity for License.**—Section 2222 of the Code is as follows: "Marriage without license prohibited; when not

void for want of authority in person solemnizing it. Every marriage in this state shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined together." *Offield v. Davis*, 100 Va. 250, 40 S. E. 910. See *Colston v. Quander*, 1 Va. Cas. 283.

#### **Power of Clerk to Administer Oath.**

—The act, Code of 1873, ch. 159, § 13, authorizes the clerk of a county or corporation court, when an application is made to him for a marriage license, to require evidence that the female to be married is over the age of twenty-one years, and to administer an oath to the person giving the testimony. *Maybush v. Com.*, 29 Gratt. 857.

For a decision as to the power of a clerk to administer the oath before the adoption of the Code, see *Com. v. Williamson*, 4 Gratt. 554.

#### **Indictment for Issuing to Infant.**

In an indictment upon the statute, 1 Rev. Code, ch. 106, § 16, against the clerk of a county court, for issuing a marriage license for the marriage of an infant never before married, without the consent of the infant's father or guardian, it is not necessary to charge, that the clerk knew that the party was an infant, or that he issued the license maliciously or corruptly, or that a marriage took place in pursuance of the license. *Com. v. Hill*, 6 Leigh 636.

**May Issue without Oath.**—The clerks of court in many cases issue a marriage license without any oath or affidavit. This is uniformly done where the parties who contemplate the marriage are known to the clerk to be of full age. *Com. v. Williamson*, 4 Gratt. 554, 556.

**On a prosecution for bigamy,** where a marriage is alleged to have taken place in a foreign country or state, proof must be made of a valid marriage according to the law of that country or state; but no particular kind of evidence is essential to establish the fact, except that it can not be proved by repudiation and cohabitation. *Bird v. Com.*, 21 Gratt. 800.

**Effect of False Oath.**—The swearing falsely before the clerk that a person applying for a marriage license is over the age of twenty-one years, does not constitute the offense of perjury. But if by such false oath, the person applying is enabled to obtain a marriage license, and the marriage takes place, the taking the false oath is a misdemeanor. *Com. v. Williamson*, 4 Gratt. 554. See generally, the title PERJURY.

## C. COMMON-LAW MARRIAGES.

### 1. What Constitutes.

"There is much controversy as to what constitutes a valid common-law marriage. It always has been and still is a doubtful question in England. *Reg. v. Mills*, 10 Clark & F. 534; 1 Bish., Mar. & Div., §§ 270, 278. In the American states where such marriages have been recognized and held valid there is considerable diversity as to their requisites. In North Carolina, Tennessee, Massachusetts, Maine, and Maryland some ceremony or celebration seems to be necessary to a valid common-law marriage, and in most or all of these states it has been questioned whether or not the statutes have not superseded common-law marriages, and that a marriage, to be valid, must be in conformity with the statutes. *State v. Samuel*, 2 Dev. & B. 177; *Grisham v. State*, 2 Yerg. 588; *Com. v. Munson*, 127 Mass. 459; *State v. Hodgskins*, 19 Me. 155; *Denison v. Denison*, 35 Md. 361, 379. The rule is fully as liberal, if not more so, in New York and Pennsylvania, than it is in any of the other states. In New York

it has been held, that no religious form or ceremony of any kind is essential to validity of the marriage. All that is requisite in that state is that the parties should be capable of contracting, and that they should actually contract to be man and wife; but such contract must be proved to the satisfaction of the court, and may be proved by the wife, when her testimony is corroborated and entitled to credit. *Bissell v. Bissell*, 55 Barb. 325; *Van Tuyl v. Van Tuyl*, 57 Barb. 235." *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36, 38.

**Marriage by Clergyman.**—"In England it has long since been held, that to constitute a valid marriage, by the common law, it must be celebrated in the presence of a clergyman in holy orders. 'The fact that the bridegroom himself was a clergyman in holy orders, there being no other clergyman present, did not make the marriage valid.' *Beamish v. Beamish*, 9 H. of L. Cases, 274." *Offield v. Davis*, 100 Va. 250, 252, 40 S. E. 910.

### 2. Validity.

**Rendered Void by Statute.**—The enactment of our statute, now § 2222 of the Code, wholly abrogated the common law in force in this state on the subject of marriages; and no marriage or attempted marriage, if it took place in this state, can be held valid here unless shown to have been under a license, and solemnized according to our statute. The language of the statute is mandatory, and not simply directory. *Offield v. Davis*, 100 Va. 250, 40 S. E. 910. See also, *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477; *Colston v. Quander*, 1 Va. Dec. 283.

In *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36, decided in 1887, this statute was construed, and in an opinion by Snyder, J., an able and learned jurist, concurred in by the entire court, it was held: First, "common-law marriages, when contracted in this state, are not recognized by our courts as



valid;" and second, "No marriage in this state is valid, when it affirmatively appears that it had not been solemnized according to the requirements of our statute on the subject, although the parties may thereafter have associated and cohabitated together as husband and wife." *Offield v. Davis*, 100 Va. 250, 256, 40 S. E. 910.

**Not Recognized by Courts.**—Common-law marriages, when contracted in this state, are not recognized by our courts as valid. *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36.

No marriage contracted in this state is valid when it affirmatively appears that it has not been solemnized according to the requirements of our statutes on that subject, although the parties may thereafter have associated and cohabited together as husband and wife. *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36.

### 3. Marriage of Colored Persons.

The act of February 27th, 1866, to legalize the marriage of colored persons living together as husband and wife at the time the act was passed, includes and applies to colored persons so living together though they were born free. *Francis v. Francis*, 31 Gratt. 283.

A colored man and woman lived together in the same house from 1852 until 1868. Both had been born free. In 1868 the man abandoned the woman and intermarried with another woman. During the years they were living together, the woman gave birth to ten children all of them by the man, never denied by him or questioned by any other person, until, in 1868, the man, as a pretext, no doubt, for his contemplated abandonment, raised a question as to the paternity of a son then eleven years of age. The man for many years recognized the woman as his wife, spoke of her as such with whom he had dealings or with whom he was acquainted. The children were treated by him as his own, and in

every respect he conducted himself as if he had been husband by the rights of matrimony duly solemnized. The mother and sisters of the man visited the house and recognized them as husband and wife. It was held, that under the act of February, 1866, the parties were legally married. *Francis v. Francis*, 31 Gratt. 283.

At common law, slaves were incapable of contracting valid marriage, but actual marriage had certain moral force, and might be confirmed after emancipation. *Scott v. Raub*, 88 Va. 721, 14 S. E. 178. See generally, the title SLAVES.

## III. Evidence.

### Cohabitation, Name, Reputation.—

The virtuous act of matrimony may be proved by cohabitation, name, reputation, and other circumstances. *Purcell v. Purcell*, 4 Hen. & M. 507, 512.

**Acts, Conduct and Conversation.**—It is not necessary that there shall be evidence of an actual agreement to take each other as husband and wife, but the relation may be established by proof—by the acts, conduct and conversation of the parties. *Francis v. Francis*, 31 Gratt. 283.

**The declarations of parties** and other attendant circumstances of cohabitation, all of which are admissible as parts of the *res gestæ* to prove marriage, must, together with the repute originating therefrom, be contemporaneous with the intercourse, and not subsequent. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

**Deliberate admissions and acts** are also competent evidence of the validity of a marriage, under the *lex loci contractus*. The admissions, however, must not be casual, but deliberate. Such admissions of a prior marriage in another state, are sufficient evidence of such marriage, without proving the marriage to have taken place agreeably to the laws of that state. Such admissions and acts are competent evi-

dence not only of the fact of the marriage, but also of its validity, under the "lex loci contractus." *Rex v. Brampton*, 10 East R. 282; *Hemmings v. Smith*, 4 Douglas R. 33; 3d *Waterman's Archbold*, §13; and *Bird's Case*, 21 Gratt. 800. *Womack v. Tankersley*, 78 Va. 242, 243.

**Abuse and Threatening Language.**—

In a suit for a divorce the facts of the parties calling each other husband and wife, and of the alleged husband following the alleged wife after she had fled his house, and abusing and threatening her with violence, and that all of their neighbors regarded them as husband and wife and treated them as such, and who proved the woman (who applied for the divorce) to be chaste and virtuous, of good general character, and submissive to the alleged husband, are sufficiently strong to force conviction on the mind of the truth of the alleged marriage between them. *Hitchcox v. Hitchcox*, 2 W. Va. 435.

**Effect of Presumption.**—In the interest of morality and decency the law presumes marriage between a man and woman when they live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relatives as having and being entitled to that status. But cohabitation and repute do not constitute marriage. They are only evidence tending to raise a presumption of marriage, and, like other presumptions of fact, may be overcome by countervailing evidence. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

**Must Be Matrimonial Cohabitation.**

—The presumption of marriage from cohabitation apparently matrimonial is very strong, especially where legitimacy is involved; and this presumption can only be overcome by cogent and satisfactory proof. But to raise this presumption the cohabitation must appear to be a matrimonial cohabitation. Mere cohabitation is not suffi-

cient. It must be attended with such conduct as would justify the repute of the marriage. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

**General Reputation.**—Marriage may be proved in civil cases, other than actions for seduction, by reputation, declarations, and the conduct of the parties. But, to raise the presumption of marriage, the reputation must be founded on general, not divided or singular, opinion; and, where the declarations of the parties are relied on, the circumstances under which they are made must determine their value. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

If a party undertakes to establish a marriage between a man and woman at one time and place, he can not rely upon other facts and circumstances to raise a presumption of marriage at some other time and place. *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

**An abstract from the books** of the county court containing a record of the marriages and births, duly certified by the proper officer having the custody thereof, are prima facie evidence of the facts therein stated. *Blair v. Sayre*, 29 W. Va. 604, 2 S. E. 97.

Where the issue was whether a married woman who had executed a deed was at the time a minor, she may, under § 27, ch. 63, of the West Virginia Code, introduce in her own behalf an abstract of her marriage license, which sets forth her age at that time. *Blair v. Sayre*, 29 W. Va. 604, 2 S. E. 97.

**Minister.**—In a prosecution for bigamy, the first marriage may be proved by the minister who solemnized it. *State v. Goodrich*, 14 W. Va. 834.

**Rules Same in Civil and Criminal**

**Cases.**—Where the existence of the marriage is the issue, the rule of evidence is the same in civil as in criminal proceedings, and the decision must be on the weight of the evidence. *Womack v. Tankersley*, 78 Va. 242.

And the same authorities establish that in all cases where the issue is the existence of the fact of the marriage, the rule of evidence is the same in civil as in criminal proceedings. Such evidence being clearly competent, it is for the tribunal, whether judge or jury, deciding the issue upon the facts, to render its decision upon the weight of the evidence. And the appellate court will not overturn the decision thus arrived at, except in cases of manifest error or misconduct. The judgment of a court of competent jurisdiction will always be presumed to be right; and a party in an appellate court alleging error must show the error, else the presumption in favor of its correctness will prevail. *Broom's Legal Maxims*, 946 (marginal); *Harman v. Lynchburg*, 33 Gratt. 37; *Womack v. Tankersley*, 78 Va. 242, 244.

**Appellate Court Will Not Invalidate Marriage.**—Where the court below has determined the fact of the existence of the marriage upon the weight of the evidence, the appellate tribunal will not overturn its decision, except in cases of manifest error or misconduct. *Womack v. Tankersley*, 78 Va. 242.

**Parol Evidence of Foreign Marriage.**—In a prosecution for bigamy, where the first marriage took place in Pennsylvania, and the second marriage in this state, it became a question how the said first marriage might be proved. By the law of Pennsylvania, marriages may be solemnized by taking each other for husband and wife, before twelve witnesses, and the certificate of their marriage under the hands of the parties, and witnesses, at least twelve, and one of them a justice of the peace, shall be brought to the register of the county where they are married, and registered in his office. Decided that the parol evidence of one of the witnesses who was present at the marriage (and who proved that they took each other for husband and wife before twelve witnesses, one of whom

was a justice of the peace), was proper, competent and sufficient to prove that such person was a justice of the peace; the commission of the said justice, or a copy thereof, is not necessary; but the parol evidence of the witness, that he knew the said justice, that he was generally reputed as such, that he acted as justice, and that witness had not heard to the contrary, is proper and sufficient. *Warner v. Com.*, 2 Va. Cas. 95.

**Proof of Foreign Marriage.**—In England it is the settled rule, that a foreign marriage may be proved by any competent witness present at the ceremony, with further proof of such circumstances as lead to the conclusion that the marriage is valid according to the laws of the country in which it is celebrated. *Bird v. Com.*, 21 Gratt. 800, 806.

When a witness testifies to a marriage in a foreign state, solemnized in the manner usual and customary in such state, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as can be expected or desired; and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with its provisions. *Bird v. Com.*, 21 Gratt. 800.

#### IV. Marriage between White and Colored Persons.

**Statutory Provision.**—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce, or other legal process. Va. Code, 1904, § 2252 (1849).

**Less than One-Fourth Negro Blood.**—A marriage between a white man and a woman who is of less than one-fourth of negro blood, however small this lesser quantity may be, is legal. *McPherson v. Com.*, 28 Gratt. 939.

**Of Indian Descent.**—A woman whose father was white and whose mother's father was white, and whose great-grandmother was of brown complexion, reputed to be of Indian descent, is not a negro in the sense of the statute, rendering void marriages between white and colored people. *McPherson v. Com.*, 28 Gratt. 939.

**As a Criminal Offense.**—For a full treatment of the marriage of a white and colored person as constituting a criminal offense, see the title MISCEGENATION.

### **Marriage Annulment.**

See the title DIVORCE, vol. 4, p. 740.

### **Marriage Articles.**

See the title MARRIAGE CONTRACTS AND SETTLEMENTS.

### **Marriage Brokerage Contracts.**

See the title ILLEGAL CONTRACTS, vol. 7, p. 249.

### **Marriage Licenses.**

See the title MARRIAGE, ante, p. 570

## **MARRIAGE CONTRACTS AND SETTLEMENTS.**

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**CROSS REFERENCES.**

See the titles CURTESY, vol. 4, p. 148; DESCENT AND DISTRIBUTION, vol. 4, p. 588; DOWER, vol. 4, p. 782; EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540; HUSBAND AND WIFE, vol. 7, p. 178; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; SEPARATE ESTATE OF MARRIED WOMEN; TRUSTS AND TRUSTEES.

## I. Instrument.

"In Virginia a woman might, and in this state she may, in contemplation of marriage, by deed of bargain and sale in which the intended husband joins, convey land to a person in fee, in trust for the bargainor till the marriage, and thereafter to permit the husband to occupy and enjoy the land during the joint lives of husband and wife, and if, during the coverture, she shall by deed or will appoint it to another and die, then the estate to determine in the trustee and vest in the appointee; or if, without appointment made by her by deed, the husband shall die and she shall survive him, then the estate in the trustee to determine; or if, without appointment by deed or will, she shall die in the lifetime of the husband, then, at her death the estate in the trustee to determine. And if she properly appoint the estate, it will accordingly vest; but if not, then on the husband's death in her lifetime, the estate will revert to her; or at her death in his lifetime it will revert to her heirs." *Ocholtree v. McClung*, 7 W. Va. 232.

## II. Parties.

### A. GENERALLY.

It is sufficient if the prospective husband and wife are parties to the settlement. *Roane v. Hern*, 1 Wash. 47.

### B. INFANTS.

Infants may contract by marriage articles or settlements, and such contracts will bind them when of full age. *Tabb v. Archer*, 3 Hen. & M. 399.

A deed of marriage settlement is made before marriage, between an infant female, her guardian, the intended husband, and trustee; whereby her real estate is settled on her and her children, etc., and her husband covenants, that he will, when afterwards required, execute any and every further conveyance proper for more effectually settling and assuring the subject to the uses declared by the deed; husband and

wife exhibit a bill in chancery, praying that this settlement be set aside, on the ground of the infancy of the wife at the time it was executed; and the wife, on a privy examination directed by the chancellor, declares that she has freely and voluntarily joined in the bill. Held, whether the infant feme were bound by the deed or not, the husband was bound by his covenant, and equity will not aid him to avoid it; and bill was dismissed. *Lee v. Stuart*, 2 Leigh 76. See the title INFANTS, vol. 7, p. 461.

## III. Consideration.

See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 540.

### A. GENERALLY.

The intended marriage is a sufficient consideration for the settlement made in contemplation thereof. *Roane v. Hern*, 1 Wash. 47; *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599; *Vance v. Richards*, 39 W. Va. 578, 20 S. E. 603; *Clay v. Walter*, 79 Va. 92.

Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it. *Eppes v. Randolph*, 2 Call 125.

Property claimed by a son-in-law under a marriage contract with a decedent in his lifetime, and recovered by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent, unless it appear that such decree was obtained by fraud or collusion between the parties. *Clay v. Williams*, 2 Munf. 105.

**Sufficient Proof of Execution before Marriage.**—Upon a bill of injunction, exhibited by husband and wife and their trustee, to prevent the husband's creditors from selling property covered by a deed of marriage settlement; the deed appearing on its face, and by the oaths of all the complainants, including the trustee (who appeared to

have no interest except as a party to the suit), to have been executed before the marriage; and it not being charged in the answers, or any of them, that the said deed was in fact antedated; though not attested by any subscribing witness, but admitted to record upon the acknowledgment of the parties only; and though the defendants, in their answers, averred that the said acknowledgments took place after the marriage; the court could not with propriety dissolve the injunction on the ground that the said deed was antedated. *Scott v. Loraine*, 6 Munf. 117.

#### **B. FRAUDULENT INTENT.**

If the wife had knowledge of the fraud or participated therein, the settlement would be void, but if a man wishing to enter into matrimony with a particular woman, should, being insolvent, convey to her all his property, and it be accepted by her with full knowledge of the facts, the mutual intent being, not to defraud his creditors, as a primary object, but to contract marriage, each on such terms as could reasonably be procured from the other, the case would not be within the statute of frauds. *Clay v. Walter*, 79 Va. 92.

**Constructive Notice.**—Such knowledge can not be presumed, nor will she be concluded by the fact that a notice was served upon her, setting forth the property owned by her intended husband, his debts and that the intended settlement was fraudulent, in the absence of evidence of her actual knowledge thereof; since § 1, ch. 163, of the Code of Virginia, 1873, does not contemplate any such notice. *Clay v. Walter*, 79 Va. 92; *Moore v. Butler*, 90 Va. 683, 19 S. E. 850.

### **IV. Parol Marriage Settlements.**

#### **A. PRIOR TO 1785.**

Parol marriage agreements were valid in Virginia prior to the act of 1785. *Thornton v. Corbin*, 3 Call 384; *Foster v. Foster*, 4 Call 231.

In *Foster v. Foster*, 4 Call 231, a marriage contract was enforced upon acknowledgment before witnesses, although they were not present when it was made. In this case, the promise was made before the passage of the act of 1785 to prevent frauds and perjuries.

#### **B. SINCE 1785.**

An antenuptial contract, even if satisfactorily proved, must be in writing in accordance with the section of the statute of frauds providing that "any agreement made upon consideration of marriage" must be in writing in order to be valid. There can be no departure from the statutory rule where there has been no fraud and no agreement to reduce the settlement to writing. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; *Lightfoot v. Colgin*, 5 Munf. 42.

#### **C. MARRIAGE NOT A PART PERFORMANCE.**

In such case the subsequent marriage is not deemed a part performance, so as to take the case out of the statute. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157.

### **V. Marriage Articles.**

#### **A. GENERALLY — CONSTRUCTION.**

See post. "Construction," XII.

Marriage articles are considered as the heads or minutes, only, of an agreement entered into between the parties, upon a valuable consideration (the marriage), and being in their nature executory, ought to be construed and moulded, in equity, according to the intention of the parties at the time of concluding them. And equity will totally disregard the form, if the substance of the agreement and the intention of the parties in making it can be gotten at. *Tabb v. Archer*, 3 Hen. & M. 399.

Whenever, in marriage articles, a settlement is proposed to be made, if there be any casus omissus or chasm in the uses or estate intended to be set-

tled, such chasm shall be supplied by the court according to the intention of the parties, if possible, to be collected from the instrument, if not, then from the rules of law or the usages customary to such settlements. *Tabb v. Archer*, 3 Hen. & M. 399.

A recital in marriage articles, stating it to be the intention of the parties to settle all the real and personal estate of the wife, except as therein after exempted, and a part of such estate being omitted in a subsequent specification thereof, recourse may be had to the excepting clause to prevent the universality of the recital from being restricted (as it otherwise might be) by the specification. *Tabb v. Archer*, 3 Hen. & M. 399.

It is the proper province of a court of equity to decree the specific execution of marriage articles, where the apparent intention of the parties will direct the decree, without a strict scanning of the articles according to nice grammatical rules, or the technical meaning of the words. *Roane v. Hern*, 1 Wash. 47.

The intention of the parties to marriage articles is to be collected from the nature of the agreement; the language and context thereof; the usage in similar cases; and the legal rights of the parties, as they existed before, and would have existed after the marriage, if no such articles had been made; but parol or other evidence, dehors the articles, to explain, or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained, or unless something agreed on by the parties at the time, has been omitted, through fraud or accident. Such instruments are to be construed as a whole. *Tabb v. Archer*, 3 Hen. & M. 399; *Coatney v. Hopkins*, 14 W. Va. 338.

Parol evidence is admitted to explain the meaning of the parties, in marriage articles, when a conveyance

is called for. *Flemings v. Willis*, 2 Call. 5. See the title PAROL EVIDENCE.

### B. ARTICLES CONTROL.

A marriage settlement made after marriage, in pursuance of articles entered into before marriage, is to be controlled by the articles. *Stubbs v. Whiting*, 1 Rand. 322.

Hence, where the articles provide that the wife's property should remain subject to her own control and disposition, free from the marital rights of her husband and giving her unlimited power of disposition during coverture, and if she survived her husband without having disposed thereof, then to the only use and behoof of the wife, her heirs and assigns forever; and, by a subsequent deed of settlement all of said property was settled on the wife and her two children, or to the use of any other person she might appoint by deed or will; the articles control, and, if the wife survives her husband, she is entitled to all such property in absolute right. *Stubbs v. Whiting*, 1 Rand. 322.

### C. INDORSEMENT—EFFECT.

An indorsement made on articles by the husband and wife subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof so far as regards the wife. she being no longer *sui juris*. *Tabb v. Archer*, 3 Hen. & M. 399; *Eidson v. Fontaine*, 9 Gratt. 286.

### D. ARTICLES OR AGREEMENT—CRITERION.

When there is no covenant or grant or any words capable of passing an interest or of declaring that she will stand seised to the uses in the instrument or of creating a use or trust on the part of the wife, such an instrument will be held to constitute marriage articles, not a marriage settlement, being executory, not executed. *Tabb v. Archer*, 3 Hen. & M. 399.



## VI. Recordation.

See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 7, p. 540.

### A. GENERALLY.

A deed of marriage settlement made before the marriage, conveying the property of the wife, and in which the intended husband joined, is fraudulent and void as to the subsequent purchases from the husband without notice, unless duly recorded, said deed having been admitted to record upon proof in court by two witnesses only, whereas the statute required three witnesses. In this case the dictum to the contrary in *Lord v. Jeffries*, 5 Rand. 211, was overruled. *Thomas v. Gaines*, 1 Gratt. 347.

Under the act of 1785, a deed of marriage settlement must be recorded within eight months, else it will be void as to creditors of the husband, and a court of equity will not relieve against a neglect to comply with the statute. It will only relieve where recordation has been prevented by the fraud of the creditors themselves or their privies. *Anderson v. Anderson*, 2 Call 198.

A deed of marriage settlement executed before, and recorded after the marriage, but within the time required by law, is conclusive against the creditors of the husband, for debts contracted by him before the marriage. And this, although such deed was recorded upon the acknowledgment of the parties, without any privy examination of the wife. *Scott v. Gibbon*, 5 Munf. 86.

**Parol Marriage Settlements.**—Roane, J., in *Thornton v. Corbin*, 3 Call 384, was of the opinion that the act requiring marriage settlements to be recorded only applied to written marriage settlements, and did not affect the validity of parol agreements.

### B. DECREE EXECUTING SETTLEMENT.

In a suit by husband and wife against

the executor of her father, to obtain possession of her property, there is a decree directing the executor to deliver it to the husband and wife, to be held by them subject to the uses and stipulations of a marriage agreement entered into by them before marriage, but unrecorded. Held, the decree did in effect set up and execute the marriage agreement; the marital rights of the husband were thereby intercepted; and the property, taken and received in virtue of the said decree, was thereafter held by the husband and wife as trustees under said decree for the purposes of the agreement; and not by the husband in his character of husband alone. That the validity of the decree is not impaired by the failure to record it in the county where the property was situated or the parties resided; and the rights acquired in virtue of the decree are good and valid against the subsequent creditors of the husband. After the death of the husband, the wife and children file a bill against his administrator to recover the property covered by the decree which remained, and for satisfaction for that which had been wasted by the husband; and there is a decree in their favor. Held, such recovery of the property undisposed of, and for the value of such as was wasted, is conclusive against the administrator and creditors of the husband. *Dabney v. Kennedy*, 7 Gratt. 317.

### C. REACKNOWLEDGMENT.

A deed reacknowledged within eight months from its date, and recorded within four months from the reacknowledgment, is good from the date of the reacknowledgment, although more than eight months have elapsed between the time when the deed was first executed, and the day of recording it. *Eppes v. Randolph*, 2 Call 125.

### D. REMOVAL OF PROPERTY.

Deed of marriage settlement of slaves then in Hanover, where deed was made and duly recorded; husband,

entitled to, and holding possession under settlement, removes with the slaves to Richmond, and there mortgages them for debt of his own, contrary to terms of the settlement, within twelve months after his removal of them; the trustee of the subject under the settlement, fails to have it recorded in Richmond, within twelve months after removal of the slaves; but within the twelve months, he filed a bill in chancery against the husband and mortgagee, asserting his legal title to the slaves and the trusts of the settlement. Held, the mortgagee being a purchaser with notice of settlement within twelve months after removal of slaves to Richmond, as to him, the failure of the trustee in the deed of marriage settlement, to have it recorded in Richmond, does not make the settlement void, under statute 1 Rev. Code, ch. 99, § 11, p. 364. *Hughes v. Pledge*, 1 Leigh 443.

#### **E. BETWEEN PARTIES.**

An agreement made in contemplation of marriage, though void against creditors because not recorded, is valid between the parties; and the wife and children for whose benefit it is made, may call for a specific execution of the agreement, if there is no existing creditor or purchaser whose rights will be affected by it, though the marital rights of the husband have attached by an actual reduction of the property into his actual possession. *Dabney v. Kennedy*, 7 Gratt. 317.

#### **F. VOLUNTEERS.**

In *Thornton v. Corbin*, 3 Call 384, it was held that the statute requiring the recordation of marriage agreements against "purchasers," applies only to purchasers for value, hence, such agreements do not have to be recorded against mere volunteers. *Claiborne v. Henderson*, 3 Hen. & M. 322, 358.

### **VII. As Bar to Marital Rights.**

See the title SEPARATE ESTATE OF MARRIED WOMEN.

#### **A. GENERALLY.**

The marital rights of the husband may be intercepted, by a marriage settlement, either wholly or in part. *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155; *Findley v. Findley*, 11 Gratt. 434; *Mitchell v. Moore*, 16 Gratt. 275; *Pollock v. Glassell*, 2 Gratt. 439; *Beard v. Beard*, 22 W. Va. 130; *Coatney v. Hopkins*, 14 W. Va. 338.

The rights of a husband to the property of his intended wife, may be intercepted by his agreement to that effect. And where by express contract before, and in contemplation of marriage, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach, during the coverture, or after the death of the wife. In such case the wife is to all intents to be regarded as a feme sole in respect to such property; and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass as if the wife died sole and intestate. *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155; *Robinson v. Brock*, 1 Hen. & M. 212; *Findley v. Findley*, 11 Gratt. 434; *Beard v. Beard*, 22 W. Va. 130.

Where, by a marriage settlement a husband in lieu of dower and in consideration of property acquired by her, conveys certain real estate and negroes (including four derived from her) to a trustee and his heirs, to the use of himself and wife and the survivor of them for life, then to the child or children of the marriage, and, if no child, then the land and slaves originally belonging to the husband, except two, in trust for his heirs or disposed of as he should appoint and direct, and the rest of the slaves for the use of the heirs of the wife or disposed of as she should appoint and direct; neither husband nor wife has any more than an estate

for life, and the husband's marital rights are excluded, nor can he claim as "heir" to his wife, except in the one case provided by statute. *Robinson v. Brock*, 1 Hen. & M. 212.

But if the husband has expressly stipulated and agreed that, if his wife should die childless and intestate, and he should survive her, he would never set up any claim to the enjoyment of any part of her real or personal estate, he would be excluded from taking as tenant by the curtesy or as distributee. So, if such release must necessarily be implied from what he did expressly agree to. *Beard v. Beard*, 22 W. Va. 130.

If the husband has relinquished his marital rights to his wife's property, he is not entitled to administration upon her estate. *Charles v. Charles*, 8 Gratt. 486, 56 Am. Dec. 155. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 483.

As to the effect of marriage articles as a bar to dower, see the title **DOWER**, vol. 4, p. 782.

**Husband's Rights as Distributee.**—Where a marriage settlement merely conveys certain personal property of the wife, to trustees, in trust to permit the husband to receive said property during the joint lives of husband and wife, and, if the wife survive, to pay over said property to the wife, but making no provision for the case of the husband surviving, it was held, that the right of the husband as distributee of the wife was not excluded by the marriage settlement. *Coatney v. Hopkins*, 14 W. Va. 338; *Beard v. Beard*, 22 W. Va. 130. See the title **DESCENT AND DISTRIBUTION**, vol. 4, p. 588.

By a deed of marriage settlement, personal property of the wife is conveyed to the husband for the exclusive benefit of the wife and her children during her life, and at her death, of her issue, if any of them be living; and it is provided that in the event of the wife's dying without issue, the prop-

erty shall be distributed in the same manner as if the deed had not been made. Upon the death of the husband without children (the wife still living), a creditor of the husband, at whose suit the latter took the oath of insolvency, claims that the husband has an interest in the property, which may be charged in the event of the wife's dying without issue. Held, the conveyance to the husband was merely in the character of trustee, and its effect was to intercept the marital rights of the husband, and preclude him from all beneficial interest during the existence of the trust; that the provision for the event of the wife's dying without issue looked not to the state of things existing at the time of the marriage, but to such as should exist at the death of the wife; that the purpose was in such event to divest the legal title conveyed to the husband as trustee, and let the personal estate stand upon the same footing as any other personal chattels of a wife not reduced into possession by the husband during the coverture; that if the husband had survived the wife, he should have had a right to administer upon her personal estate, and hold the same free from distribution; but in the event that actually occurred, of the survivorship of the wife, the husband at no time acquired any individual ownership of the subject. *Mathews v. Woodson*, 2 Rob. 601.

**Joinder of Widow in Deed—Effect.**—See the title **DESCENT AND DISTRIBUTION**, vol. 4, pp. 626, 627.

## **B. NOT BARRED TO A GREATER EXTENT THAN INTENTION PLAINLY REQUIRES.**

But the husband will never be deprived of his marital rights to a greater extent than the terms of the deed clearly require. *Mitchell v. Moore*, 16 Gratt. 275; *Pickett v. Chilton*, 5 Munf. 467; *Coatney v. Hopkins*, 14 W. Va. 338; *Beard v. Beard*, 22 W. Va. 130.

The husband, on the marriage, being a purchaser for a valuable considera-

tion, can not be deprived of any of his legal rights, accruing by the marriage; except such as (according to a just and liberal construction of the articles) he must be understood and intended to have given up; if, then, there be any chasm in the articles, whereby the legal rights of the husband may, in certain events, interpose between the uses declared by them, a court of equity, in directing the settlement, ought to have regard to those legal rights, so as to preserve to the husband the enjoyment thereof, on the happening of such events. And the same construction ought to be made, in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it. *Tabb v. Archer*, 3 Hen. & M. 399. See the title SEPARATE ESTATE OF MARRIED WOMEN.

No provision, however explicit, that the husband should not be tenant by the curtesy or distributee would exclude his curtesy or right as distributee, in the absence of a devise or bequest to others, expressly or by implication. *Beard v. Beard*, 22 W. Va. 130.

### VIII. Election.

Where, by deed of settlement, a husband makes a settlement of property on his wife, and then, by will, makes a disposition of the property different from that made by the deed of settlement and far less beneficial to the wife, and dies, and the wife takes administration with the will annexed; the widow may claim under the deed of settlement without having renounced the provision made for her by the will according to the statute. 1 Rev. Code, ch. 104, § 6, and the taking administration with the will annexed, by the widow, is not an election by her to take under the will and not to claim under the deed of settlement. Only the general doctrine of election would apply. *Taylor v. Browne*, 2 Leigh 419.

See the title EQUITABLE ELECTION, vol. 5, p. 124.

### IX. Rescission.

Where, by deed of marriage settlement, the wife's estate is conveyed to the use of the husband during the joint lives of husband and wife, and thereafter to be at her sole disposal, and the husband's estate, from and after his death, is conveyed to the use of the wife for her life, and, after the marriage, husband and wife agree upon a separation, and that each shall relinquish all claim upon the estate of the other, and they separate accordingly, and the husband conveys to the wife's trustee all his interest in her estate under the deed of settlement, and the wife retains the possession of the estate and takes the profits until the husband's death, a period of fourteen years, the annual value being greater than that of the husband's own estate; after the husband's death, the wife files a bill in chancery against the devisee of his estate for an account of the rents and profits which she claims as tenant for life under the marriage settlement; it was held, that the claim can not be allowed in equity, it appearing that the consideration for the reconveyance of the wife's property, was that the husband was to have his property reconveyed to him. *Fadeley v. Weatherby*, 8 Leigh 29.

### X. Reformation.

A woman being about to marry, it is agreed between her and her intended husband that out of her personal estate a sum of money shall be given to, and settled upon, her sister, and the intended husband undertakes to have an instrument drawn to carry this purpose into effect; the husband accordingly has an instrument prepared, which is produced by him immediately before the marriage, and executed; but it turns out that the instrument is so drawn, that at law it does not amount

to a gift, nor intercept the marital rights. Held, notwithstanding, the agreement itself may be set up against the husband, and equity will correct the defect in the instrument, whether it proceeded from fraud or mistake. *Brown v. Bonner*, 8 Leigh 1.

### **XI. Rights of Issue.**

The children of a marriage, when provided for by a settlement, whether it be ante or postnuptial, are always regarded as being embraced within the consideration of the settlement; and the rights thereby secured to them can not be released by the wife by any instrument however formal. *McChesney v. Brown*, 25 Gratt. 393.

A principal intention of such agreement must be to secure a settlement which shall be an effectual provision for such issue, which end can not be obtained by a settlement so framed as to leave it in the power of the parents to bar their issue by fine or recovery or any other conveyance. *Tabb v. Archer*, 3 Hen. & M. 399.

The children born of the marriage, are purchasers, under both father and mother, by virtue of marriage articles, though, upon the death of father and mother, they take (where the limitation is to the issue generally) as coparceners per stirpes, and not per capita. Marriage articles are not to be rescinded, after the marriage, even by consent of the husband and wife, their chief object being an effectual provision for the issue or by any conveyance which they, or either of them can make; but may be enforced in equity, at the suit of the issue (whether in esse, or en ventre sa mere), or for any other persons for whose benefit such articles were intended. The court will either compel performance (by appointing trustees where none were inserted in the articles, and decreeing a settlement), or set aside any conveyance made with intent to defeat the rights of the issue, or of those in remainder,

expectant on the estate for life of the husband and wife. *Tabb v. Archer*, 3 Hen. & M. 399. See also, *Healy v. Rowan*, 5 Gratt. 414.

**Where Promise Is to Father.**—A grandfather, who had promised before marriage to give his daughter's husband a negro woman, made a conveyance of her after the marriage, and with the consent of the father, to the children of his daughter begotten and to be begotten; the next day the grandfather and father agreed to exchange the above negro for another, which was duly done. A bill by the children to set up the first deed, which was lost, and for a decree for the negro named therein, was dismissed, the grandfather having no title at the time of the conveyance, the title being in the father and he not being estopped by his consent to the deed, if he had the legal title, nor if equitable only would he be estopped, the conveyance to his children by their grandfather being voluntary. If the children had any equitable claim, the claim of the grandfather was superior, he being a purchaser for valuable consideration. *Applebury v. Anthony*, 1 Wash. 287.

### **XII. Construction.**

See ante, "Generally—Construction." V. A.

#### **A. GENERAL RULES.**

In construing a deed of marriage settlement, the intention of the grantor is the great object to be sought after, in ascertaining which, no fixed course of construction, founded on arbitrary rules and technical principles, is to be relied upon; but that intention is to be best deduced from the terms and provisions of the deed, and also a will, in which such deed is recognized and reaffirmed, viewed in the light of the circumstances which attended the execution of these instruments. In seeking the true interpretation of the language used, we are not tied down to the literal words, however technical

and of whatever established legal signification they may be, when read abstractly in a single phrase; but must read and interpret them in their relation to other terms and provisions of the instrument in which they occur. *Brown v. Brown*, 31 Gratt. 502.

The intention of the parties to a marriage settlement is to be collected from the nature of the agreement, the language and context thereof, the usage in similar cases, and the legal rights of the parties as they existed before, and would have existed after the marriage if no such settlement had been made. *Coatney v. Hopkins*, 14 W. Va. 238.

### B. PAROL EVIDENCE.

So when the marriage settlement provided that the prospective husband should have all his father's land lying above Poplar Swamp and which he had purchased of Bronaugh, and by an indenture of the same date, it was stipulated that the father would convey to the said son all of the tract belonging to him whereon the father lived, lying above a certain other stream and the land bought of Bronaugh thereto adjoining, and by a previous will the father had given this son all his lands above said Poplar Swamp and to another son all his lands below said swamp and there were several tracts bought of Bronaugh, lying above said Poplar Swamp, all of them except the tract in dispute adjoining the tract on which the father resided, the tract in dispute being only a distance of a quarter of a mile from the father's home tract, but separated from the other son's land by all of his brother's tract, it was held, that the circumstances surrounding the parties showed that the tract in dispute was intended to belong to the son provided for in the marriage settlement, more particularly where such construction had been acquiesced in by the parties for many years. *Flemings v. Willis*, 2 Call 5. See the title EVIDENCE, vol. 5, p. 295.

### C. PARTICULAR INSTANCES.

#### 1. Power of Appointment—Execution.

Under a settlement by a husband on himself and wife, and to the survivor for life, she has a power of appointing to whom the land shall go in the event that she shall die without leaving issue at her death; so that such disposition is signified under her hand and seal in writing, or by last will and testament. The wife afterwards unites with her husband in a deed by which she relinquished her right in the land for a valuable consideration, and dies without leaving issue. Held, that although she was not privily examined as to her execution of the deed, yet the same being under her hand and seal in writing, as prescribed in the deed vesting in her the power, she thereby destroyed her power of appointment. *Hume v. Hord*, 5 Gratt. 374. See the title POWERS.

#### 2. Contingent Estate Legal or Equitable.

The prevailing intent in each deed, properly manifest, controls its construction and effect, as to whether the estate, vested in the immediate bargainee for his own benefit or upon the trusts declared, is a fee determinable, and, on the happening of the contingency or execution of the appointment, the legal estate determines in him and shifts to another, or reverts to the bargainor; or, on the other hand, the legal estate, vested in the trustee, is a fee absolute, and remains in him, while a mere equitable interest declared in favor of an ulterior contingent beneficiary or an appointee, vests in the latter. *Ocheltree v. McClung*, 7 W. Va. 232.

#### 3. Rights of Issue to Legal Estate.

If, by a deed of marriage settlement, duly recorded, slaves be conveyed to certain trustees and their heirs, to the use of the wife, for life; and after her death, to the use of the husband, for life; and after the death of the survivor, to the use of the children of the

marriage, equally to be divided between them, and their heirs forever; upon the deaths of the husband and wife, the children of the marriage are entitled, not only to the equitable, but to the absolute legal estate. *Baird v. Bland*, 3 Munf. 570. See the title **TRUSTS AND TRUSTEES**.

#### 4. Wife's Power of Disposition.

E being about to marry F, executes a deed, by which he authorizes her during their lives or at her death, to control and dispose of her property in as full and ample a manner as she could do if she were not his wife; and he relinquished to her all right and title to the said property which he might acquire by the marriage. On this deed there is an endorsement of the same date executed by E and F, which says: "It is further understood and agreed upon between us, that should she die, first, I am to retain the property and have the use of it during my natural life; but at my death it is to go to the person or persons which it may be her will or desire should have it." The wife may give away or dispose of the property in her lifetime; and the husband is only entitled to a life interest in that which remains at her death. Nor is this construction affected by a subsequent memorandum in these words: "It is hereby understood and agreed that the provisions of this contract are not intended to exclude my wife from her right of dower in my estate, should she survive me." *Eidson v. Fontaine*, 9 Gratt. 286.

#### 5. Wife's Power of Disposition—Remainder to Issue—Survivorship.

In an antenuptial marriage settlement conveying and settling the property of the feme, it was recited that "it had been agreed that the husband should, after the intended marriage had, receive and enjoy, during their joint lives, the interest and occupation of the said real and personal estate; and also that the same, and the interest and profits thereof, from and after

the decease of such of them as should first happen to die, should be at the sole use and only disposal of the wife notwithstanding the coverture." The trusts declared in the deed were for the husband for their joint lives. If she survived, the whole property to be absolutely vested in her; but if he survived, to him for life; at his death, to the children of the marriage in equal portions; and if no child, or such child should die before age, then to the brothers and sisters of the wife, to be equally divided among them. Held: 1. The wife has no power to dispose of the property during the coverture. 2. The remainder vested in the children on their attaining full age. 3. A child dying within age without issue, the estate vested in the survivors. *Whiting v. Rust*, 1 Gratt. 483. See the title **SEPARATE ESTATE OF MARRIED WOMEN**.

#### 6. Power of Sale—Election—Rights of Husband.

Husband and wife convey the lands of the wife in trust for themselves during their joint lives, with power to the wife to direct a sale and dispose of the proceeds either in her lifetime or by will, or to dispose of the land by will; and if the land is sold in her lifetime, and she dies without a will, that the husband shall receive out of the proceeds of sale \$2,500, and the balance to go to certain other persons named. If the land is not sold during her life and the husband survives her, he shall hold and enjoy the land during his life. But if he, within three years from the wife's death, require a sale of the land, the trustee shall sell it within six months; and out of the proceeds of sale shall pay the husband \$2,500. The husband survived the wife, and, within three years from her death, elected to have the land sold. The trustee was then dead, and by a friendly suit in chancery, a new trustee was appointed, who advertised the land for sale; but before the day of sale the husband

died. Held, 1. That the husband having elected within the three years to have the land sold, and take the \$2,500 in lieu of his life estate, the effect of such an election was an equitable conversion of the land into money. 2. That the election of the husband was not defeated by his death before the sale was made; and his executor is entitled to have the sale made, and to receive \$2,500 out of the proceeds of said sale. *Washington v. Abraham*, 6 Gratt. 66.

#### 7. Choses in Action of Wife—What Language Includes.

A deed of marriage settlement, conveying "all the lands, slaves, goods, chattels and property" of the wife, includes her choses in action; so that a sum of money due to the wife before the marriage will not, when recovered, belong to the husband, but to the trustees, for the uses specified in the deed. In such case, therefore, a submission to arbitration of a controversy concerning a debt to the wife, being made by the debtor with the husband, is void, as relating to a subject not in their power to control. *Wilcox v. Hubbard*, 4 Munf. 346.

#### 8. Dower Slaves—When Wife Entitled in Addition to Other Provisions.

By marriage settlement, the wife, at the death of her husband, was to have one-third of all the negroes whereof the husband died possessed, in lieu of dower; and if she survived and had no child by him she was to have all the negroes which came by her, in her absolute right. She did survive and had no child by him. Held, that she was entitled to the dower slaves in addition to her own before the marriage, and she is not precluded by a different division and assignment in the county court, to which she was no party. *Hearne v. Roane*, Wythe 90; *Roane v. Hern*, 1 Wash. 47.

#### 9. Husband Entitled to Life Estate.

It having been agreed by marriage articles that all the estate, real and per-

sonal, of the wife should remain in her right and possession during the marriage and that the profits only should be applied to the support of the husband and wife and their issue, if any, and it having been further agreed that the husband would never sell or dispose of any part of the said estate, but that the same should always be held as an inviolable fund for the support of the said husband and wife and their issue, if any; the first clause was construed as a declaration of the uses of the estate during coverture only, and the second clause as declaring the uses afterwards. The husband, therefore, as well as the wife, was adjudged to be entitled to the benefit of these uses for life. *Tabb v. Archer*, 3 Hen. & M. 399.

#### 10. Power to Appoint Not Power to Sell or Manumit Slaves.

Marriage articles giving the wife the use of certain slaves during coverture with the power to appoint to others and revesting her with the ownership, if she survived her husband, does not confer the power on the wife, dying before her husband, to sell or manumit the slaves. *Ellis v. Baker*, 1 Rand. 47.

#### 11. Carriage Horses—Number.

Where a marriage settlement provides that the wife "shall have the best riding carriage and the horses belonging to it," the wife is entitled only to the two horses, which ordinarily drew the carriage and not four. *Hearne v. Roane*, Wythe 90.

#### 12. Rights of Issue—Survivorship.

Husband and wife entered into a marriage contract, wherein it is recited, that with a view to secure to the wife her separate property, and to provide for the wife and the issue of the marriage, etc., the husband covenants with trustees named, that after his just debts are paid, there shall be raised out of his estate, the sum of ten thousand pounds current money, to be paid in preference to any voluntary disposition of his property, whether by will or otherwise, and placed in the hands



of said trustees for the purpose aforesaid, to be held by them in trust for the issue of said marriage, as tenants in common, with benefit of survivorship; the wife to share the profits of said fund during her life, she taking a child's part. The husband died in 1841 and the wife in 1843, leaving seven children of the marriage. The husband by his will made in 1841, referred to and confirmed the marriage contract, and left the whole of his estate to be equally divided among his seven children. Five of the children died before the estate was ready for distribution. Held, that, looking to the deed and the will, the intention of the husband was an equal distribution among his children; and this intention is not defeated by the use of the words "with benefit of survivorship." On the death of the wife, the interest vested in the children, and the fund is to be divided among them and the children of those of them who have since died. *Brown v. Brown*, 31 Gratt. 502.

### 13. Additional or Substituted Settlement.

A man, in contemplation of marriage, executed his bond to a trustee for his intended wife for \$50,000, to be held subject to the uses declared in a marriage settlement of even date. During his lifetime, the husband made payments on account of interest on said bond and in addition purchased dividend obligations of the R. F. & P. R. Co. and caused them to be transferred on the books in the name of the wife's trustee. The marriage settlement provided that the husband might substitute other property for said bond, wholly or in part, with the written consent of the wife, such property to be credited on the bond at an agreed value. It was held, that such dividend obligations were not to be considered as payments on the bond, but as gifts to the wife, hence, she was not required to elect. *Allison v. Allison*, 99 Va. 472, 39 S. E. 130.

## D. LIABILITY OF SUBJECT FOR BENEFICIARIES' DEBTS.

See the title TRUSTS AND TRUSTEES.

### 1. Debts of Husband.

Where a deed of marriage settlement declares that the husband and wife shall enjoy the interest and profits of the property settled, jointly, during their lives (said property being that of the wife), that the trustee permit them, during their joint lives, to take and enjoy the said interest and profits for their own use and benefit, and that, if the husband survive, he shall pay over the property to the husband, the husband has no property in the subject which can be subjected by his creditors. *Scott v. Gibbon*, 5 Munf. 86.

But the contingent interest of the husband in such a case may be charged by his creditors. *Scott v. Gibbon*, 5 Munf. 86.

Where the husband conveys his property to trustees for his maintenance and that of his wife and children, in order to guard against his improvidence, making provision for payment of past debts but expressly disabling himself from incurring future ones, a debt subsequently contracted by the husband can not be charged on the prospective profits of the trust estate so as to deprive the beneficiaries of support. *Markham v. Guerrant*, 4 Leigh 279.

Nor can the trustee himself pledge the prospective profits of the trust estate necessary for the current support of the cestuis que trustent, to such a debt. *Markham v. Guerrant*, 4 Leigh 279.

The case was distinguished from that of *Scott v. Loraine*, 6 Munf. 117, where it was said that, property conveyed to trustees by a deed of marriage settlement, in trust to permit the husband and wife to have the income for their use and benefit, might be taken in execution to satisfy a debt incurred after marriage for their proper use and bene-

fit; on the ground that the purpose in that case was merely to intercept the marital rights and shield the property from the husband's creditors. *Markham v. Guerrant*, 4 Leigh 279.

A deed of settlement made in contemplation of marriage between a single woman and her intended husband, who was at the time insolvent, and embracing her property alone, and providing that neither the property nor the profits arising therefrom should be liable for the debts of the intended husband, then due or thereafter to become due, will, in equity, be construed so as, consistently with the terms of the deed, to effectuate the leading intent of the parties. That being to secure the enjoyment of the property to the intended wife and her family, including the husband, free from the claims of his creditors, all idea of property in the husband during the coverture is excluded, and no right can be acquired by his creditors to seize or sell the subject of the trust. *Perkins v. Dickinson*, 3 Gratt. 335.

Where a marriage settlement conveys slaves to use of husband and wife during their joint lives; remainder to wife, if she survive; remainder to whomsoever the wife shall appoint, if she die before the husband; remainder, in default of such appointment, to husband for life, and afterwards, to offspring of the marriage; to the intent, that the property shall not be subject to disposal, debts, contracts or engagements of husband, it was held, that during wife's life, the property can not be disposed of by husband, or applied to the satisfaction of his debts. *Hughes v. Pledge*, 1 Leigh 443.

Where by deed of marriage settlement, slaves of the feme are conveyed to a trustee, in trust to permit the husband to take the profits during the joint lives of himself and his wife; remainder, if the husband should first die, to the wife; and if she should first die, to such persons as she should appoint; with an express declaration,

that the property should not be subject to the husband's debts; it was held, that the husband's interest in the profits during the joint lives of himself and his wife, is subject to his debts; and provision should be made for satisfaction of a creditor, by hiring the slaves out, or otherwise, as most convenient. *Butler v. M'Cann*, 4 Leigh 631.

Real estate is vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for a son of the grantor; while the annuitant is yet living, a creditor of the son recovers a judgment against him and exhibits his bill in chancery, to subject the son's equitable interest in the estate to the debt. Held, 1, that such an equitable interest can not be taken in execution at law; 2, that it is bound by the judgment in equity, which will apply it to the satisfaction of the debt; but 3, as the annuitant is yet living, and is not compellable to take a gross sum in satisfaction of the annuity, and as the trustee is to hold the subject and pay the annuity out of the profits, the court of chancery ought not to direct the sale out and out of the debtor's equitable interest, subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt. *Countts v. Walker*, 2 Leigh 268.

## 2. Debts of Husband and Wife.

But property conveyed by deed of marriage settlement, in trust that the husband and wife shall be permitted, during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt incurred after the marriage for supplies furnished for the proper support of the husband and wife. *Scott v. Loraine*, 6 Munf. 117.

## XIII. Rights, Duties and Liabilities of Trustee.

### A. INVESTMENT.

If, by a deed of marriage settlement.

property be conveyed in trust to be invested in "Bank stocks or freehold lands or lots," the trustee is not thereby authorized to make the investment in United States 6 per cent. stock. *Banister v. McKenzie*, 6 Munf. 447.

#### **B. RIGHT OF BENEFICIARIES TO FOLLOW PROPERTY.**

The president and acting manager of a private corporation is trustee in a deed of marriage settlement and, as trustee, he sells the trust property, in violation of his duty as trustee, and purchases a part of it for the corporation. The corporation is a participant in the violation of the trust and liable therefor. The cestuis que trustent having sued the trustee for an account of the trust subject and made the corporation a party, and having taken a decree against the trustee for the amount of the purchase money for which the trust property sold, which proves unavailing, may then pursue the property in the hands of the corporation, if it is still in the possession of the corporation, or have a decree against it for the price at which it was purchased. *Barksdale v. Finney*, 14 Gratt. 338.

#### **XIV. Post Nuptial Settlements and Conveyances.**

A postnuptial settlement in favor of

a wife, made in pursuance of a fair contract for valuable consideration, will be good. *William & Mary College v. Powell*, 12 Gratt. 372. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 540.

#### **XV. Pleading and Practice.**

##### **A. JURISDICTION.**

##### **1. Promise to Settle Personal Property.**

The remedy upon a promise to settle a certain sum upon a daughter as her marriage portion, is at law and not in equity. *Bannister v. Shore*, 1 Wash. 173.

##### **2. Specific Performance.**

A bill in equity lies for specific performances of a marriage contract, though the plaintiff might have redress at law. *Foster v. Foster*, 4 Call 231. See the title **SPECIFIC PERFORMANCE**.

##### **B. DECLARATION—SUFFICIENCY.**

A declaration upon a promise to give the plaintiff upon intermarriage with defendant's granddaughter, as much of his estate as he gave to any of his own children, is fatally defective in not alleging, how much he did give to his own children. *Smith v. Walker*, 1 Wash. 135.

#### **Married Women.**

See the title **HUSBAND AND WIFE**, vol. 7, p. 178, and references given.

#### **Marshal.**

See the titles **MUNICIPAL CORPORATIONS; SHERIFFS AND CONSTABLES; UNITED STATES**.

# MARSHALING ASSETS AND SECURITIES.

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#### CROSS REFERENCES.

See the titles EXECUTORS AND ADMINISTRATORS, vol. 5, p. 483; JUDGMENTS AND DECREES, vol. 8, p. 161; PARTNERSHIP; VENDOR AND PURCHASER.

## I. Compelling Election between Securities.

### A. DEFINITION.

"To marshal assets, in the sense of the courts of equity, is to make such arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens or other claims of particular persons to prior satisfaction out of a portion of these funds." 4 Min. Inst. (3d Ed.) 1361.

### B. STATEMENT OF GENERAL RULE.

The rule as to marshaling assets is that if one party has a lien on or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties; provided always this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund. *Russell v. Randolph*, 26 Gratt. 705; *Vance v. Monroe*, 4 Gratt. 52; *Jones v. Phelan*, 20 Gratt. 229; *Schultz v. Hansbrough*, 33 Gratt. 567, 582; *Hudson v. Dismukes*, 77 Va. 242; *Watkins v. Dupuy*, 87 Va. 87, 12 S. E. 294; *Stephenson v. Taverners*, 9 Gratt. 398; *Tennent v. Pattons*, 6 Leigh 196, 212; *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798; *McCrum v. Lee*, 38 W. Va. 583, 18 S. E. 757; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242; *Wiley v. Mahood*, 10 W. Va. 207; *Alston v. Munford*, 1 Brock. 266; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Kyger v. Sipe*, 89 Va. 507, 512, 16 S. E. 627; *Blakemore v. Wise*, 95 Va. 269, 272, 28 S. E. 332; *Strange v. Strange*, 76 Va. 240, 244; *Straus v. Kerngood*, 21 Gratt. 584.

The general rule, undoubtedly, is that where a creditor has a lien on two

funds for the payment of his debt, and a subsequent creditor has a lien on one of them only for another debt, the former will be compelled to resort in the first instance for satisfaction to the fund not common to both; or, if he has already been paid out of the doubly-charged fund, the subsequent creditor will be substituted pro tanto to his rights as against the other fund. *Rixey v. Pearre*, 89 Va. 113, 114, 15 S. E. 498.

A court of equity, in a proper case, will compel a creditor having a lien on two parcels of property so to enforce it as not to injure the rights of him who has a lien on but one of them. *Aldrich v. Cooper*, 2 White & T. Lead. Cas. Eq. (4th Ed.), pt. 1, p. 255; *Stephenson v. Taverners*, 9 Gratt. 398; *Alston v. Munford*, 1 Brock. 266; *Wiley v. Mahood*, 10 W. Va. 207; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242; 2 Bart. Ch. Pr. § 278; 1 Bart. Ch. Pr. § 92. *McCrum v. Lee*, 38 W. Va. 583, 18 S. E. 757, 761.

In *Russell v. Randolph*, 26 Gratt. 705, 718, the court said: "This is a familiar doctrine of the equity courts; the rule being that if one party has a lien or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties; provided, always, this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund. In such cases, the equity of the creditor having but one fund, is not against the double creditor, but only against the common debtor; that the accidental resort of the paramount creditor to the double fund shall not enable the debtor to get back the second fund discharged of both debts. When, therefore, the paramount creditor is satisfied out of the doubly charged fund, the other creditor has

a right of substitution to all his rights against the remaining fund. 1 Story's Eq. Jur., § 633; Adam's Eq., mar. 272; Vance v. Monroe, 4 Gratt. 52; Jones v. Phelan, 20 Gratt. 229."

In *Watkins v. Dupuy*, 87 Va. 87, 92, 13 S. E. 294, it is said: "It is undeniable that, under the established doctrine of 'marshaling assets,' it is the rule that where one debt is payable out of only one fund, and another is payable out of two, to pay first out of the fund in hand that debt which can not be satisfied from any other source. 1 Pom. Eq. Jur., § 396; Vance v. Monroe, 4 Gratt. 52; Russell v. Randolph, 26 Gratt. 705, 718; Jones v. Phelan, 20 Gratt. 229; Seldon on Subrogation, §§ 61, 62."

"And when, before any action has been taken, a court of equity is called upon to act with all the parties before it, it will enforce the principle that when a creditor has a lien on two funds for the same debt, and another creditor has a subsequent lien on one of the funds only, equity will require the former to resort, in the first instance, to the fund upon which the subsequent creditor has no lien. Citations above. 3 Pom. Eq. Jur., § 1414; 1 Story, Eq. Jur., § 633; Kanawha Valley Bank v. Wilson, 25 W. Va. 242." *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798.

#### **Rights of Subsequent Lien Creditors.**

—And this is true, even though in its consequences harm results to another creditor having a lien on the property later in date. *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798.

**This doctrine is founded on the maxim:** "Sic utere tuo ut non lædas alienum." The general principle is: If A hath lien on two funds, and B hath lien on only one, A must first resort to the fund whereon B hath no lien, if such course be necessary to satisfy both liens. *Hudson v. Disbukes*, 77 Va. 242, followed in *Kyger v. Sipe*, 89 Va. 507, 512, 16 S. E. 627.

The rule, founded as it is, not upon a contract, but upon principles of equity

and benevolence, or, as is sometimes said, upon the maxim sic utere tuo ut alienum non lædas, will never be so applied as to unduly delay or inconvenience the prior creditor, or to prejudice the rights of third persons. *Rixey v. Pearre*, 89 Va. 113, 115, 15 S. E. 498.

**Doctrine Much Favored.**—This doctrine of marshaling assets is a long-settled favorite, and highly cherished branch of equitable jurisdiction. It is founded on the best and purest principles, and productive of that even-handed justice, which, to the greatest practicable extent, enforces the maxim *sum cuique tribuito*. *Tennent v. Pattons*, 6 Leigh 196.

#### **C. SPECIFIC APPLICATIONS OF RULE.**

Where D. had a lien on one of two tracts of land, and K. a posterior lien on only one of them, and P. a still later lien on the other, it was held, that if the parties are all before the court, and the subject of the encumbrances fully under his control, that K. or his trustee has the right to require that the D. debt should be paid by the tract on which D., as between himself and K., had the exclusive lien, and which was more than sufficient for the purpose, and leave the other tract to be applied to K.'s lien. *Rhea v. Preston*, 75 Va. 757.

**Mortgage Creditors.**—"If A has a mortgage on two tracts of land for the same debt, and B has a mortgage on but one of the tracts for another debt. B has a right in equity to require A to have recourse in the first instance to the tract that B can not touch, at least when it will not prejudice A's rights nor improperly impair his remedies." 4 Min. Inst. (3d Ed.) 1362.

If A has two mortgages, and B has one of the same subjects mortgaged to him, B will be aided by equity, in throwing A upon that subject which B can not touch. *Tennent v. Pattons*, 6 Leigh 196.

M. and J. are bound as sureties for

E. who conveys slaves to a trustee to indemnify them, and to secure divers other debts; and judgment against E., the principal, and M. and J., the sureties, and judgments against E. for all other debts so secured, are recovered at the same time; after which the trustee appoints J., one of the cestuis que trust, his agent to carry the trust slaves to a southwestern market, and E., the mortgagor, accompanies him, carrying out three other slaves; J. and E. cooperate in selling the trust slaves, and E. sells the other three slaves for a gross sum of \$12,325 for both parcels of slaves, and bring back a bill of exchange for \$2,000, and \$10,325 in money. The trustee receives the bill of exchange from E. and makes efforts to get it cashed, but, the acceptors having failed, without success, and sends it to an attorney for collection; of the \$10,325, he, with the acquiescence of M. and J., permits E. to retain \$1,000, and receives \$9,325, out of which, with the acquiescence of M. and J., he pays no dividend to them or to the creditor to whom they are sureties, but applies the whole to the other debts secured by the mortgage; and after all these transactions, E. by deed of trust conveys his land to indemnify K., another surety for him, and the trustee sells the land under this deed, and K. becomes the purchaser; held, that M. and J. being entitled to indemnity under a mortgage of slaves and to a lien by judgment on E.'s land, and K. having only a mortgage on the land, equity would compel the former to take satisfaction out of the mortgage of slaves, if that fund were equally certain and available, and leave the land for K.'s indemnification; but as it was uncertain when the bill of exchange for \$2,000 would be collected, or whether it could be collected at all, the court will give M. and J. the benefit of their lien on the land, leaving K. to be subrogated to the benefit of the bill of exchange. *Kent v. Matthews*, 12 Leigh 573.

**Deed of Trust Creditors.**—"There can be no question that a deed of trust creditor is an alienee for value, and entitled to have prior judgment lienors enforce their judgments against lands unaliened at the date of such trust, even against subsequent trust creditor under § 8, ch. 139, Code. This is also the settled law of subrogation, that a trust creditor may require a judgment lienor to resort to lands of the debtor not subject to such trust even though such lands are subject to subsequent trust liens. *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798; *Woods v. Douglas*, 46 W. Va. 657, 33 S. E. 771." *First Nat. Bank v. Simms*, 49 W. Va. 442, 444, 38 S. E. 525.

M. sells S. a tract of land, for the purchase money of which he takes three bonds payable in one, two and three years, and he takes a deed of trust on the land to secure the same. When the first bond becomes due he sues thereon and obtains a judgment, on which execution is issued on the property of S., who obtains an injunction thereto, which is afterwards dissolved. M. then brings an action on the injunction bond against S. and his surety, V.; and pending the suit, the land is sold under the deed of trust, and purchased at a price not quite sufficient to discharge the two last bonds for the purchase money, which were then due. After the sale, the defendants to the suit on the injunction bond insist that the proceeds of the sale of the land should be first applied to satisfy the judgment obtained on the first bond. Held, the proceeds of the sale are to be applied to the discharge of the two last bonds, leaving the judgment on the first bond in full force. *Vance v. Monroe*, 4 Gratt. 52, cited in *Russell v. Randolph*, 26 Gratt. 705, 718.

In March, 1871, R. executed a declaration of homestead, which embraced all his personal property; and on the 10th of August, 1871, he conveyed this property to P. in trust for his wife and children. In January,



1874, J. having purchased D.'s judgment, he filed a bill against R. and his wife and children and P., in a state court, to subject this personal property to satisfy this judgment; and in April, 1874, there was a decree in the bankrupt court, by which the proceeds of C.'s land was distributed among the assignees of his bonds, it not being enough to satisfy J. And it being suggested to the court, that beside the small tract of land aforesaid, there was personal property of R., which might be subjected to pay the said judgment, which was sufficient for that purpose, it was decreed that no part of the proceeds of C.'s land should be applied to pay the judgment of D. It was held, that as holder of the bond, J. had but one fund upon which he can rely for payment, whilst D. has two funds for the satisfaction of his judgment, the land and the personal property embraced in the deed of homestead and deed of trust. And a court of equity will marshal the assets, and compel D. to exhaust the fund upon which J. had no claim, that J. may appropriate the only fund within his reach. *Russell v. Randolph*, 26 Gratt. 705.

**Assignees.**—"The prior incumbrancer had a lien on the whole property. The assignees had a lien on two-thirds of it, and the property was insufficient to satisfy both liens. In this state of things a court of equity, on the familiar principle of marshaling securities, would charge the prior incumbrance first upon the third of the property on which the assignees had no lien, and then upon the other two-thirds; so that the property left, after satisfying the prior incumbrance, would be property on which the assignees had a lien and would be applicable to its discharge." *Schofield v. Cox*, 8 Gratt. 533, 536.

**Judgment Creditors.**—"Eichelberger has lands, other than the 'Federal Hill' tract, upon which all those judgments are existing liens; and the judgment

lienors thus having two funds to which they may resort, whilst Baugher has but one, so far as his trust liens are concerned, it may be right that the prior judgment lienors should first be made to seek satisfaction of their claims out of the other lands of Eichelberger, so as to enable Baugher to have satisfaction of his trust debts out of the only fund he has a lien on, viz.; the 'Federal Hill' tract. *Conrad v. Harrison*, 3 Leigh 532; *Lewis v. Caperton*, 8 Gratt. 148." *Baugher v. Eichelberger*, 11 W. Va. 217, 226.

**Lessor's Lien for Rent.**—G. is tenant of a house and lot leased of S., and he gives a deed of trust on a part of the personal property in the house, to secure a debt to P., which is recorded. He afterwards gives another deed of trust on all the property in the house, to secure a debt to J. S. distrains for a year's rent upon the property embraced in the deed to secure P. By consent of all the parties, all the property conveyed in the deeds is sold, and after paying the rent there is a balance left. It was held, that S. is entitled to be paid first his year's rent, out of the proceeds of the whole property, if necessary; but the proceeds of the property not embraced in P.'s deed is to be applied first to pay S. "Are not the lessors bound to resort, for the payment of the rent due to them, first to that part of the property on which they have a lien which is not included in the deed of trust, before they can resort to that part which is so included? To state the case is to answer the question. None of the rights or remedies of the lessors can be taken away or impaired; but they must be so used as not to injure the rights of others." *Jones v. Phelan*, 20 Gratt. 229.

**Vendor's Lien Creditor.**—K. sold and conveyed to T. a tract of land, reserving a lien for the payment of the purchase money. Afterwards, and on same day, T. executed two deeds of trust to secure the payment of two

certain debts to D., in one of which deeds the tract purchased from K. is conveyed to secure one debt, K. uniting in this deed, and in the other deed a tract called the "Mill Tract," to secure the other debt. Subsequently to these deeds, T. executed another trust deed to secure a debt to P., conveying the said "Mill Tract" and other tracts of land. Held, that K had the right to require that the debt to D. shall be paid by the "Mill Tract" on which D., as between himself and K., has the exclusive lien, and leave the other tract to be applied to K.'s lien; and K.'s equity in this respect is prior and paramount to that of P. to have the "Mill Tract" on which his lien rested exonerated from the D. debt for his benefit. *Rhea v. Preston*, 75 Va. 757.

#### D. CONDITIONS PRECEDENT.

##### 1. Both Funds Must Be Available.

The doctrine of marshaling securities can have no application, where one of the funds is not a substantial, available security to the paramount creditor, but is merely nominal and valueless, as where there is an assignment of a chose secured by a deed of trust, but the trust deed at the time this doctrine is invoked is no longer an available security, but the assignment is the only security. *Sandidge v. Graves*, 1 Pat. & H. 101.

##### 2. Both Funds Must Belong to Common Debtor.

To invoke the doctrine of marshaling securities both sources of payment must belong to the common debtor. The equity is not invoked against the doubly secured creditor, but against the common debtor, and can not be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice, of the creditor entitled to the double fund. *Blakemore v. Wise*, 95 Va. 269, 272, 28 S. E. 332; *Russell v. Randolph*, 26 Gratt. 705, 718. See 3 Va. Law Reg.

744; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498.

A court of equity will not marshal securities unless there is a common debtor, and not then if it would operate to the injury of a party against whom it is invoked. *Peery v. Elliott*, 101 Va. 709, 44 S. E. 919, citing *Russell v. Randolph*, 26 Gratt. 705, 717; *Blakemore v. Wise*, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781.

"In *Ex parte Kendall*, Lord Eldon clearly stated the doctrine thus: If A, he said, has a right to go upon two funds, and B upon one, having both the same debtor, and the funds are the property of the same person, A shall take payment from that fund to which he can resort exclusively, so that both may be paid. But it was never said that if I have a demand against A and B, a creditor of B shall compel me to go against A without more. If I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded in some equity giving B, for his own sake, as if he was a surety, etc., a right to compel me to seek payment of A. It must be established that it is just and equitable that A ought to pay in the first instance, or there is no equity to compel a man to go against A, who has resort to both funds." Quoted in *Rixey v. Pearre*, 89 Va. 113, 115, 15 S. E. 498.

**Social and Individual Assets.**—In order for a creditor who has a lien upon one fund to be entitled to substitution to the right of a creditor who has a lien upon that and another fund, it is a necessary condition, among other things, that both funds upon which the prior creditor's claim is secured should be the property of the same debtor, and this condition does not exist where the assets of a partnership constitute one of the funds, and the individual property of a member of the partnership constitutes the other fund, unless that partner has, in equity, become en-

titled to the partnership assets and become primarily liable for the partnership debts. *Guggenheimer v. Martin*, 93 Va. 634, 25 S. E. 881; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498.

### 3. Singly Charged Creditor Must Have Lien.

Before the singly charged creditor can invoke this doctrine, or complain of acts of the doubly charged creditor to his prejudice, he must have acquired a lien. *Kent v. Matthews*, 12 Leigh 573.

## E. RIGHTS AND LIABILITIES OF PARAMOUNT CREDITOR.

### 1. Rights of Paramount Creditor.

**In General.**—A creditor having two different securities, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. *Carter v. Hampton*, 77 Va. 631, citing *Asberry v. Asberry*, 33 Gratt. 463.

A creditor having two distinct liens on separate subjects, as deed of trust and judgment for the same debt, but binding different properties, may proceed upon both at the same time, although he is entitled to but one satisfaction. Under some circumstances, however, as where several creditors' bills are filed to subject the same property, a court of equity may stay proceedings in one or more suits and require them to be heard with another having priority in time and right. *Miller v. Byers*, 99 Va. 163, 37 S. E. 782, citing *Asberry v. Asberry*, 33 Gratt. 463, 472.

R., as administrator of J., brought an action against B., who was insolvent, and his sureties in his official bond to recover the amount due from B., and this action was pending when the decree was made in the case in equity. Held, a creditor having two different remedies, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satis-

faction. And the administrator of J. can not be delayed by a protracted controversy with the sureties of the guardian; he has his right of action against the party who has concurred in the breach of trust committed by the guardian, and therefore incurs the like liability. *Asberry v. Asberry*, 33 Gratt. 463.

### Must Not Prejudice Rights of Paramount Creditor.

**In General.**—The rule that when a creditor has a lien on two funds, and another creditor has a subsequent lien on one of the funds only, equity will require the former to resort, in the first instance, to the fund upon which the subsequent creditor has no lien, for the satisfaction of his debt, is subject to the qualification that such course must appear to be necessary for the payment and satisfaction of both debts, and must not operate to prejudice the rights of the first creditor to the double fund. Neither must there be any unreasonable doubt of the sufficiency of the one fund to satisfy the debt of the first creditor. *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22; *Schultz v. Hansbrough*, 33 Gratt. 567, 582; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Miller v. Holland*, 84 Va. 652, 5 S. E. 701; *Kent v. Matthews*, 12 Leigh 573; *Hudson v. Dismukes*, 77 Va. 242; *Peery v. Elliott*, 101 Va. 709, 44 S. E. 919.

"Where creditor has a lien on two funds, and subsequent creditor has a lien on one of them, former will be required to resort first to the fund not common to both; or, if he has already been paid out of the doubly-charged fund, subsequent creditor will be substituted pro tanto to the other fund; but this rule will never be so applied as to unduly delay the prior creditor, or to the prejudice of third persons; and they must both be creditors of the same debtor, and the funds must belong to the same person. *Miller v. Holland*, 84 Va. 652, 5 S. E. 701."

*Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498.

The equity of marshaling securities is not invoked against the doubly secured creditor, but against the common debtor, and can not be invoked against the common debtor where it would trench upon the rights, or operate to the prejudice, of the doubly secured creditor. *Blakemore v. Wise*, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781.

The creditor who has a lien on or interest in the two funds, can only object to being compelled to resort to the singly charged fund, upon showing that such a course would operate to his prejudice. *Russell v. Randolph*, 26 Gratt. 705.

**Additional Risk, Injury or Delay.**—In *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501, the court said: "In *Schultz v. Hansbrough*, 33 Gratt. 567, Judge Burks, speaking for the court, said: 'It is a rule in equity, said to be well established in this country, that where one has a lien upon two funds, and another a posterior lien upon only one of them, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for the deficiency'; though the rule," he added, "is generally applied only in cases where to compel a resort to the single charged fund would not be productive of additional risk or injury to the double creditor."

Where a creditor can resort to two funds for payment, while another creditor can resort to but one of them, the first creditor can not be delayed in enforcing his debt, but may resort to the fund most easily accessible, and the other creditor who has been prevented from resorting to that fund must take his place as to the other. *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

**Principal Debtor Insolvent.**—Where a vendor's lien is retained to secure the payment of several bonds given for the

purchase money of lands, and a judgment is obtained at law by the assignee of one of those bonds against the principal on the bond and his surety, the surety can not come into a court of equity and compel such assignee to exhaust his vendor's lien before enforcing the collection of his judgment by execution against the surety, although it is shown that the principal debtor is insolvent. *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. 257.

**Illustrative Cases.**—In March, 1871, R. executed a declaration of homestead, which embraced all his personal property; and on the 10th of August, 1871, he conveyed this property to P. in trust for his wife and children. In January, 1874, J., having purchased D.'s judgment, he filed a bill against R. and his wife and children and P., in a state court, to subject this personal property to satisfy this judgment; and in April, 1874, there was a decree in the bankrupt court, by which the proceeds of C.'s land was distributed among the assignees of his bonds, it not being enough to satisfy J. And it being suggested to the court, that beside the small tract of land aforesaid, there was personal property of R., which might be subjected to pay the said judgment, which was sufficient for that purpose, it was decreed that no part of the proceeds of C.'s land should be applied to pay the judgment of D. It was held, that D. is the only person who can complain of being required to resort to R.'s personal estate to the relief of the land fund, and that only upon showing that such a course would operate to his prejudice. And if D. did show this, J. might satisfy his judgment and stand in his place. In this case he has done better by taking an assignment of the judgment. Clothed with the rights and remedies of D., J. may properly proceed against the property of R. to satisfy R.'s debt, and against the land of C. to satisfy the debt chargeable upon it. *Russell v. Randolph*, 26 Gratt. 705.

Held, also, J. being the assignee of R. of one of the bonds given for the purchase money of the land, and thus a creditor of C., and having a lien on the land to secure the bond, he has all the equities of C. against R., and also an equity against R. as assignor of the bond. *Russell v. Randolph*, 26 Gratt. 705.

A commissioner appointed to sell land under an order of court for the payment of the debts of a deceased person, made the sale and received one-third of the purchase money, but failed to give the required bond. He was ordered, upon confirmation of the sale, to pay from the funds reported in his hands certain debts of the deceased. This he failed to do, and, after the docketing of the decree against him, he conveyed his own land in trust for a creditor of his own. The court held, that the rights of the parties to the decree were paramount to those of such creditor, and that the latter, moreover, had no claim to be subrogated to the rights of the creditors of the deceased against the purchaser at the sale, he having no equity superior to theirs. *Lee v. Swepson*, 76 Va. 173.

A partner grants his individual property in trust to secure a debt of his firm to a bank. Afterwards the firm grants its assets to secure its debts, including the bank debt, that was preferred. The firm assets were applied to satisfy the bank debt. The firm creditors petitioned to be substituted to the lien of the bank on the individual property aforesaid. Held, they were not entitled to such substitution, to the prejudice of the individual creditors. *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498.

W. owed H. \$1,055, and executed a deed of trust to secure it; at about the same time W. owed C. & X. \$1,600, and also held a chose in action against H. for that amount, which he assigned to C. & X. to secure them. In W.'s

name they sued H. for this amount, and recovered judgment, and sued out execution. H. thereupon filed a bill of injunction, alleging the insolvency of W., and tendered to C. & X. the difference between \$1,600 and the \$1,055, and prayed that the plaintiffs in the execution, after this set-off was made, might be perpetually enjoined. The defendants, C. & X., answered the bill, resisted the set-off, and showed that W. had executed a deed of trust to secure H. the \$1,055, and that W. was insolvent, and prayed, if the set-off was allowed, to be subrogated to the rights of H. in the deed of trust. The court perpetuated the injunction, but did not decree the subrogation asked. On appeal, held, the set-off was properly allowed, because H. could not be delayed in the collection of his debt. *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

## 2. Liabilities of Paramount Creditor.

### Release of Doubly Charged Security.

—If a prior judgment lienor releases the property subject to a second deed of trust, the proceeds of which are amply sufficient to satisfy his judgment lien, he can not enforce payment of such judgment lien out of the property subject to a first deed of trust until such latter trust is fully satisfied. *First Nat. Bank v. Simms*, 49 W. Va. 442, 38 S. E. 525.

Thus where a defendant sold a mill and took a mortgage on the mill and also on the purchaser's land which latter mortgage was more than enough to pay his debt, and afterwards the purchaser gives a deed of trust on the mill, whereupon the defendant comes in the nighttime and ships the mill beyond the jurisdiction of the court, selling it for a small amount, it was held that, since the defendant deprived the trust creditors of the right to have the securities marshaled, a court of equity properly rendered judgment against such defendant for the difference between the amount for which the mill

sold and what it would have brought if undisturbed. *McCrum v. Lee*, 38 W. Va. 583, 18 S. E. 757.

If a judgment creditor has as such a lien covering the debtor's lands and also certain lands which the debtor has sold, such creditor may release the land so sold without impairing his right to assert his judgment lien against all the other lands of the debtor, though at the date of such release junior judgment liens existed against the judgment debtor. The junior judgment creditors have no right to complain of such release, though when it was made the lands released had not been fully paid for, and the judgment creditor did not insist that the balance of the purchase price be paid toward the satisfaction of his judgment or of the judgments in favor of the junior creditors. *Blakemore v. Wise*, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781.

M. and J. are bound as sureties for E. who conveys slaves to a trustee to indemnify them, and to secure divers other debts; and judgment against E. the principal and M. and J. the sureties, and judgments against E. for all other debts so secured, are recovered at the same time; after which the trustee appoints J. one of the cestuis que trust, his agent to carry the trust slaves to a southwestern market, and E. the mortgagor accompanies him, carrying out three other slaves; J. and E. co-operate in selling the trust slaves, and E. sells the other three slaves, for a gross sum of \$12,325 for both parcels of slaves, and bring back a bill of exchange for \$2,000, and \$10,325 in money; the trustee receives the bill of exchange from E. and makes efforts to get it cashed, but, the acceptors having failed, without success, and sends it to an attorney for collection; of the \$10,325, he, with the acquiescence of M. and J., permits E. to retain \$1000, and receives \$9,325, out of which, with the acquiescence of M. and J. he pays no dividend to them or to the creditor to whom they are sure-

ties, but applies the whole to the other debts secured by the mortgage; and after all these transactions, E. by deed of trust conveys his land to indemnify K. another surety for him, and the trustee sells the land under this deed, and K. becomes the purchaser. Held, that, as to the \$1,000 which was retained by E. out of the proceeds of sales of the trust slaves, and as to the application of the whole money received by the trustee, to the payment of other debts, without paying any dividend to M. and J. or to the creditor to whom they were sureties; as K. had no lien on E.'s land at that time, if the parties claiming under the mortgage of the slaves had wasted the whole fund, or released the mortgage, that would not have prevented them from resorting to the lien on the land for satisfaction, K. having then no lien with which their proceedings interfered. *Kent v. Matthews*, 12 Leigh 573.

**Laches, Forbearance or Neglect of Senior Creditor.**—It seems that mere laches, forbearance, or neglect, on the part of the senior creditor, to enforce his lien against one of the two funds on which his debt is charged, without any fraudulent combination with the debtor to defeat his creditors, will not operate pro tanto as a release of the doubly charged fund from the lien of the paramount incumbrance. *Sandidge v. Graves*, 1 Pat. & H. 101.

## F. ENFORCEMENT AGAINST INNOCENT THIRD PARTIES.

### 1. In General.

Marshaling will not be enforced to the prejudice of a third party. As subrogation is an equity, it will not be enforced where the effect will be to prejudice or impair the rights of third persons, it being well settled that where both parties have an equal claim to the consideration of a chancellor, the law will be suffered to take its course. *McClaskey v. O'Brien*, 16 W. Va. 791, 792; *Hall v. Hyer*, 48 W. Va. 353, 37

S. E. 594; *Lee v. Swepson*, 76 Va. 173; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Miller v. Holland*, 84 Va. 652, 5 S. E. 701; *McCrum v. Lee*, 38 W. Va. 583, 18 S. E. 757; *Marshall v. Hall*, 51 W. Va. 569, 42 S. E. 641.

As was said by this court in *Lee v. Swepson*, 76 Va. 173: "One thing is very clear—that securities will never be marshaled to the injury of those persons over whom the party claiming the benefit of the principle has no superior equity." *Peery v. Elliott*, 101 Va. 709, 713, 44 S. E. 919.

**Right Indefeasible by Subsequent Parties.**—"Though it is broadly stated that marshaling will not be enforced to the prejudice of third parties, yet that statement is too broad, for it seems that, when once the right of a creditor having a lien on one property to compel another creditor having a lien on two properties to subject, in the first instance, the property on which the junior creditor has no lien, exists, it is good against a third subsequent lienor, though not against one antedating the one who asks the marshaling, because he had this right when the third party's right began." Note by Brannon, J. *Woods v. Douglas*, 46 W. Va. 657, 33 S. E. 771; 2 Beach. Mod. Eq. Jur., sec. 785, say this is the general rule.

"It is contended by counsel for appellant that the court erred in not compelling Stuart, Adm'r, Markey, and the Merchants' National Bank to resort to the real estate of A. C. Holmes and J. W. Hammond for the payment of their debts, because they had liens upon two funds, while Foley, Blair and Stinespring had liens only upon the real estate of the Ruleys, and, first, upon the social property of the firm, it appears that the liability of Holmes was that of surety for F. R. Ruley & Bro. This court held in *McClaskey v. O'Brien* and *Hart v. O'Brien*, 16 W. Va. 791, that "Marshaling should not be enforced to the prejudice of a third party. As subrogation is in equity, it will not

be enforced when the effect will be to prejudice or impair the rights of third persons, it being well settled that where both parties have an equal claim to the consideration of a chancellor, the law will be suffered to take its course." The right of a creditor who has the power to resort to one of two funds to compel another creditor who has a lien upon both to resort to the other fund is a mere equity. The right of a surety to be subrogated to the lien of the creditor against his principal is also an equity and one of at least equal dignity with the other. The court did not err in exempting from sale the property of Holmes, if it was right in giving preference over the claim of Foley to the debts for which Holmes was bound as surety, which is the subject of the next inquiry." *Foley v. Ruley*, 50 W. Va. 158, 166, 40 S. E. 382.

Where a deed of trust to secure a husband's individual indebtedness binds the property of both wife and husband, a court of equity will protect the interest of the wife as surety for her husband, and will compel a sale and application of the husband's interest or property first, if the same can be done without substantially prejudicing the rights of the trust creditor. *Hall v. Hyer*, 48 W. Va. 353, 37 S. E. 594, citing *McClaskey v. O'Brien*, 16 W. Va. 791.

## 2. Bona Fide Purchasers.

The equity of a judgment creditor to marshal the assets, as a means of obtaining payment out of a fund that is not subject to the lien of a judgment, will not be enforced against a bona fide purchaser, unless the equity springs out of some contract between the purchaser and vendor. *McClaskey v. O'Brien*, 16 W. Va. 791; *Withers v. Carter*, 4 Gratt. 407; *Schultz v. Hansbrough*, 33 Gratt. 567, 582.

This equity has no existence, as against a bona fide purchaser, in favor of a creditor who has no lien on the

land sold, unless such equity springs out of some special provisions of the contract between the purchaser and the vendor. In the absence of stipulations to the contrary, the purchaser of a clear title has the right to require his vendor, to remove all encumbrances from the land, and this equity is prior and paramount to the equity of any creditor acquiring a subsequent lien on other lands of the vendor to have the securities marshaled for his relief against the purchaser. *Schultz v. Hansbrough*, 33 Gratt. 567, 582.

But where the purchaser buys subject to an existing encumbrance, or undertakes to pay it off in satisfaction of the purchase money due his vendor, the case is very different. He thus becomes the principal debtor and as between himself and the vendor at least, he is primarily bound to discharge the encumbrance, and the vendor having a right as against him to require the obligation to be performed, the subsequent encumbrancer is entitled to stand in the vendor's shoes and have his equities administered for his relief. *Schultz v. Hansbrough*, 33 Gratt. 567, 582.

A mortgagee of land and slaves, can not be compelled to resort to a sale of the slaves before he shall disturb the possession of bona fide purchasers of the lands from the mortgagor; but the decree against such purchasers ought to permit them, after satisfying the claim of the mortgage, to seek indemnity out of the mortgaged slaves, or the estate of the mortgagor, or any other person liable to such demand, so far as the mortgagee might be able to charge such party, or otherwise. *Mayo v. Tomkies*, 6 Munf. 520.

**Purchasers with Notice of Equitable Lien of Vendor.**—The doctrine of the English cases was that the equitable rule which says, that he who has two securities shall not so use them, as to defeat him who has but one, does not extend to the equitable lien of the vendor for unpaid purchase money;

but even this doctrine is strongly shaken by the late English decisions, especially by Lord Eldon, in the great case of *M'Kreth v. Simmonds*, 15 Vesey 329. *Tompkins v. Mitchell*, 2 Rand. 428.

Where one of two joint purchasers of real property, who have given their notes for the payment of the purchase money, becomes insolvent, and the other pays more than his moiety of the purchase money, such latter party has a lien on the property to reimburse him for all that he has paid above one moiety of the purchase money, in preference to the creditors of the insolvent debtor claiming under a deed of trust from him, unless they appear to be purchasers without notice. *Tompkins v. Mitchell*, 2 Rand. 428.

#### G. MARSHALING IN RESPECT TO HOMESTEAD.

Where homestead has been set apart, and there is not sufficient property unexempt to pay the debts, all creditors must share ratably in such property, and then those creditors as to whom homestead is waived are entitled to satisfaction out of the homestead for the balance of their debts unpaid. *Scott v. Cheatham*, 78 Va. 82; *Strange v. Strange*, 76 Va. 240; *Russell v. Randolph*, 26 Gratt. 705, disapproved.

"After the homestead has been set apart, the residue of the estate should be applied to the payments of the debts ratably, and after this residue has been exhausted, the exempted property may be subjected to the payments of such portions of the debts entitled to the benefit of the waiver as remain unpaid." *Hatorff v. Wellford*, 27 Gratt. 356; *Strange v. Strange*, 76 Va. 240. *Scott v. Cheatham*, 78 Va. 82.

After the exempted property has been set apart, the residue shall be applied towards paying all the decedent's debts ratably (unless there be some entitled to priority under Va. Code, 1873, ch. 126, § 25), and after the residue has been exhausted the ex-



empted property may be subjected to pay such portions of the homestead-waived debts as remain unpaid. *Strange v. Strange*, 76 Va. 240.

Decedent's entire estate may be subjected to a homestead-waived debt, but the portion not embraced in the homestead deed shall be first subjected. Va. Code, 1873, ch. 183, § 3. *Strange v. Strange*, 76 Va. 240.

"Creditors holding claims with waiver of the benefit of exemption are clearly entitled to resort to the whole estate of the decedent for satisfaction, but the statute (Code of 1873, ch. 183, § 3), provides that 'when such (the) debtor or contractor is possessed of other estate than that which he may be entitled to hold exempt from liability \* \* \*, then such other estate shall be subjected and exhausted before that which the said debtor or contractor may be entitled to hold as exempt is sold.' After the homestead and exempted personal property have been set apart, the residue of the estate should be applied towards the payment of all the decedent's debts ratably (unless there be some entitled to priority under the statute, Code of 1873, ch. 126, § 25, in which case the priority must be respected), and after this residue has been exhausted, the exempted property may be subjected to the payment of such portion of the debts entitled to the benefit of waiver as remain unpaid. This is the construction given to the statute, and, we think, correctly, by Chancellor Fitzhugh, in *Breeden, for, etc., v. McMinn's Adm'r and others*, 5 Va. Law Journal, 771, cited in argument." *Strange v. Strange*, 76 Va. 240, 244.

#### H. AS BETWEEN PARTIES TO NEGOTIABLE PAPER.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 463.

Upon a bill by a judgment creditor to subject the lands of his debtors to satisfy a judgment obtained against them as the maker and endorser of a note, whose liability inter sese are suc-

cessive, it is error to decree a sale of the lands of the last endorser before resorting to the lands of the maker and prior endorser of such note, unless to require the plaintiff to exhaust the estate of those debtors, whose liability is prior to the last endorser, will in the opinion of the court unduly delay the plaintiff in the collection of his debt. *Shenandoah Val. Nat. Bank v. Bates*, 20 W. Va. 210, citing *Mayo v. Tompkins*, 6 Munf. 520; *Horton v. Bond*, 28 Gratt. 815.

### I. PLEADING AND PRACTICE.

#### 1. Jurisdiction.

W., administrator of G., assigns the bond of T. to the executors of H., in discharge of a debt due from G. to H. The executors of H. sue T., and recover a judgment upon the bond; and he thereupon enjoins it on the ground that G. was indebted to him for a legacy left by R., of whom G. had been executor. And this injunction is afterwards perpetuated. Ten years after the perpetuation of the injunction, the second administrator de bonis non of G. entered into an agreement under seal, with the executors of H., to pay the debt out of the assets of G.'s estate, when they should be received; and the executors agreed to wait with him twelve months, and to release their costs in the injunction suit, and dismiss it as far as they were concerned. But the administrator was not to be bound personally; and the executors were at liberty, if the money was not paid at the end of the year, to cancel the agreement, and proceed to enforce any of their existing legal remedies. The administrator did not collect assets within the year; and the executors afterwards sued upon this agreement. Held, that it was proper to sue in equity to have an account of or marshaling of assets; and this especially as the agreement being under seal, it was doubtful whether an action at law could be maintained upon it. *Braxton v. Harrison*, 11 Gratt. 30.

L, P & Co. late partners are in-

debted to B, and it is agreed that P shall take a tract of land belonging to the partners, and pay B, and the title is conveyed to B to be held until P pays him. B makes a lease to P of the land, reserving a rent payable in two, four, and six years, which amounts to his debt, with right of distress, and re-entry. After the first rent falls due, B distrains upon slaves and other property on the land, belonging to P, but which P had mortgaged to H, to secure a debt due him, before the agreement between the partners and P and B. H then files a bill against B and P to restrain the sale of the slaves, etc., under B's distress, and to have them applied to the payment of his debt; and charges a fraudulent combination between B and P to shelter P's property from his creditors, and to deprive H of his security, and that the land is sufficient to pay P's debt to B. Pending the suit, the slaves, etc., are sold on the motion of B, and the proceeds are put into the hands of a receiver; and afterwards B objects to the jurisdiction of the court. Held, the bill charging that the land on which he had an exclusive lien was sufficient to pay P's debt to B, on the principle of marshaling assets, a court of equity had jurisdiction of the case. *Henley v. Perkins*, 6 Gratt. 615.

## 2. Methods of Enforcing Right.

### a. By Subrogation.

A creditor who has two funds open to him, while another has but one, can not take the latter fund without placing that one exclusively within his reach at the disposal of the creditor whom he has deprived of the means of payment. If he refuses or neglects to fulfill this duty, equity will decree subrogation. *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600; *Alston v. Munford*, 1 Brock. 266, Fed. Cas. No. 267; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Kent v. Matthews*, 12 Leigh 573; *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798.

"It being the object of a court of equity, that every claimant upon the assets of a deceased person, shall be satisfied, as far as such assets can, by any arrangement, consistent with the nature of the respective claims, be applied in satisfaction thereof, it has long been settled, that where one claimant has two funds to resort to, and another only one, the first shall resort to that fund on which the second has no lien; or the second shall be pro tanto substituted to this last fund." *Tennent v. Pattons*, 6 Leigh 196, 212.

The doctrine is well settled that where a creditor has two funds, to which he may resort for the satisfaction of his debt, one of which is primarily liable, and the other only secondarily liable for the payment thereof, the person having the right to resort to the latter fund for the payment of his demand stands in the situation of a surety to the owner of the primary fund in the application of the equitable principle of substitution in behalf of sureties, and if the funds secondarily liable be applied by the creditor to the satisfaction of his demand the person who stands in the situation of such surety is entitled to be subrogated to all the rights and remedies held by such creditor for his indemnity. *Nuzum v. Morris*, 25 W. Va. 559, 569, citing *Story's Eq. Juris.*, § 633; *Bart. Ch'y Pr.*, § 328; *White & Tudor's L. C. in Eq.* 149-151; 2 Tuck. Com. 492; *Morrill v. Morrill*, 53 Vt. 74; 2 Min. Inst. 173; *McClung v. Beirne*, 10 Leigh 394; *Kent v. Matthews*, 12 Leigh 573; *Eddy v. Traver*, 6 Paige 521; *Hase v. Ward*, 4 Johns. Ch'y 130; *Neely v. Jones*, 16 W. Va. 625.

"This is a familiar doctrine of the equity courts; the rule being that if one party has a lien or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that

course is necessary for the satisfaction of the claims of both parties; provided always this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund. In such cases, the equity of the creditor having but one fund, is not against the double creditor, but only against the common debtor; that the accidental resort of the paramount creditor to the double fund shall not enable the debtor to get back the second fund discharged of both debts. When, therefore, the paramount creditor is satisfied out of the doubly charged fund, the other creditor has a right of substitution to all his rights against the remaining fund. 1 Story's Eq. Jur., § 633; Adams' Eq., mar. 272; Vance v. Monroe, 4 Gratt. 52; Jones v. Phelan, 20 Gratt. 229." Russell v. Randolph, 26 Gratt. 705, 717.

**Illustrative Cases.**—In March, 1871, R. executed a declaration of homestead, which embraced all his personal property; and on the 10th of August, 1871, he conveyed this property to P. in trust for his wife and children. In January, 1874, J. having purchased D.'s judgment, he filed a bill against R. and his wife and children and P., in a state court, to subject this personal property to satisfy this judgment; and in April, 1874, there was a decree in the bankrupt court, by which the proceeds of C.'s land was distributed among the assignees of his bonds, it not being enough to satisfy J. And it being suggested to the court, that beside the small tract of land aforesaid, there was personal property of R., which might be subjected to pay the said judgment, which was sufficient for that purpose, it was decreed that no part of the proceeds of C.'s land should be applied to pay the judgment of D. It was held, that C.'s land being only liable to satisfy D.'s judgment because of his failure to have his deed recorded, if he had paid that judgment, or if it had been paid out of the proceeds of his land, he would have been

substituted to all the rights and remedies of D. against R.; and he would also have had a remedy against R. upon the warranty in R.'s deed. Russell v. Randolph, 26 Gratt. 705.

#### **b. Assignment of Doubly Charged Security.**

One of the best ways of enforcing this rule of marshaling is for the singly charged creditor to take an assignment of that security, thereby clothing himself with the rights and remedies of the doubly charged creditor. Russell v. Randolph, 26 Gratt. 705; Hudkins v. Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22, citing Woodcock v. Hart, 1 Paige 185.

#### **3. Creditor's Bill.**

B., as cestui que trust, in two deeds of trust made to L., as trustee, filed his bill in equity in the name of himself and said trustee, to enforce his trust liens upon a particular tract of land of E., alleging priority over all other liens by one of his trust liens, but admitting the priority of certain other trust liens and judgment liens, designated by his bill and exhibits, over his second trust lien, and made those particular lienors parties to the suit, and praying to convene those creditors before a commissioner, to ascertain and audit their respective debts in the order of their priorities; and that the land, or so much thereof as may be necessary to pay B.'s debts, be sold. E. was owner of other tracts of land, upon which the said judgment creditors and others had liens, but the bill took no notice thereof. Held, the bill was a single creditor's bill against all lienors on the particular tract of land designated in the bill, but was not a general creditor's bill, such as would have called for marshaling all the lien debts existing upon all the lands of E. Baugher v. Eichelberger, 11 W. Va. 217.

#### **4. Bill for Accounting.**

Held, upon such a bill, it is error to decree an account to be taken by a commissioner "of all debts due by

E.," "and which are valid and subsisting liens on his lands, the amounts of said debts, the persons to whom due, and their priority;" and to show "the quantity and annual and fee-simple value of all the lands of E." The bill not having contemplated, nor asked for such an account, parties interested, relying on the essential inquiry as made by the bill, may thus be taken by surprise, and not collect testimony to meet the commissioner's inquiry. If after-discovered facts and testimony render it necessary for an account of such scope, the complainant should be permitted to file a supplemental bill, and thus present a proper cause for such an account. *Baughner v. Eichelberger*, 11 W. Va. 217.

#### 5. Decree Must Conform to Pleadings and Proofs.

Held, the bill having for its object the enforcement of B.'s specific claims on a certain tract of E.'s land, B. could have a decree touching only the object of the bill. *Baughner v. Eichelberger*, 11 W. Va. 217.

#### 6. Error.

It is error for the circuit court not to determine, by marshaling the same, out of which of the proceeds of several properties various judgments and trust liens should be paid according to their priorities. *First Nat. Bank v. Simms*, 49 W. Va. 442, 38 S. E. 525.

"Where there is no error on the face of a report, and it depends on extraneous evidence, a party must except; but in this case all the matters on which the right to have the liens so marshaled are stated in the bill, and thus the error would appear on the face of the report, in a legal point of view, and would avail in this court without exception below. *Shenandoah Val. Nat. Bank v. Shirley*, 26 W. Va. 563." *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798, 799.

## II. Inverse Order of Alienation.

### A. IN GENERAL.

It is well settled that where land

which is subject to an incumbrance, is sold in parcels to different persons by successive alienations, it is chargeable in the hands of the purchaser in the inverse order of alienation. *McClung v. Beirne*, 10 Leigh 394; *Miller v. Holland*, 84 Va. 652, 5 S. E. 701; *Whitten v. Saunders*, 75 Va. 563, 569; *Payne v. Webb*, 23 W. Va. 558, 564; *Gracey v. Myers*, 15 W. Va. 194, 202; *Alley v. Rogers*, 19 Gratt. 389; *Jones v. Phelan*, 20 Gratt. 229, 241; *Henkle v. Allstadt*, 4 Gratt. 284; *Harman v. Oberdorfer*, 33 Gratt. 497, 506; *McClintic v. Wise*, 25 Gratt. 448, 456; *Conrad v. Harrison*, 3 Leigh 532; *Jones v. Myrick*, 8 Gratt. 179; *Lynchburg Perpetual Bldg., etc., Co. v. Fellers*, 96 Va. 337, 31 S. E. 505; *Brengle v. Richardson*, 78 Va. 406; *Rodgers v. McCluer*, 4 Gratt. 81; *McClaskey v. O'Brien*, 16 W. Va. 791.

To the point that the inverse order of the subsequent alienations of incumbered property is the true order in which the property ought to be sold to satisfy the incumbrance. *Henkle v. Allstadt*, 4 Gratt. 284, was cited in *Alley v. Rogers*, 19 Gratt. 366, 389; *Jones v. Phelan*, 20 Gratt. 229, 242; *Miller v. Holland*, 84 Va. 652, 656, 5 S. E. 701; *Gracey v. Myers*, 15 W. Va. 194, 202; *Jones v. Myrick*, 8 Gratt. 179, 180.

While there is one decision to the contrary (*Beverley v. Brooke*, 2 Leigh 425), it seems now well settled in Virginia that when land, subject to a lien, is bought by purchasers at different times, the purchasers shall be subjected in equity in the inverse order of their purchases. If any of the land remains in the hands of the debtor, that, of course, should be subjected first. See *Brengle v. Richardson*, 78 Va. 406; *McClaskey v. O'Brien*, 16 W. Va. 791; *Renick v. Ludington*, 20 W. Va. 511; *Conrad v. Harrison*, 3 Leigh 532; *Rodgers v. McCluer*, 4 Gratt. 81; *Henkle v. Allstadt*, 4 Gratt. 284. See *McClung v. Beirne*, 10 Leigh 394, 402, and *Jones v. Phelan*, 20 Gratt. 229, 241; where the principal decisions are discussed. See also, 2 Min. Inst. (4th

Ed.) 306, and cases there collected. *Alley v. Rogers*, 19 Gratt. 366.

Where land subject to an encumbrance is sold successively in parcels, each of them will be liable in the inverse order of alienation. "If a judgment or mortgage is a lien on three tracts of land belonging to the same person, who sells one of them to A., another afterwards to B. and finally the third to C., A. is entitled to exoneration at the expense of B. and C. while B. has a similar right against C., and if an execution is issued on the judgment, the court may direct that C.'s land shall be first exposed to sale, next B.'s, and that A.'s shall not be held, unless the other tracts do not produce enough to satisfy the debt. *McClaskey v. O'Brien*, 16 W. Va. 791, 838.

#### **B. LANDS IN HANDS OF DEBTOR.**

See the title JUDGMENTS AND DECREES, vol. 8, p. 452.

If any of the land remains in the hands of the debtor, that, of course, should be first subjected. *McClaskey v. O'Brien*, 16 W. Va. 791; *Renick v. Ludington*, 20 W. Va. 511; *Miller v. Holland*, 84 Va. 652, 5 S. E. 701.

Where part of a tract of land subject to a vendor's lien is conveyed, the residue is primarily liable for the whole debt. *Miller v. Holland*, 84 Va. 652, 5 S. E. 701.

#### **C. WHERE PART ONLY OF LAND IS CONVEYED.**

But where only a part of a tract of land subject to a lien or other encumbrance is conveyed, the residue is primarily liable for the whole debt. *Conrad v. Harrison*, 3 Leigh 532; *Baughner v. Eichelberger*, 11 W. Va. 217, 226; *Payne v. Webb*, 23 W. Va. 564.

#### **D. ABSOLUTE CONVEYANCES AND CONVEYANCES AS SECURITY.**

If, however, any parcel of land had been conveyed in trust to secure a debt, and another parcel conveyed

afterwards absolutely, the equity of redemption in the land conveyed in trust will be subjected before the land conveyed absolutely. *M'Clung v. Beirne*, 10 Leigh 394.

#### **E. FRAUDULENT OR VOLUNTARY ALIENEES.**

The rule that land successively aliened is liable in the inverse order of alienation, applies even though one of the alienees is a fraudulent or voluntary grantee. *Whitten v. Saunders*, 75 Va. 569; *Miller v. Holland*, 84 Va. 652, 5 S. E. 701; *Renick v. Ludington*, 20 W. Va. 511.

Where a part of a tract or parcel of land, subject to a mortgage, or other charge is conveyed, the residue is primarily liable for the whole debt; and where there are successive conveyances, at different times, the land is liable in the inverse order of the conveyances. In other words, each grantee, as the phrase is, "sits in the seat of his grantor," and must take the land with all its equitable burdens. It is the same, in effect, as if the grantor had executed a mortgage on the unsold land for the indemnity of his grantee, so that a subsequent purchaser with notice of the first or any prior conveyance, takes the land with this increased burden upon it. And the rule, very justly, is the same, whether the land be conveyed for valuable consideration or not; for if it were otherwise it would enable a purchaser with notice of a prior voluntary conveyance to perpetrate a fraud upon the donee, which equity abhors. *Miller v. Holland*, 84 Va. 652, 654, 5 S. E. 701.

#### **F. EXCEPTIONS TO GENERAL RULE.**

##### **1. In General.**

Generally, as we have seen, where land subject to an encumbrance is sold successively in parcels, each of them will be liable in the inverse order of alienation. To this general rule there are exceptions under circumstances. *McClaskey v. O'Brien*, 16 W. Va. 791.

## 2. Effect of Covenants of Warranty.

Where a grant of part of the land covered by an encumbrance contains a covenant of warranty, there can be no doubt that the burden is to be borne exclusively by the residue of the land in the hands of the grantor. This results not from the technical operation of the covenant, but from the evidence which it affords of the intent; and the effect will be the same, if it appears unmistakably from any part of the deed or from a collateral writing, that the vendee is to have an unencumbered title. And perhaps where there is not a covenant of general warranty, the same rule should prevail, unless there is evidence of an opposite design. *McClaskey v. O'Brien*, 16 W. Va. 791.

### Grant with Warranty to Volunteer.

—It seems that a paramount judgment will not be marshaled as against a grant with warranty to a volunteer, in order to leave the real estate of the grantor free for the discharge of a judgment which has been entered subsequently to the grant. *McClaskey v. O'Brien*, 16 W. Va. 791, 841.

"Where a grant of part of the land covered by an encumbrance contains a covenant of warranty, there can be no doubt that the burden is to be borne exclusively by the residue of the land in the hands of the grantor. This results not from the technical operation of the covenant, but from evidence which it affords of the intent; and the effect will be the same, if it appears unmistakably from any part of the deed, or from a collateral writing, that the vendee is to have an unencumbered title." *McClaskey v. O'Brien*, 16 W. Va. 791, 838.

In *Henkle v. Allstadt*, 4 Gratt. 284, it was held, that where a tract of land is subject to a mortgage, and the owner of the land sells a part thereof, and conveys it with general warranty, and then sells the remainder of the tract, "the part last sold is primarily liable for the satisfaction of the mortgage debt." See also, *Jones v. Myrick*, 8

Gratt. 179. *Gracey v. Myers*, 15 W. Va. 194, 202.

## 3. Where Purchaser Assumes Outstanding Lien.

The general rule is, that when part of a tract of land, subject to a lien, is conveyed, the residue is primarily liable for the whole debt. An exception to the rule, however, as well established as the rule itself, is, that where the purchaser of such part assumes the payment of the outstanding lien, then the part first sold becomes primarily liable for the whole debt. 3 Pom. Eq., §§ 1206, 1225. In the latter section the author says: "Whenever a grantee of any parcel either expressly assumes the payment of the mortgage, or his deed is in such form that he takes the parcel conveyed to himself subject to the mortgage as a part of the consideration, then, as has been already shown, the parcel thus purchased becomes in the hands of himself and of those holding under him, primarily chargeable with the mortgage as against the mortgagor or grantor, and consequently as against all subsequent grantees of other parcels from the mortgagor. By such an express or implied assumption, the doctrine of liability in the reverse order of alienation and all of its consequences are defeated with respect to the mortgagor and the subsequent grantees." No particular form of words is necessary to create a binding assumption. *Litchfield v. Preston*, 98 Va. 530, 532, 37 S. E. 6.

Generally, where a portion of a tract of land subject to a vendor's lien has been sold, the land, as between alienees, should be subjected in the inverse order of alienation; but where the purchaser of the first portion agrees with his vendor that so much of the unpaid purchase price as may be necessary shall be applied to the discharge of the vendor's lien, then such portion becomes primarily liable; and, if the agreement appears on the face of the

deed to such first vendee, and the deed is recorded, it enures to the benefit of a subsequent purchaser of the residue of the tract, and may be taken advantage of by him, although primarily intended for the protection of the first vendee. *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6.

## G. APPLICATIONS OF RULE TO PARTICULAR INCUMBRANCES.

### 1. Lands Subject to Mortgage or Deed of Trust.

**In General.**—Where land subject to the lien of a mortgage or deed of trust is sold successively in parcels, they will be liable to the satisfaction of such debt in the inverse order of alienation. *Conrad v. Harrison*, 3 Leigh 532; *McClung v. Beirne*, 10 Leigh 394, 402; *Henkle v. Allstadt*, 4 Gratt. 284, 292; *Alley v. Rogers*, 19 Gratt. 366, 389; *Jones v. Phelan*, 20 Gratt. 229, 241; *McClintic v. Wise*, 25 Gratt. 448, 456; *Whitten v. Saunders*, 75 Va. 563; *Miller v. Holland*, 84 Va. 652, 656, 5 S. E. 701; *Gracey v. Myers*, 15 W. Va. 194.

Where land, which is subject to the lien of a mortgage or other paramount incumbrance, is sold in parcels successively to different persons, the buyers are prima facie chargeable in the inverse order of alienation. *Jones v. Myrick*, 8 Gratt. 179; *McClaskey v. O'Brien*, 16 W. Va. 791, 838.

In *McClaskey v. O'Brien*, 16 W. Va. 791, 839; *Jones v. Myrick*, 8 Gratt. 179, was cited to the point that, where land, which is subject to the lien of a mortgage or other paramount incumbrance, is sold in parcels successively to different persons, the buyers are prima facie chargeable in the inverse order of alienation. Again, in *Gracey v. Myers*, 15 W. Va. 194, 202, it is said: "In *Henkle v. Allstadt*, 4 Gratt. 284, it was held, that where a tract of land is subject to a mortgage, and the owner of the land sells a part thereof, and conveys it with general warranty,

and then sells the remainder of the tract, 'the part last sold is primarily liable for the satisfaction of the mortgage debt.' See also, *Jones v. Myrick*, 8 Gratt. 179." *Jones v. Myrick*, 8 Gratt. 179, was also cited as authority on this point in *Kelly v. Hamblen*, 98 Va. 383, 390, 36 S. E. 491.

In *Miller v. Holland*, 84 Va. 652, 656, 5 S. E. 701, *Buchanan v. Clarke*, 10 Gratt. 164, was cited among others as authorizing the proposition that when the mortgagor of land sells, at different times, portions of the mortgaged premises, the land retained by the mortgagor must first be subjected to the satisfaction of the mortgage lien, and, if this is not sufficient, the lands aliened are liable in the inverse order of their alienation. See also, on this point, *Alley v. Rogers*, 19 Gratt. 366.

**Mortgages and Deeds of Trust on Personalty.**—And the rule that the inverse order of the subsequent alienation of encumbered property, is the true order in which the property ought to be sold to satisfy the encumbrance, applies as well to a deed of trust on personal property, as on real estate. *Jones v. Phelan*, 20 Gratt. 229, citing *Enders v. Brune*, 4 Rand. 438; *Conrad v. Harrison*, 3 Leigh 532.

**Illustrative Cases.**—On the 6th of March, 1862, R. borrowed of G., who was then in Baltimore, having gone there on a visit to a daughter, and having been unable to return to Virginia, through D., who acted in Virginia as the agent of G., the sum of \$5,000; for which R. executed his bond at five years, and a deed of trust on real estate to secure the same. R. subsequently sold the land, subject to the deed of trust, to J., who retained \$5,000 of the purchase money, and covenanted with R. to assume and pay the bond from R. to G. J. afterwards sold the same land, subject to the same deed of trust, to W. & Co., who likewise covenanted to assume and pay the said bond from R. to G. Held, in decreeing that balance, W. & Co., who

were ultimately bound to indemnify the other parties, ought to be required in the first instance to pay it, and in case of their failure, the other parties in the inverse order of the time of their several liabilities. *Whitlock v. Gordon*, 1 Va. Dec. 238.

In 1865, C. sold and conveyed to M. a tract of sixty-eight acres; in 1866, the same vendor conveyed to the same vendee a tract of one hundred and ten acres without retaining a lien for the purchase money; on the day of the last conveyance, M., the vendee, and wife conveyed the one hundred and ten acres and the sixty-eight acres to W., trustee, to secure seven bonds of \$1,000 each, the purchase money of the one hundred and ten acre tract, which trust was promptly recorded. A few days after executing this trust M. and wife conveyed the one hundred and ten acres to J. M., who paid the whole of the purchase money. On the 21st day of May, 1868, M. and wife conveyed the sixty-eight acres to W. and J. Gracey. C. assigned four of the said bonds, secured in the trust deed, which bonds remain unpaid. Held, as there was no lien retained in the deed for the tract of one hundred and ten acres, it can make no difference that the debt secured by the trust deed was for the purchase money of the said tract. *Gracey v. Myers*, 15 W. Va. 194.

Held, that the tract of sixty-eight acres, being last sold and conveyed with notice of the trust, is primarily liable to the satisfaction of the unpaid balance of the debt secured by the trust, and that the tract of one hundred and ten acres is liable for any part thereof only in the event that the tract of sixty-eight acres is insufficient to pay it. *Gracey v. Myers*, 15 W. Va. 194, following *Conrad v. Harrison*, 3 Leigh 532; *Henkle v. Allstadt*, 4 Gratt. 284.

S. mortgages a parcel of 360 acres of land to B. to secure a debt due to him; then S. mortgages all of the same land, except seventy-five acres, to H. to

secure debt due to him, these seventy-five acres being excepted and reserved out of this second mortgage, because the mortgagor was then in treaty with a third person for the sale thereof to him, which treaty was afterwards broken off; and then S. mortgages the whole parcel of 360 acres to C., to secure a debt due to him. Held, that H., the second mortgagee, has a right, as against Sisson, the mortgagor, B., the first mortgagee, and C., the third mortgagee, to insist that the debt due to B. shall be satisfied out of the parcel of seventy-five acres reserved out of the second mortgage to H. so as to leave that part of the subject mortgaged to H. untouched, and applicable to the satisfaction of the debt due him. That C., the third mortgagee, has no right to call on H., the second mortgagee, to contribute, pro rata, to the satisfaction of the debt due to B., the first mortgagee. *Conrad v. Harrison*, 3 Leigh 532.

#### **Lands Subject to Negotiable Paper.**

—On the 24th of May, 1859, G. conveyed real estate in Henrico to W. to secure four negotiable notes of that date, payable in six, twelve, eighteen and twenty-four months to R., who lived in Kentucky. The notes were endorsed by R. and deposited by him in the F. bank for collection. On the 21st of February, 1861, G. conveyed to A. this real estate, with much more, in trust for payment of his debts; debts being a lien upon any of the property to be paid first. On the 17th of April, 1863, A. sold the greater part of the real estate conveyed to W., and conveyed the same by deeds of different dates to the purchasers; and some of these purchasers conveyed subsequently to others. The last two of the notes aforesaid were protested for nonpayment, and remained in the bank until the 14th of September, 1863, when A. paid them to the bank in confederate notes, and took them up; confederate notes being then the only currency, and being generally received by



the banks in payment of notes either owned by the bank or deposited for collection, and being then depreciated to about twelve for one in gold; but the deed of trust to W. was not released. After the war, R. filed his bill, claiming that the two notes were still due, and seeking to enforce the trust for their payment, and he made G., the bank, A., and the purchasers from A., and the present holders, parties. Held, if it is not necessary to sell the whole of the real estate conveyed to W., to pay said notes, the part not sold by A. is first to be sold; and after applying the proceeds of said sale to the payment pro tanto of said notes, the balance due upon them should be raised rateably out of the lots now held by the purchasers respectively, in proportion to the amounts of the purchase money for which they were respectively sold by A. on the 17th of April, 1863, without regard to the dates of the deeds from A. to the purchasers. *Alley v. Rogers*, 19 Gratt. 366.

## 2. Lands Subject to Vendor's Lien for Purchase Money.

See the title **VENDOR'S LIEN**.

**In General.**—Where part of a tract of land subject to a vendor's lien is conveyed by successive conveyances, the land is liable in the inverse order of the conveyances, that is, each grantee must take the land with all its equitable burdens. *Miller v. Holland*, 84 Va. 652, 5 S. E. 701; *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6.

H. sells and conveys two tracts of land to W., who sells and conveys them to D.; and D. sells and conveys one of the tracts to A.; both D. and A., knowing at the time of their respective purchases that a part of the purchase money was yet due from W. to H. Upon a bill by H. against the three purchasers, to enforce his lien on the land for the unpaid purchase money; held, the tract purchased by A. shall not be subject until the tract

retained by D. has been first sold, and proves insufficient to discharge the amount due. *Alford v. Helms*, 6 Gratt. 90.

**Voluntary Alienee.**—A debtor possessed of a large tract of land conveys a part of the same by deed of gift to one of his sons, who thereafter sells it to another person for a valuable consideration. The father debtor, then, by subsequent deeds for value, executed at different times, conveys nearly the whole of his said land to different purchasers. On proceedings to subject said land to the payment of a portion of the purchase money, for which the vendor to the debtor had retained his vendor's lien; held, the lands will be held liable in the inverse order of the alienations from the debtor, and this, too, although one of the alienees is a purchaser from the son of the debtor, who held under a voluntary conveyance from the debtor. *Whitten v. Saunders*, 75 563, 569.

**Exceptions to Rule.**—Generally, where a portion of a tract of land subject to a vendor's lien has been sold, the land, as between alienees, should be subjected in the inverse order of alienation; but where the purchaser of the first portion agrees with his vendor that so much of the unpaid purchase price as may be necessary shall be applied to the discharge of the vendor's lien, then such portion becomes primarily liable; and, if the agreement appears on the face of the deed to such first vendee, and the deed is recorded, it enures to the benefit of a subsequent purchaser of the residue of the tract, and may be taken advantage of by him, although primarily intended for the protection of the first vendee. *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6.

## 3. Lands Subject to Judgment Lien.

See the title **JUDGMENTS AND DECREES**, vol. 8, p. 456.

**In General.**—In the case of *Beverley v. Brooke*, 2 Leigh 425, it was decided

that where a judgment is obtained against a debtor, who afterwards aliens his lands to divers alienees by divers conveyances, all the lands in the hands of the several alienees are alike liable to the judgment creditor, and must contribute pro rata. This case, however, was doubted, in *Conrad v. Harrison*, 3 Leigh 532, and expressly overruled in *M'Clung v. Beirne*, 10 Leigh 394, 403; and the following rule laid down, that where land which is subject to the lien of a judgment is sold in parcels to different persons by successive alienations, it is chargeable in the hands of the purchaser in the inverse order of such alienations. *Whitten v. Saunders*, 75 Va. 563; *Kelly v. Hamblen*, 98 Va. 383, 390, 36 S. E. 491; *Lynchburg Perpetual Bldg., etc., Co. v. Fellers*, 96 Va. 337, 31 S. E. 503; *Jones v. Myrick*, 8 Gratt. 179.

Land subject to a judgment lien which have been sold or encumbered by the debtor, are to be subjected to the satisfaction of the judgment in the inverse order in point of time of the alienations and incumbrances; the land last sold or encumbered being first subjected. *Jones v. Myrick*, 8 Gratt. 179.

And notwithstanding a statement to the effect in *Conrad v. Harrison*, 3 Leigh 532, there can be no doubt that the rule as to the inverse order of alienation is the same in the case of a judgment as of a mortgage.

Lands being liable for judgments in the inverse order of alienation, those primarily liable should be first exhausted before proceeding against a purchaser whose land is only secondarily liable. *Nelson v. Turner*, 97 Va. 54, 33 S. E. 390.

**Illustrative Cases.**—The judgment debtor having been the owner of a large tract of land, charged with a lien of one thousand dollars in favor of his children payable at his death; and having at different times aliened the same to three different vendees, and to indemnify his second alienee against

any loss by reason of said lien upon the portion of said land, having conveyed to a trustee another tract of land; and the commissioner to whom the cause was referred, having failed to report the amount of said lien, and whether the said three several parcels of said land are chargeable rateably with said lien, or whether same will be first chargeable upon the parcel last aliened, or whether any part thereof will be chargeable on the land conveyed in trust to indemnify said second alienee; and the court having thereupon decreed that the said land so conveyed in trust "be sold subject to the lien created thereon by said deed of trust;" held, that the said lien of one thousand dollars is chargeable upon the parcels of land so aliened, in the inverse order of said alienations, and that the parcels last sold, are first liable. *Hutton v. Lockridge*, 22 W. Va. 159.

By deed bearing date the 15th of October, 1863, Mrs. G., in consideration of \$10,000, for which S. executes his bond to G., conveys a tract of land to S. reserving in the deed a vendor's lien. G. marries H., and H. obtains from S. a new bond for the principal and interest, and in October, 1868, recovers a judgment against S. for the amount. S., who owned a number of tracts of land, after the judgment, conveys the lands to different purchasers; and among them by deed dated 22d of May, 1877, S. conveyed to R. the land purchased of G.; and R. in this deed bound himself to pay the debt of S. to G. By deed dated May 3, 1878, S. conveyed all his lands including the land bought of G. to L. in trust to secure a number of his creditors stating their debts as about a certain sum. In August, 1878, H. files his bill to subject the lands owned by S. at the date of his judgment or afterwards acquired to satisfy his judgment. Held, the land conveyed by G. to S., and by him conveyed to R. is to be first sold to satisfy the judgment of H. "The

alienees are all before the court, and it is the plainest equity imaginable, that the land primarily bound should be first subjected. If the lands conveyed by the trust deed of May 3, 1878, were first sold, after satisfaction of the complainant's judgment, the trust deed creditors would be entitled to be substituted for relief against the land held by Robertson, or such of the proceeds as remained after satisfaction of Hansbrough's judgment. There is every reason therefore why the land sold to Robertson shall be subjected in the first instance. The statute (Code of 1873, ch. 182, § 10) declaring the order in which aliened lands shall be liable, must be construed so as to harmonize with the equities which have been considered. It could never have been intended by the legislature to subvert equities at once so potent and so obvious." *Schultz v. Hansbrough*, 33 Gratt. 567, 583.

Judgment creditor brings suit to enforce his lien. After account ordered and taken and other liens proved, the other lienors become parties to the suit, and are entitled to have the lands sold for their relief in the order of their respective priorities, and aliened lands of the debtor must be sold in the inverse order of the alienation. *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508; Code, 1873, ch. 182, § 10. *Brengle v. Richardson*, 78 Va. 406.

The land not included in the deed of trust should have been first sold, and applied to the prior judgment; and if insufficient to discharge it, then the lands included in the deed of trust should have been sold, and so much of the proceeds thereof as, with the proceeds of the land not conveyed, amount to a moiety of the proceeds of all the said lands, should have been applied if necessary to the satisfaction of said judgment. *Buchanan v. Clarke*, 10 Gratt. 164.

"The lands conveyed by the said deed of trust to secure the trust creditors, upon the principle of marshaling,

ought not to be sold to satisfy the judgments which antedate the deed of trust, until all the lands upon which such judgments have a lien, but which are not conveyed by the deed of trust, are first sold, and then only so much of them as may be necessary to satisfy any balance which may still be due on the said judgments." *Schultz v. Hansbrough*, 76 Va. 817, 830.

Where land subject to judgment liens has been sold by the debtor in parcels, but it does not appear that the land was more than sufficient to satisfy the liens, a decree providing for the sale of some parcels separately and some in solido is not erroneous, under Code, 1887, § 3575, providing that where land subject to the lien of a judgment is more than sufficient to satisfy the same, and has been aliened, that which was aliened last shall first be liable. *National Exchange Bank v. Preston*, 2 Va. Dec. 652.

**A judgment creditor having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.** *Jones v. Myrick*, 8 Gratt. 179.

#### **4. Lands Subject to Lessor's Lien for Rent.**

Where land subject to a lessor's lien for rent, which stands on the same principle with the lien of a mortgage, is sold successively in parcels, each of them will be liable in the inverse order of alienation. *Jones v. Phelan*, 20 Gratt. 229, citing *Conrad v. Harrison*, 3 Leigh 532.

G is tenant of a house and lot leased of S, and he gives a deed of trust on a part of the personal property in the house, to secure a debt to P, which is recorded. He afterwards gives another deed of trust on all the property in the house, to secure a debt to J. S distrains for a year's rent upon the

property embraced in the deed to secure P. By consent of all the parties, all the property conveyed in the deeds is sold, and after paying the rent there is a balance left. Held, after S is satisfied, P is entitled to have the balance of the proceeds of the property, embraced in his deed, applied to pay pro tanto his debt. "It can make no difference that the distress warrant of the lessors in this case was levied on the property conveyed by the first deed of trust, instead of the property not conveyed by the first but conveyed by the second deed of trust. The lessors could not, in that way, defeat or impair the right of the creditors secured by the first deed, who may obtain by subrogation what they might have obtained by marshaling the securities." *Jones v. Phelan*, 20 Gratt. 229.

##### 5. Assignment of Choses in Action Secured.

See the title ASSIGNMENTS, vol. 1, p. 773.

Where bonds or other choses in action secured by a lien on land are assigned, the order of payment out of the proceeds of a sale of the land is determined by the order of time of assignment, and not by the order in which the bonds fall due, unless otherwise provided expressly, or to be plainly inferred from the transaction. *Thomas v. Lynn*, 40 W. Va. 122, 130, 20 S. E. 878, 881, citing as authority *Schofield v. Cox*, 8 Gratt. 533.

Where eight notes for the purchase money of land, which are secured by deed of trust on the same, have, by assignments for value, come into the hands of one person, and he in turn assigns four of them to a subassignee, who in turn assigns these four notes to the plaintiff "without recourse," held, (1), the assignment of these notes, by force of law as an incident thereto, carries the deed of trust which secures the purchase money; (2), the four notes so assigned are entitled to be first paid out of the proceeds of the land when the same is sold. *Jenkins*

*v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090.

Where, without any intermediate assignment, the assignee, who has come into possession of all the said notes, assigns "without recourse" the fifth of them directly to the plaintiff, who is a son of the purchaser, the fifth note so assigned is entitled to like priority over the three remaining notes, which are still held by the defendant. *Jenkins v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090.

Bonds secured by vendor's lien, assigned at different times to different persons. Held, they must be satisfied out of the proceeds in the order of their assignment. *McClintic v. Wise*, 25 Gratt. 448; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531.

A. living out of the state, D. sues out a foreign attachment against him, and attaches the one-third of the land which was not sold to B., and also the debt due from B. to A., the attachment being issued after the assignment to C. Held, the whole land being sold together, the one-third and so much of the two-thirds of the purchase money as is necessary, will be applied to discharge the first incumbrance; and the balance will be applied to pay the assignee. *Schofield v. Cox*, 8 Gratt. 533.

That C. is entitled to have the one-third of the land not embraced in his security, applied in the first place to satisfy the first incumbrance, to the relief of the two-thirds of the land conveyed by B. to secure his bonds; that the payments beyond the amount of the first four bonds, made by B. to A. without notice of the assignment, having been made on account, are not to be treated as applicable to the first bond assigned to C.; but to the bonds held by A. *Schofield v. Cox*, 8 Gratt. 533.

In 1856 M sold and conveyed her share of a tract of land to her brothers, J and H, reserving a vendor's lien in the deed for \$1,204.93. In 1860 J and H sold and conveyed with general warranty the whole tract to A

for \$23,500, of which one-third was paid in cash, and bonds of \$2,000 given to H for the balance, payable in each year from 1861 to 1867, and \$1,666.66 in 1868, reserving in the deed a vendor's lien as security. In 1860 H assigned the four bonds falling due in 1865-66-67 and 1868 to K, and K assigned to G in April, 1861, the bond due in 1866, and in November, 1865, she assigned to G the bond due in 1867. In the latter part of 1860, or the first of 1861, K assigned to S the bond due in 1865. A died in 1867, having paid off the first four bonds and made payments to G on the sixth, and after his death A's executors paid to K the last bond. The deed from M to J and H was recorded, but was destroyed by the federal forces in 1864. After the war, C, as assignee of M, filed a bill to enforce the vendor's lien in the deed from M for the \$1,204.93, and obtained a decree. Pending C's suit, G filed his bill to enforce the vendor's lien in the deed to A, for a balance due on the two bonds assigned to him. A's executors and devisees insisted that they should have credit on the bonds assigned to G and S for the amount of C's decree, they insisting that the purchase money paid by A in his lifetime and the executors since, was paid without any knowledge of C's lien on the land, that deed having been destroyed. J and H were insolvent. Held, that the liability of such assigned bonds to such right of set-off is not in the order in which said bonds are payable, but in the inverse order of their assignment; and if some of said bonds were assigned and some were not, the unassigned bonds were liable to said right of set-off before the assigned bonds, even though the unassigned bonds were payable before the assigned bonds. *Armentrout v. Gibbons*, 30 Gratt. 632.

#### **H. LANDS SOLD CONTEMPORANEOUSLY.**

See the title JUDGMENTS AND DECREES, vol. 8, p. 459.

Where the different parcels of land are sold contemporaneously, they must contribute pro rata to the satisfaction of the encumbrance. *Alley v. Rogers*, 19 Gratt. 366; *Harman v. Oberdorfer*, 33 Gratt. 497.

Where the different parcels are sold contemporaneously, they must contribute pro rata to the satisfaction of the judgment. *Harman v. Oberdorfer*, 33 Gratt. 497; *Alley v. Rogers*, 19 Gratt. 366; *M'Clung v. Beirne*, 10 Leigh 394.

#### **I. RIGHTS AND REMEDIES OF PURCHASERS.**

C., in 1852, by recorded deed, conveyed to J. M. 297 acres of land, reserving a lien for the purchase money. In 1856, J. M. died, bequeathing his estate to his widow. In 1859, she conveyed one tract so devised her, to N. M. in trust for her three infant children, and married W. In 1863, she and W. conveyed to H. another tract so devised her, to H., embracing the 297 acres whereon the lien was reserved. In 1871, C. filed her bill against W. and wife, and H. to enforce his lien, which H. was compelled to satisfy. H. then sued to subject the land conveyed to N. M., trustee, for his reimbursement: Held: H. can take nothing by his bill, which must be dismissed, without prejudice, however, to his right to proceed at law against W. and wife on the covenants contained in their deed and against the estate of J. M., deceased. *Miller v. Holland*, 84 Va. 652, 5 S. E. 701.

#### **J. PLEADING AND PRACTICE.**

See post, "Marshaling in Administration," III.

**Amount and Priority of Liens.**—The judgment debtor having been the owner of a large tract of land, charged with a lien of one thousand dollars in favor of his children payable at his death; and having at different times aliened the same to three different vendees, and to indemnify his second alienee against any loss by reason of

said lien upon the portion of said land, having conveyed to a trustee another tract of land; and the commissioner to whom the cause was referred, having failed to report the amount of said lien, and whether the said three several parcels of said land are chargeable rateably with said lien, or whether same will be first chargeable upon the parcel last aliened, or whether any part thereof will be chargeable on the land conveyed in trust to indemnify said second alienee; and the court having thereupon decreed that the said land so conveyed in trust "be sold subject to the lien created thereon by said deed of trust;" held, that it was error in the said circuit court to decree that the said land so conveyed in trust, should be sold subject to the lien created thereon by said deed of trust without first ascertaining the amount of said lien chargeable on said several parcels, and fixing the priorities thereof. *Hutton v. Lockridge*, 22 W. Va. 159.

**Amendment — Parties.**—Held, that the court should have required the plaintiffs to amend their bill by making the children of said judgment debtor who are entitled to the benefit of said lien, parties defendant thereto, and should have caused said commissioner to ascertain the value of the parcel last aliened, and whether the same will be sufficient to secure the payment of the whole of said lien, and if not what portion thereof will fall on the parcel conveyed to said second alienee and whether any, and if any, what part of the proceeds of the sale of said land so conveyed in trust to indemnify said second alienee ought to be retained for such indemnity. *Hutton v. Lockridge*, 22 W. Va. 159.

### III. Marshaling in Administration.

#### A. LIABILITY OF HEIRS, DEVISEES AND LEGATEES.

—See the title HEIRS AND DEVI-

SEES, vol. 7, p. 73, and references given.

**Common-Law Rule.**—At common law, land could be charged with a decedent's debts (other than debts of record and debts of specialty binding the heirs expressly, for which an action lay at law) only in a court of chancery, either in consequence of a will or some other trust so providing, or by means of a bill to marshal assets, that is, to arrange them in such order as to make them go as far as possible towards the payment of all debts. Lands, therefore, at common law, except as to debts of record and of specialty binding the heirs, were always equitable assets. 3 Min. Inst. (2d Ed.) 583; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

The heir was entitled to the real estate, though charged with debts, until convicted of mismanagement, or misapplication of profits. *Trent v. Trent*, *Gilmer* 174.

"At common law an estate taken by descent subjects the heir to pay, to the extent of the value of the land, all the debts of the ancestor due by any contract of record (e. g., a judgment or recognizance), or any contract of specialty; that is, under seal, which expressly binds the heirs. 2 Bl. Com. 201, n. 2; *Id.* 243-4; 1 Lom. Dig. 773-4; *Piper v. Douglass*, 3 Gratt. 371; 2 Minor's Inst. 451-2. The act of March 1st, 1842, was the first statute of this state making real estate assets for the payment of simple contract debts. That act, however, was subject to a proviso declaring that no debt not evidenced by writing, signed by the debtor, or some person legally empowered by him, shall be charged on the real estate by virtue of this act. This proviso was omitted at the revisal of 1849, so that, as the law now stands, the real estate is subject to the payment of all the just debts of the decedent without qualification. Acts, 1841-42, p. 55; Code, 1849, ch. 131, § 3; Code, 1873, ch. 127, § 3. It is manifest

that the lands of the intestate in the hands of his heirs was bound for the payment of this bond at common law and independent of statute." *Alexander v. Byrd*, 85 Va. 690, 699, 8 S. E. 577.

**Merger.**—C. recovers a judgment in Maryland against T., on his covenant binding his heirs; and then T. dies, leaving no estate in Maryland, but leaving real estate in Virginia. The judgment does not merge the covenant, so as to exonerate the heirs from liability thereon, in respect to real assets descended in Virginia. *Beall v. Taylor*, 2 Gratt. 532.

**Statutory Rule.**—Statutes, however, have done away with the distinction between debts chargeable on decedent's lands at common law and simple contract debts, and have made real as well as personal estate subject to the just debts of the intestate. But the object of these statutes was not to disarrange the order of liability of the assets of the decedent's estate, which by a long line of adjudication has become firmly settled, as we shall see later. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108; *Laidley v. Kline*, 8 W. Va. 218; *McCandlish v. Keen*, 13 Gratt. 615; *Peirce v. Graham*, 85 Va. 325, 7 S. E. 189; *Lewis v. Overby*, 31 Gratt. 601.

In 4 Kent's Com. 420, it is said that by legislation remedying the harsh and unjust rule of the common law, "Heirs are rendered liable for the debts of the ancestor by simple contract, as well as by specialty, and whether specially named or not, to the extent of the assets descended, on condition that the personal estate of the ancestor shall be insufficient, and shall have been previously exhausted." Kerr on Real Prop., § 2302, says: "In all those cases where a person dies leaving debts, if the personal estate is insufficient to pay them, the courts of chancery have power to direct a sale of the real estate to enforce the payment of such debts." The statutes of many of the

states, on this subject, are very similar, and the same general principle underlies all of them. *McConaughy v. Bennett*, 50 W. Va. 172, 180, 40 S. E. 540.

"The real estate is made assets in the same order as the personal estate, so that while the personalty is first liable, and is therefore primarily to be subjected, both are liable; and it has never been held, and it is not likely ever to be held, that the creditors must take care that the personal representative does not waste any of the assets liable to their debts, or the amount of the waste will be charged to them. The personal assets are placed in the hands of the personal representative, to be by him administered, and, for the faithful performance of his duties as such representative, bond, with ample security, is required, and the law prescribes how the debts shall be paid; but if the debts are unduly paid out of their order, or the personal assets distributed or wasted, or otherwise exhausted, the law makes the real estate assets, and the same is made liable in the hands of the heirs to the satisfaction of the debts; and by the fifth section of the same chapter the heir who shall sell and convey such estate after suit brought, is made personally liable for the value of the same, with interest. *Scott v. Ashlin*, 86 Va. 581, 587, 10 S. E. 751.

But lands of the intestate in the hands of his heirs were bound for the payment of specialty debts of the ancestor independent of statute. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

The act of March 1, 1842, was the first statute in Virginia making real estate assets for the payment of simple contract debts. That act, however, was subject to a proviso, declaring that no debt not evidenced by writing signed by the debtor, or some person legally empowered by him, shall be charged on the real estate by virtue of this act. This proviso was omitted at the revision of 1849, so that, as the law now

stands, the real estate is subject to the payment of all the just debts of the decedent without qualification. Acts, 1841-42, p. 55; Code, 1849, ch. 131, § 3; Code, 1873, ch. 127, § 3. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577, 581.

The sole object of this act was to put specialty and simple contract creditors on the same footing, and dispense with the necessity for marshaling assets. January Report of Revisors, 1849, p. 675.

**Effect on Order of Liability.**—See post, "Order of Liability of Assets," III, C.

The court of appeals has held repeatedly since the statute, making real estate of a decedent's assets, for the payment of his debts, went into effect July, 1850, that personal estate is the primary fund for the payment of debts. *Lewis v. Overby*, 31 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367, 375; *Duerson v. Alsop*, 27 Gratt. 229, 237; *Edmunds v. Scott*, 78 Va. 720.

But Va. Code, 1887, § 2665, making real estate of decedent's assets for the payment of debts, does not give a devisee of encumbered land the right of contribution from devisees of unencumbered land. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

There can be no resort to decedent's real estate to pay his debts until his personality has been exhausted. When that has been exhausted, whether by devastavit or distribution, the real estate in the hands of his heirs may be subjected. Code, 1873, ch. 127, § 3. *Scott v. Ashlin*, 86 Va. 581, 10 S. E. 751.

**Sale of Property.**—Where real estate in the hands of heirs is sought to be subjected to the judgment of the decedent ancestor's debts, and that portion of it assigned to one of the heirs before the commencement of the suit has been aliened to a bona fide purchaser, whether absolutely or in trust to pay his debts, and that heir has become insolvent, the rest of the real estate in the hands of those heirs who

have not aliened it, is liable not only for the proportionate share which each heir would at first have borne, but for the whole debts of the decedent, to be contributed by each one in proportion to the value and extent of the land descended to him. *Ryan v. McLeod*, 32 Gratt. 367; *Lewis v. Overby*, 31 Gratt. 601.

**Liability of Legatees.**—A legatee is entitled to nothing until the debts of the testator are paid; he has no claim except upon the bounty of the testator; if he receives payment before the debts are paid, he takes subject to the condition of making restitution, if it becomes necessary to satisfy creditors; and no dealing of the executor with him or advancement made to him, can in any manner affect or modify the liability of the testator's estate to the payment of his debts. *Leake v. Leake*, 75 Va. 792. See *Dunn v. Amey*, 1 Leigh 465.

"Assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies. \* \* \* The legatee takes subject to the liability of being compelled to refund at the suit of a creditor." *Davis v. Newman*, 2 Rob. 664.

**Some Legatees Insolvent.**—If some of the legatees are insolvent, the others will be required to make good the deficiency, to the extent of what they have received. *Leake v. Leake*, 75 Va. 792; *Hopkirk v. Dennis*, 2 Munf. 326; *Ryan v. McLeod*, 32 Gratt. 367.

**Deficiency Caused by Devastavit.**—Although the executor had in hand sufficient assets to pay both debts and legacies, and although a portion of the assets was actually paid to the legatees and another portion set apart for a creditor, which was wasted by the executor, still the creditor had a right to demand restitution from the legatee. *Leake v. Leake*, 75 Va. 792, 794.

**Participation by Distributees in Devastavit.**—Where the distributees, by



participating with the administrator in making distribution of the personality among themselves, aid the administrator in the commission of a devastavit, they are of course liable. *Watts v. Taylor*, 80 Va. 627.

**Voluntary Payments by Executor.—**

Legatees can not be compelled to refund to an executor where he, mistaking the value of the assets, voluntarily paid them their legacies, there being no creditors of the decedent, but his estate turning out inadequate for the payment of legacies. *Davis v. Newman*, 2 Rob. 664.

**Refunding by Legatees.**—Where legatees are called upon to refund at the suit of a creditor, the general principle is that all must be before the court and the burden apportioned among them, if it can be done without material delay or injury to the creditor. *Leake v. Leake*, 75 Va. 792, 794.

A testator devises a tract of land for the payment of a particular debt, and the land is sold; but the creditor receives only the first payment of the purchase money, and refuses to take the balance, which is applied to the payment of other debts of the testator. Whether the land was the primary fund for the payment of the particular debt, or not, that debt was in fact the debt of the testator's estate, for which a legatee was responsible under his refunding bond. *Archer v. Archer*, 8 Gratt. 539.

**B. MARSHALING IN AID OF SIMPLE CONTRACT CREDITORS.**

**In General.**—Before the passage of statutes subjecting the real estate of a decedent to his simple contract debts, it was held, that where the deceased left both specialty and simple contract creditors, and the former, instead of resorting to the realty which they alone could reach, proceeded against the personality to the exclusion of the simple contract creditors who had no other fund, the latter under the equitable doctrine of marshaling, so far as the

personalty had been exhausted to satisfy the specialty debts, should stand against the realty whether devised or descended, in the place of the specialty creditors. *Tennent v. Pattons*, 6 Leigh 196; *Cralle v. Meem*, 8 Gratt. 496; *Pugh v. Russell*, 27 Gratt. 789; *Meade v. Grigsby*, 26 Gratt. 612; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

It is a well-settled doctrine of equity, that if a specialty creditor, whose debt binds the heirs, receives satisfaction out of the personal assets of the decedent, a simple contract creditor will in equity stand in his place against the real assets, to the extent that the specialty creditor shall have exhausted the personal assets in the payment of the debts. The reason is that when there is both real and personal assets, creditors by specialty, in which the heirs are bound, are by the common law entitled to payment out of either of these funds. At law they may take their remedy against the heir, or against the executor. Having their election of remedies, if they exhaust the only fund to which the simple contract creditors can apply, equity places the latter in the position of the former, so far as the specialty creditors have exhausted the personal estate. 2 Lomax on Executors, pp. 418, 419. *Pugh v. Russell*, 27 Gratt. 789, 796.

A simple contract creditor shall receive out of the real assets descended to the heirs at law as much as has been paid to bond creditors out of the personal assets. *Haydon v. Goode*, 4 Hen. & M. 460.

**The payment of taxes due to the state** out of the personal assets did not give a simple contract creditor a right to have the assets marshaled. *Pugh v. Russell*, 27 Gratt. 789.

**Report of Commissioner.**—A commissioner, settling an administration account before a court of probates, states in his report that two of the credits allowed the executor were for payments of judgments, which were liens on the real estate. This is not

evidence against the devisees to prove that the judgments were recovered against the executor upon a bond of the testator binding his heirs, and to entitle a simple contract creditor to marshal the assets. *Pugh v. Russell*, 27 Gratt. 789.

**As to Devisees.**—A judgment is recovered against an executor by a simple contract creditor of his testator; and the creditor then files a bill against the devisees to marshal the assets, and subject the land of the testator in the hands of the devisees. It must be presumed that his action was not barred by the statute of limitations when the judgment was recovered; and he is not therefore barred by the statute in his proceeding against the devisees to marshal the assets. *Pugh v. Russell*, 27 Gratt. 789.

**As to Judgment Creditors.**—In the application of the principle of marshaling assets, simple contract creditors will be substituted for specialty creditors, but not for judgment creditors; that is, the simple contract creditors can not charge the lands for so much of the personal fund as has been applied to the payment of debts due by judgments obtained against the ancestor. The reason is, that the writ of *elegit*, by virtue of which the land is charged by judgment against the ancestor, does not issue singly against the land, but against all the chattels (save oxen, and beasts of the plough), and if the chattels be sufficient, the land ought not to be extended. The judgment creditor, therefore, had not the election between two funds (as the specialty creditor has) and the principle on which the assets are marshaled does not apply to the case. *Alston v. Munford*, 1 Brock. 266, 1 Fed. Cas. 578; *Pugh v. Russell*, 27 Gratt. 789; *Rogers v. Denham*, 2 Gratt. 200.

Though simple contract creditors might, before the act of 1850, be substituted to the rights of a creditor by bond binding the heirs, the doctrine of marshaling assets does not apply to a

judgment. *Pugh v. Russell*, 27 Gratt. 789.

Before the act in the Code of 1849, if a judgment recovered against an executor or administrator upon the bond of the deceased, binding his heirs, was paid out of the personal estate, simple contract creditors might be substituted to the right of such creditor against the heirs. *Pugh v. Russell*, 27 Gratt. 789.

Previous to the act in the Code of 1849, a judgment against a deceased person had priority over debts by simple contract, and was to be paid out of the personal assets, if these were sufficient for the purpose; and having been paid out of the personal assets, this did not give simple contract creditors a right to have the assets marshaled, and to have their debts paid pro tanto out of the real estate. *Pugh v. Russell*, 27 Gratt. 789.

**Enforcement of Right by Subrogation.**—"Another doctrine of the equity courts is the doctrine of subrogation. The surety is entitled to enforce every remedy and every security the creditor has against the principal debtor, to stand in the place of the creditor, and to have all the securities of the latter transferred to him. These securities can not be released or in any manner impaired by the creditor to the prejudice of the surety. The rights of the latter do not rest upon contract, but upon the principles of natural justice. So far is this doctrine carried, that if the surety pays the bond and thereby utterly extinguishes the debt, a court of equity will nevertheless keep it alive for his benefit, in order to substitute the surety to all the rights and remedies of the creditor. The rule of marshaling assets depends upon the same principles. If a bond binding the heirs is paid out of the personalty, the debt is gone; but the equity courts permit a simple contract creditor to stand in the shoes of the bond creditor, and charge the debt by simple contract upon the realty." *Meade v. Grigg*, 26 Gratt. 612, 616.

D. being the endorser of C. on several notes discounted at bank, and it being expected that he will endorse other notes for C., the latter executes a bond binding his heirs to D., with a condition that he will, when required by the bank or D., pay off all such notes, and thus indemnify and save D. harmless. C. dies whilst D. is his endorser on several notes, which by an arrangement with the bank, D. takes up by the discount of his own note; and subsequently the administrator of C. pays up the whole amount of the notes, principal and interest, out of the personal estate. Held, that this bond was a valid security to D., binding the heirs of C.; and that the notes, to the extent of the penalty, having been paid out of the personal assets, the simple contract creditors of C. are entitled to have the assets marshaled, and to be substituted to the extent of the penalty of the bond, to the rights of D. upon the real estate, in the hands of the heirs of C. *Cralle v. Meem*, 8 Gratt. 496, cited in *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. 600.

## C. ORDER OF LIABILITY OF ASSETS.

### 1. In General.

The order in which the different kinds or subjects of property constituting the estate of a deceased testator, and which are liable to the payment of debts, will be applied, seems to be pretty clearly settled by the various adjudications that have been made upon the subject. The first to be so applied, is the personal estate at large not exempted by the terms of the will or necessary implication. Next to it, real estate or an interest therein expressly set apart by the will for the payment of debts. Next, real estate descended to the heir. After it, properly, real or personal, expressly charged with the payment of debts, and then subject to such charge, specifically devised or bequeathed. If these prove inadequate, then general pecuniary legacies, and

after them specific legacies, both classes rateably; and in the last resort real estate devised by the will. *Cranmer v. McSwords*, 24 W. Va. 594; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108; *Elliott v. Carter*, 9 Gratt. 541; *Laidley v. Kline*, 8 W. Va. 218; 3 Min. Inst. (2d Ed.) 584.

Where the testator charges his debts on his personality only, the order of applying his estate to the payment of his debts is: (1) Personality at large; (2) residuary legacies; (3) general pecuniary legacies; (4) specific legacies; and lastly, real estate devised by will. And where the residuary legacy is bequeathed to the executor, and he takes and consumes it, leaving the testator's debts unpaid, his sureties are liable for the amount thereof before real estate devised by will can be subjected. *Edmunds v. Scott*, 78 Va. 720, citing *Elliott v. Carter*, 9 Gratt. 541.

### 2. Personality Primary Fund.

#### a. Payment of Debts.

The well-settled general rule is that the personal estate is the natural and primary fund for the payment of debts, and must first be exhausted before the real estate can be made liable; nor will it be exonerated by a charge on the real estate, even where there is a specific lien for a debt on the real estate, unless there be expressed words, or a plain intent, in the will to make such exoneration. *Swann v. Housman*, 90 Va. 816, 20 S. E. 830; *New v. Bass*, 92 Va. 383, 23 S. E. 747; *Elliott v. Carter*, 9 Gratt. 541; *Leake v. Leake*, 75 Va. 792; *Pleasants v. Flood*, 89 Va. 96, 15 S. E. 504; *McCloud v. Roberts*, 4 Hen. & M. 443; *Suckley v. Rotchford*, 12 Gratt. 60; *Saddler v. Kennedy*, 26 W. Va. 636; *Bell v. McConkey*, 82 Va. 176.

The personal property is made by law the primary fund for the payment of debts. *Scott v. Ashlin*, 86 Va. 581, 10 S. E. 751; *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

The personality is the only fund liable to the payment of legacies, unless

they are charged upon the realty by express direction or necessary implication. *Smith v. Mason*, 89 Va. 713, 17 S. E. 3.

In the absence of a testamentary provision for the payment of debts, the personal property of a decedent is the primary fund for their payment, even though the debts be secured by a lien given by the decedent in his lifetime on his real estate. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

**In a suit in equity to subject the separate estate of a married woman to the payment of her debts** where it appears that she owns personal and real estate, and the personalty is more than sufficient to pay the indebtedness, the personalty should first be subjected before resorting to the realty. *Fitzgerald v. Phelps, etc., Windmill Co.*, 42 W. Va. 570, 26 S. E. 315.

**In equity, whether the lands be charged by the will, or the bond, of the ancestor**, creditors must exhaust the personal estate, before they can resort to the lands. *Garnett v. Macon*, 6 Call 308.

**Debts Subsequently Discovered.**—Executors, who in ignorance of debts against the decedent, have paid over the proceeds of the personal property to the devisees, are entitled to have the devisees subjected in the first place to pay the amount to the creditor. *Lewis v. Overby*, 31 Gratt. 601.

**General Charge—Personalty Exhausted.**—Where a testator charges all of his estate with the payment of debts, if, after the personal estate is exhausted, there remains a debt against the estate, it will be a charge on the real estate. *Hudgin v. Hudgin*, 6 Gratt. 320.

**Realty and Personalty Equally Charged.**—It seems to be settled that though personal property is applicable to the payment of debts before real property, when neither species is expressly charged by the terms of the will, yet when both are equally and ex-

pressly charged they stand on the same footing, and each must be applied in the payment of debts pro rata according to their respective values. *Murphy v. Carter*, 23 Gratt. 477; *Elliott v. Carter*, 9 Gratt. 541; *Cockerville v. Dale*, 33 Gratt. 49.

**Laches.**—Though as a general rule the personalty dedicated by the will for the payment of debts must be taken before going against the lands devised, still it has been held that where the creditors have been delayed a long time (fifteen years), and the personal estate dedicated by the will proves insufficient for the payment of the debts, and the efforts to realize from the outlands directed by the will to be sold for that purpose, have proved abortive, then the lands of devisees not charged by the will may be subjected rateably for the discharge of the debts. *Bell v. McConkey*, 82 Va. 176. See also, *Max Meadow, Land, etc., Co. v. McGavock*, 96 Va. 131, 30 S. E. 460.

Where the evidence discloses no laches on the part of the decedent's creditors to have their claims paid out of the personalty, and the personalty has been exhausted, either by devastavit or distribution, the creditors are not barred of their statutory right to have the realty subjected to their payment. *Scott v. Ashlin*, 86 Va. 581, 10 S. E. 751.

#### b. Payment of Legacies.

The personalty is not only the primary, but the only fund liable for the payment of legacies, unless they are charged upon the realty by express direction or by necessary implication. What language will amount to an express charge must always be a matter of construction and interpretation, depending upon the terms employed in each individual case. A charge will be implied if the language of the will indicates that the testator intended the legacies to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appears that

in giving the legacies he had the real estate in mind. *Smith v. Mason*, 89 Va. 713, 17 S. E. 3; *New v. Bass*, 92 Va. 383, 23 S. E. 747; *Todd v. McFall*, 96 Va. 754, 32 S. E. 472; *Lee v. Lee*, 88 Va. 805, 14 S. E. 534; *Crouch v. Davis*, 23 Gratt. 62; *Lewis v. Thornton*, 6 Munf. 87.

Unless legacies are charged upon the real estate by express direction or by necessary implication, the personality is not only the primary, but the only fund liable for the payment of legacies. *Smith v. Mason*, 89 Va. 713, 17 S. E. 3.

Where the testator gives legacies without directing who shall pay the same, or out of what fund they shall be paid, the personal estate being the primary fund for the payment of legacies, the legal presumption is, that he intended they should be paid out of his personal estate only, and if that is not sufficient, the legacies fail. *Read v. Cather*, 18 W. Va. 263.

Where a will provided for the payment of a legacy from the testator's personal property, the legatee is not entitled to payment from lands on which there was a vendor's lien which was paid from the personal estate as a debt of the estate, thereby rendering such property insufficient to pay the legacy. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

Early in 1857, R. devised to W. real estate charged with payment of certain legacies, all whereof W. promptly paid, except one of \$1,250 to the infant children of S. December 18th, 1857, W. paid this legacy to S. and took his receipt. April 3d, 1859, for slaves delivered by W. to S. under a decree rendered sometime before in a suit by S. as next friend of his children, and for balance of a residuary legacy to them then paid by W. to S., a receipt and a refunding bond were executed by S. to W. Neither the receipts nor the bond were signed by S. "as guardian," but in the last receipt and in the bond reference was made to S. as the guardian of said children. Later W. devised

said real estate to E. and his personality to his sister. After attaining their majority these children, claiming that S. was not their guardian on 18th December, 1857, and that the payment of the legacy by W. to S. on that day, was unauthorized, sued W.'s administrator for the payment thereof. The records of G. county, wherein the qualification of S. as such guardian should have been, were destroyed, much time had elapsed, the memory of S. had failed, and evidence was lost, etc. Held: Quære, it is not necessary now to decide whether the real estate which had been devised by R. to W. and charged with the payment of this legacy, is chargeable in the hands of E., the devisee of W., before resorting for its payment to the personal estate of W. in the hands of his administrator. *Thurston v. Sinclair*, 79 Va. 101.

**Charge of Legacy Solely on Real Estate.**—Testator charged estate bequeathed to his son J with payment of annuity of \$3,000 out of the annual profits thereof to his son P, during his life, and at his death to P's child, or children, during their lives, or the life of the survivor. Testator also empowered J to sell and convey any of his real estate. P had only one child, E. J paid the annuity up to January 1st, 1871. But the slave and much of the other personality was lost by the war, and the realty became less remunerative; and in order to enable him to continue paying the annuity, it became necessary for him to sell "White Marsh," part of the real estate. So J sold it to H for \$60,000. In a suit to which P and his child (E) were parties, the court sanctioned the sale, allowed J to collect the cash payment of \$20,000 for his own uses; required H to execute his bonds for the balance (\$40,000), which bore interest at 7½ per cent. per annum, and was payable at three years, to a commissioner, and to execute a trust deed on "White Marsh" to secure payment of said bond; and directed H to pay the inter-

est annually to P in satisfaction of the annuity, until the maturity of the bond, and then to pay the \$40,000 into bank subject to the order of the court. For several years H regularly paid the annuity to P, and the arrangements seemed complete, and J so considering them, sold and conveyed the residue of the real estate to H. In 1873 H became insolvent. In 1875 H conveyed his equity redemption in "White Marsh" and the residue of the real estate, except the courthouse property, to trustees for the benefit of his wife (Mrs. H), and executed on the courthouse property a mortgage to secure £20,000 to B. The mortgage was foreclosed and Mrs. H purchased the property. H failing to pay the \$40,000 into bank, "White Marsh" was sold under decree of the court for \$34,151 net to Mrs. P, a sum insufficient to raise at 6 per cent. per annum the annuity of \$3,000. Then P and his child (E) filed their bill to subject the rest of the testator's real estate to payment of the deficiency of the annuity. Held, the arrangements made by the court to secure the payment of the annuity to P and his child after his death, exonerated the residue of the testator's real estate from the charge therefor, and that residue is not liable for the deficiency of the annuity, which the net proceeds of the sale of "White Marsh" under the deed of trust taken by the court and enforced by its decree are insufficient to pay. *Downman v. Rust*, 6 Rand. 587, reviewed and distinguished. *Hughes v. Tabb*, 78 Va. 313.

### 3. Real Estate Set Apart for Payment of Debts.

Next to the personal estate, real estate or an interest therein expressly set apart by the will for the payment of debts, is to be subjected. *Elliott v. Carter*, 9 Gratt. 541; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

If a testator does not charge the real estate with the payment of debts, but, after making his will, encumbers a por-

tion of his real estate by a specific lien, the devisee of such portion as between him and the devisee of other real estate, takes cum onere. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

### 4. Lands Descended.

**In General.**—Real estate descended to the heirs is to be subjected third. *Elliott v. Carter*, 9 Gratt. 541; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

"There is no doubt that land descended to the heir is liable for the debts of the ancestor. \* \* \* But before the land descended to the heirs can be charged with the debts of the ancestor, the personal property belonging to the estate of the ancestor, must first be applied." *Sommerville v. Sommerville*, 26 W. Va. 484.

Generally, the personal assets of an intestate, so far as they have not been administered, should be administered under the direction of the court, and applied to the payment of the debts of the intestate, and in relief of the realty which descended to the legal heir in the suit or proceeding, to subject the realty to the payment of debts of the decedent. *Laidley v. Kline*, 8 W. Va. 218.

After exhaustion of decedent's personality, his lands in possession of his heirs or devisees are liable for his debts, but not his land in possession of his widow as her dower during her estate therein. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

### Bond of Simple Contract Creditor.—

**Quære**, whether, and under what circumstances, a court of equity can decree a sale of land descended or devised (without any specific lien, or any charge, either general or special, by a conveyance or will of the ancestor or deviser), to satisfy a bond, or a simple contract creditor, claiming on the principal or marshaling assets. Especially can such decree be made, in any such case, where the rents and profits of the land are sufficient to keep down the interest accruing on the debt. *Mason v.*

Peter, 1 Munf. 437, cited in *Foster v. Crenshaw*, 3 Munf. 514, 520.

**Rents and Profits.**—But upon a bill by creditors of a decedent against his administrators, and heirs to marshal assets, the court may decree a sale of the lands descended to the heirs, but it is not bound, and ought not to decree such sale, if the rents and profits of the lands will satisfy the debts within a reasonable time, especially if the heirs be infants. *Tennent v. Pattons*, 6 Leigh 196; *Mason v. Peter*, 1 Munf. 437.

**Creditor of Deceased Debtor.**—The creditor of a deceased debtor may proceed in equity against his heirs residing abroad, as absent defendants, to marshal the assets, and thus subject the land or its proceeds, in the state, descended to them from the debtor. *Carrington v. Didier*, 8 Gratt. 260.

##### 5. Real Estate and Personalty Devised or Bequeathed for Payment of Debts.

**In General.**—After real estate descended to the heir, property, real or personal, expressly charged with the payment of debts, and then subject to such charge, specifically devised or bequeathed, is to be subjected. *Elliott v. Carter*, 9 Gratt. 541; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

A fund appointed by a will, for payment of debts and legacies, must be considered sufficient, unless the contrary be proved. *Patton v. Williams*, 3 Munf. 59.

Creditors, in seeking satisfaction of their debts, are bound to exhaust the property set apart by the testator for payment of debts, before subjecting other estate of the testator specially devised. *Patton v. Williams*, 3 Munf. 59.

Legatees have no right to call upon a devisee to contribute to the payment of their legacies, unless the real estate devised be expressly charged. *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

But if creditors would be greatly de-

layed by a resort to real estate set apart by the will for the payment of debts, then lands specifically devised may be subjected for their pro rata share of the unpaid liabilities. *Bell v. McConkey*, 82 Va. 176.

**Specific Legacies Liable before Lands Specifically Devised.**—Where the testator charges his debts on his personalty only, and the will contains no directions to the contrary, personal property specifically bequeathed is applicable before lands specifically devised; but specific devisees contribute rateably inter se, each being subjected for his proportion of the debt. *Edmunds v. Scott*, 78 Va. 720; *Elliott v. Carter*, 9 Gratt. 541; *Lewis v. Overby*, 31 Gratt. 601.

**Personal Liability of Devisee upon Acceptance.**—By accepting the devise the devisees become personally liable in respect to the subject devised to them respectively, each for his share of the debts. *Baylor v. Dejarnette*, 13 Gratt. 153.

**Realty and Personalty Equally Charged.**—It seems to be settled that though personal property is applicable to the payment of debts before real property, when neither species is expressly charged by the terms of the will; yet when both are equally and expressly charged they stand on the same footing, and each must contribute its rateable share to the common burden. *Murphy v. Carter*, 23 Gratt. 477; *Elliott v. Carter*, 9 Gratt. 541; *Cockerville v. Dale*, 33 Gratt. 45.

**Effect of Trust to Pay Debts upon Statute of Limitations.**—A devise of real estate for the payment of debts will not affect the operation of the statute of limitations upon such debts, whether they are due at the testator's death or not, unless the contrary intention on his part plainly appears. *Johnston v. Wilson*, 29 Gratt. 379. The court in this case further said: "In some of the earlier cases it was held, that a devise for the payment of debts

had the effect of reviving debts already barred by limitation; but this doctrine has been long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. *Burcke v. Jones*, 2 Ves. & Beam. 275; 7 John. Ch. R. 293; *Tazewell v. Whittle*, 13 Gratt. 329; *Baylor v. Dejarnette*, 13 Gratt. 153; 1 Rob. Pr. 346."

Where a testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of 1,500 pounds sterling towards his debts; directed sundry tracts of lands to be sold, and the moneys arising therefrom, as well as from loan office certificates, or otherwise (after payment of his just debts), to be equally divided among his six sons, on a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shown that he came within any of the exceptions of the act, it was held that the statute ought not to operate to prevent a recovery of so much of the specific fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund. *Lewis v. Bacon*, 3 Hen. & M. 89.

#### **Trust of Personality Inoperative.**

But a provision in a will that the money arising from the sale of the testator's personal property, after payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of the debts, nor take any debt out of the operation of the act of limitations. *Brown v. Griffiths*, 6 Munf. 450.

#### **Debts Barred at Testator's Death.**

In *Tazewell v. Whittle*, 13 Gratt. 347, it was said that in *Lewis v. Bacon*, 3 Hen. & M. 89, it was held, that a debt barred at the time of the testator's death was, to some extent, revived by a trust for the payment of debts out of the real estate, but that case was decided in 1808 before the decision in

*Burcke v. Jones*, 2 Ves. & Beam. 275, and ought not to be considered as settling the law.

A trust created by will for the payment of debts by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay. Hence, an undertaking which is merely nudum pactum is not comprehended, and may be barred by the act of limitations. *Chandler v. Hill*, 2 Hen. & M. 124.

**Apportionment of Burden.**—The court should subject each devisee for his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land not sold in the first instance for the payment of his or her proportion of the debt. If the land still held by one of them does not discharge his or her proportion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her proportion thereof, and so on until the whole is paid or the whole land sold. *Lewis v. Overby*, 31 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367; *Foster v. Crenshaw*, 3 Munf. 514; *Hopkirk v. Dennis*, 2 Munf. 326; *Mason v. Peter*, 1 Munf. 437.

**Advancements.**—Advancements made by the testator in his lifetime are not to be taken into the account in fixing the proportion of the debts which each devisee is to pay. *Gaw v. Huffman*, 12 Gratt. 628.

#### **6. General and Specific Legacies.**

**In General.**—If these other funds prove inadequate, then general and pecuniary legacies, and after them specific legacies, both classes rateably. *Cranmer v. McSwords*, 24 W. Va. 594; *Elliott v. Carter*, 9 Gratt. 541; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

Where there was a specific bequest in satisfaction of a debt supposed by the testator to be due from him to the legatee, and the debt was in fact due from the testator to another person;



held, that the specific bequest was not charged with the payment of the debt, there being nothing from which to deduce the inference that the testator would not have made the bequest if he had known to whom the debt was really due. *Harrison v. Haskins*, 2 Pat. & H. 388.

The presumption is as between the specific devisee and pecuniary legatee, that the testator intends the money legacy to be paid first out of the personal property and next out of the real estate which is included in the residue. *Lynch v. Spicer*, 53 W. Va. 426, 430, 44 S. E. 255.

**Residuary Legacy before Specific Devise.**—Even if a specific devise of land is charged with debts, the residuary legacy must first pay them. Likewise as to legacies; if the specific devise would be liable to debts secondarily only though so charged, much more would the residuary legacy have to pay when the specific legacy or devise is not charged. *Harrison v. Haskins*, 2 Pat. & H. 388; *Lynch v. Spicer*, 53 W. Va. 426, 431, 44 S. E. 255.

A specific legacy, although expressly charged with the payments of debts, is not liable therefor, until the residuum is exhausted, unless the residuum be expressly or by clear implication exonerated from the payment of debts. *Harrison v. Haskins*, 2 Pat. & H. 388.

A specific bequest as to its liability for the payment of debts, bears the same relation to a residuary bequest, as real estate does to personal estate, the latter being the primary fund for the payment of debts. *Harrison v. Haskins*, 2 Pat. & H. 388.

And where there is a charge on a specific bequest, and a charge on the residuum, for the payment of debts, the last provision shall control. *Harrison v. Haskins*, 2 Pat. & H. 388.

Where a testator charges his debts on his personalty only, the order of applying his estate to the payment of his debts is: (1) Personalty at large;

(2) residuary legacies; (3) general pecuniary legacies; (4) specific legacies; and lastly, real estate devised by will. And where the residuary legacy is bequeathed to the executor, and he takes and consumes it, leaving testator's debts unpaid, his sureties are liable for the amount thereof before real estate devised by will can be subjected. *Elliott v. Carter*, 9 Gratt. 541, 549; *Edmunds v. Scott*, 78 Va. 720.

**Apportionment of Burden.**—L, about a year before his death in 1866, put each of his four children into possession of a parcel of land with the personal property upon it, but did not convey it. About the same time he made his will, and by it gave to each of the children the land and property in his and her possession. By a codicil he states that he was the guardian of his children, and requires that each of them shall execute a receipt for all claims against him as guardian before they shall be entitled to receive their portion under his will. And he directs that if any one of them shall refuse so to do, his or her portion shall be sold and the proceeds held to meet the liability, and the balance paid over to those executing the receipt. These children held the lands so in their possession, each of them selling a part of that given to him or her prior to 1873. In 1873 a judgment was recovered by B's administrator against the executors of L, upon a bond on which he was surety, and in 1877 a bill was filed by said administrator against the executors and devisees of L, to have payment. The executors had been assured by L, that he owned no debts, and was under no liability, and neither they nor the other children had ever heard of this debt until the suit was brought in April, 1873. Held, all the parties being before the court, the executors are entitled to have the devisees to whom they paid over the proceeds of the personal property, subjected in the first place to pay the amount to the creditor. The court should subject each devisee for

his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land not sold in the first instance for the payment of his or her proportion of the debt. If the land still held by one of them does not discharge his or her proportion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her proportion thereof, and so on until the whole debt is paid or the whole land sold. "No doubt all the devised lands are liable for the payment of the debts of the testator, but surely each devisee should be allowed to save from sale, if possible, the land devised to him by paying his rateable share of the debts, as among the devisees themselves each is liable for a part of the debt proportioned to the value of the land devised him. If he pay more, or his lands are sold to pay more, he certainly has the right to call on his codevisees for contribution. But why sell his lands, and perhaps deprive him of a home, and then turn him around on the others to get his money, which probably would not compensate him for his loss, for the loss of a home is often irreparable? It is the constant course of equity so to administer justice as to prevent multiplicity of suits and circuity of action, save costs, and put an end to litigation. The case of *Mason v. Peter*, 1 Munf. 427, referred to in 2 Rob. Pr. (old Ed.) 89, seems to be directly in point. Akin to it is the case of *Mayo v. Tomkies*, 6 Munf. 520, 528." *Lewis v. Overby*, 31 Gratt. 601, 619.

#### 7. Real Estate Devised.

As a last resort, real estate devised by the will, without any specific charge, will be subjected to the payment of the testator's debts. *Foster v. Crenshaw*, 3 Munf. 514; *Elliott v. Carter*, 9 Gratt. 541; *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108; *Edmunds v. Scott*, 78 Va. 720.

Lands devised (without any specific charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisor, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for life of the testator's widow. *Foster v. Crenshaw*, 3 Munf. 514.

Where fifteen years delay has resulted in the payment of only a part of the creditor's debt, and has developed the fact that the lands of the principal are so encumbered by prior liens, as to leave no hope of any relief in that quarter, and the personal fund dedicated by the will of the surety proves insufficient for the payment of the debts, and efforts to realize from the outlands directed by the will to be sold for that purpose, have proved abortive, it is proper to decree that unless the devisees of the surety do, within a prescribed time, contribute their rateable proportions to pay the creditor's debt, then the lands devised to each of said devisees, shall be subjected to the payment of said proportions. *Bell v. McConkey*, 82 Va. 176.

#### D. CHARGE OF DEBTS AND LEGACIES.

##### 1. Charges of Debts and Legacies Distinguished.

"A distinction has always been recognized between charging land with debts and with legacies. As to the former, the courts have gone on a slight implication and moral principle; but as to legacies there must be a clear, manifest intention that the devisee or heir shall take subject to the legacies." *Lee v. Lee*, 88 Va. 805, 14 S. E. 534.

##### 2. Charge of Debts.

###### a. In General.

At common law the lands of the testator were only liable for debts of record and of specialty binding the heirs, and they were entitled to the real estate, though charged with debts, until convicted of mismanagement, or misapplication of profits. But as it is so natural to suppose that a man, in a

solemn act like a will, intended to be just, that courts have taken very slight words in such an instrument to imply a charge on lands. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108; *Trent v. Trent*, *Gilmer* 174; *Downman v. Rust*, 6 Rand. 587; *Gaw v. Huffman*, 12 Gratt. 628; *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

Several cases cite *Gaw v. Huffman*, 12 Gratt. 628, as authority for the proposition that, whether the will charges the real estate with the payment of the testator's debts, is always a question of intention depending upon the construction of the whole will. See *Allen v. Patton*, 83 Va. 255, 265, 2 S. E. 143; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 239, 27 S. E. 378, 382; *Thomas v. Rector*, 23 W. Va. 28.

In *Downman v. Rust*, 6 Rand. 587, 589, it is said: "Every question of the charge on land under a will, is a question of intention. In the case of debts, it is so natural to suppose that a man in that solemn act, intended to be just, that courts have taken very slight words in a will to imply a charge upon lands. The books are full of such cases. *Trent v. Trent*, in *Gilmer Rep.* 174, is one of that class."

#### b. What Constitutes.

##### Direction for Payment of Debts.

**In General.**—It is established as a general rule, that a direction by a testator that his debts shall be paid, charges them by implication on his real estate, either as against his heir at law or devisee, and this charge is not released by a subsequent selection of particular parts to be sold for that purpose. But, where the testator says, "It is my will and desire that my just debts be paid out of my estate," etc., the debts are not thereby charged upon the testator's real estate. *Allen v. Patton*, 83 Va. 255, 2 S. E. 143; *Gaw v. Huffman*, 12 Gratt. 628; *Read v. Cather*, 18 W. Va. 263; *Trent v. Trent*, *Gilmer* 174; *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202; *Clarke v. Buck*, 1 Leigh 487; *Poindexter v. Green*, 6 Leigh 504.

And an intention to charge the real estate is likewise inferred where a testator devises the real estate, after a direction that debts and legacies be first paid, or previously paid; or devises the remainder of his estate, real and personal, after payment of debts and legacies; or the devise is declared to be made after they are paid. *Lupton v. Lupton*, 2 Johns. Ch. 614; and *Lee v. Lee*, 88 Va. 805, 14 S. E. 534. *Todd v. McFall*, 96 Va. 754, 762, 32 S. E. 472.

**Illustrative Cases.**—In *Thompsons v. Meek*, 7 Leigh 419, 432, it is said by Carr, J.: The first clause in the will is, "I desire that my funeral expenses, and all my just debts be paid." This, in the commencement of a will, has often been decided to be a charge upon the realty. *Trent v. Trent*, *Gilmer* 174; *Clarke v. Buck*, 1 Leigh 487. On this question *Clarke v. Buck*, 1 Leigh 487 is cited in *Read v. Cather*, 18 W. Va. 263, 267; *Black v. Scott*, 3 Fed. Cas. 516.

The proposition of *Trent v. Trent*, *Gilmer* 174, that, where a will directs that all the testator's just debts shall be paid, this acts as a charge on the testator's real estate, was approved and followed in *Clarke v. Buck*, 1 Leigh 487; *Thompsons v. Meek*, 6 Leigh 419, 432.

Testator by his will, directs that all his just debts shall be first paid. This is a charge of the debts on the real estate; which charge is not released by bound as surety, as well as debts for which he was bound as principal. *Poindexter v. Green*, 6 Leigh 504.

Directing by will "the payment of all just debts," charges the whole estate; which charge is not released, by a subsequent selection of particular parts to be sold for that purpose. *Trent v. Trent*, *Gilmer* 174.

Testator says, "It is my will and desire that my just debts be paid out of my estate by my executors hereafter mentioned." The debts are not thereby charged upon testator's real estate. *Gaw v. Huffman*, 12 Gratt. 628.

A will which contains the following clause: "I desire that all my just debts be paid out of my estate as soon after my decease as may be convenient," does not thereby make the debts of the testator a charge upon the real estate of which he died seized and possessed. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378, following *Gaw v. Huffman*, 12 Gratt. 628.

B., owning real and personal estate, makes his will, beginning: "It is my will and desire that all my just debts be paid; after that, I wish that C. have 1000 dollars, provided my estate will admit of it;" then he bequeathes to the same C. the greater part of his personal chattels, specifically; making no mention of his real estate, which descends to his heir at law; the whole personal estate proves insufficient to pay debts and the legacy of 1000 dollars. Held, that both the testator's debts, and C.'s legacy, are charged by the will on the real estate descended. *Clarke v. Buck*, 1 Leigh 487.

Where one of the clauses in a will was as follows: "I will and direct that all my just debts be paid by my executor out of funds applicable thereto as herein provided," and no other provision was made for the payment of debts, it was held, to be manifestly the intention of the testator that they should be discharged out of the personal assets, and the language employed did not charge the real estate with their payment. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108, citing *Gaw v. Huffman*, 12 Gratt. 628; *Leavell v. Smith*, 99 Va. 374, 38 S. E. 202.

**Exceptions to Rule—Devise to Executor.**—To this general rule there are exceptions; one of which is, where the debts are directed to be paid by the executors, "If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control. If the executor is

pointed out as the person to pay, that excludes the presumption that other persons not named are to pay." 2 Story's Equ. Jur., § 1247. *Gaw v. Huffman*, 12 Gratt. 628, 634, quoted in *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

When the executor is the devisee of real estate, and he is directed to pay the debts, a charge upon it will be generally implied by such a direction. But this will not be the case where the estate is specifically devised to a person who happens to be one of the executors. And even where the executors are also devisees, a mere general introductory direction to the executors will not operate as a charge if it is manifest from the whole will that it was not so intended. *Gaw v. Huffman*, 12 Gratt. 628; *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

"And the fact that Wesley M. Bird, is executor and a devisee also is important. The case of *Downman v. Rust*, 6 Rand. 587, is exactly in point. It holds that, if the personality be inadequate, or there be expressions in the will tending to show that the testator had the land in mind, a court will make legacies a charge on land, rather than they shall go unpaid. In that case, a testator, whose personality was inadequate to pay legacies, having one brother, who would have been distributee, gave pecuniary legacies to two friends, and devised all the rest of her estate, real and personal, to that brother, and appointed him executor, and it was held, that there was a charge on the realty for the pecuniary legacies." *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852, 853.

**Miscellaneous Examples.**—Where a testator divides his whole estate without regard to its legal division into two parts called "personal fund," and "real estate," and it is plainly his intention gathered from the will, the codicils and other writings that such real estate shall bear the expense of the conversion thereof into money, equity will carry out such intention and

charge such expenses to the proceeds of such real estate, although there is a general provision in the will for the payment of all debts from such personal fund. *Mathews v. Tyree*, 53 W. Va. 298, 44 S. E. 526.

Testator, in first clause of his will, appoints his executor and provides that no security shall be required of him, except such as shall be necessary for his just debts; and then adds, "the residue of my estate I confide in him to dispose of as I shall hereafter direct;" and then directs him to sell all his real estate, except a very small part. Held, the real estate is charged with debts. *Dunn v. Amey*, 1 Leigh 465, cited in *Black v. Scott*, 3 Fed. Cas. 516.

Where it is manifest that a testator intended that his debts should be paid out of his personal estate, a direction in his will that his just debts shall be paid out of the funds applicable thereto is not a charge of his real estate with the payment of his debts. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

Where a testator expressly charges the payment of certain specified debts upon the whole of his property, and sets apart a fund for the satisfaction of his general creditor, the latter may require the specified debts to be discharged out of the general estate, so as to obtain payment themselves out of the particular fund. *Trent v. Trent*, *Gilmer* 174.

A testator says in his will: "I give and devise to my said wife a life estate in the cottage and two acres of ground. To my son Stephen I give the fee simple estate of the two acres of land just mentioned, subject to his mother's life estate. If at any time before or after the death of my wife it is thought expedient to sell said lot of ground and its improvements, it is then my will that Stephen receive one share of the purchase money in his own right, and the balance to be equally divided and paid over to his children, share and share alike; and do

hereby bind said land and improvements with the condition that the purchase money shall be distributed as I have here directed." It was held, Stephen, not having sold, had the power, as the owner in fee simple, to charge the land with the payment of his debts. *Baylor v. Balch*, 34 W. Va. 438, 12 S. E. 735.

#### c. Dower Lands.

**Lands Devised to Heirs and Dower Lands.**—Where a testator charges on land devised a debt due to another, the lands devised to the heir and the lands of the widow are all equally and successively liable, and not in different degrees, for their due proportion. There is no principle by which the lands devised to the heirs should be first subjected, and the dower lands exempted, except as to any deficiency unpaid by the sale of the lands in the hands of the heirs. *Harper v. Vaughan*, 87 Va. 426, 12 S. E. 785, citing *Wilson v. Davisson*, 2 Rob. 384; *Pugh v. Russell*, 27 Gratt. 789, 801. Compare *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577.

**Life Estate of Widow in Lieu of Dower.**—A life estate in lands having been given to the widow in lieu of dower, and being of less value than her dower would have been, her life estate is not to bear any part of the burden of paying the debts. *Gaw v. Huffman*, 12 Gratt. 628.

#### d. Measure of Liability.

S by his will gives certain personal property to his son J, out of which he directs J to pay his debts, and gives him the remainder. J conveys his whole estate, real and personal, to T, in trust to pay specific debts, some of which are his own and others are the debts of S. He dies in 1828, and by his will authorizes his executors to sell his whole estate, for payment of debts. The executors refuse to qualify, and T is appointed administrator with the will annexed. Afterwards T as trustee sells the whole estate, and after

selling enough to pay the debts provided for in the deed, he allows an agent of the widow of J to purchase eight slaves at a price far below what they would have brought if there had been fair competition. Held, by accepting the legacy J was not bound to pay the debts of S beyond the value of the property given him. The devisees and legatees of S are each responsible to the creditors of J, for the amount of debts of S paid out of J's trust fund, to the extent of the value of the property received by such devisee or legatee. *Harvey v. Steptoe*, 17 Gratt. 289.

Executor having exhausted the personal estate in payment of debts and being largely in advance to the estate for payment of debts which bound the heirs, is entitled to stand in the place of the creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the death of the testator. *Gaw v. Huffman*, 12 Gratt. 628.

**Charging the whole estate with particular debts**, lets in every creditor on the whole estate; *quære*. *Trent v. Trent*, *Gilmer* 174.

#### e. Personal Liability of Devisee.

A dies indebted to K, and by his will gives large estates to his three sons, B, C, and D, and directs that B shall pay one-half of his debts, and that C and D shall each pay one-fourth. B qualifies as executor of C and dies, and by his will gives an estate to E for life, and at his death to the eldest son of E living at his death, E not having a son at the death of B. K had sued B in equity to recover his debt, and after B's death and before E had a son, the suit is revived against the executor of B and against E, and after the birth of E's son there is a decree for a sale of a part of the land devised by B for the payment of B's half and C's fourth of the debt, and the land is sold and conveyed to the

purchaser, the son of E not being a party to the suit. On the death of E his son brings ejectment to recover the land sold, against a party claiming under the purchaser under the decree. Held, by accepting the devise the devisees became personally liable in respect to the subject devised to them respectively, each for his share of the debts; and the creditors were under no obligation to look to the general estate of A before asserting their claims against the devisees and the subject devised. B having received assets as executor of C and having executed a bond as executor, C's fourth of the debts of A were charged upon the real estate of B (if not otherwise) by his executorial bond. *Baylor v. De-jarnette*, 13 Gratt. 152.

#### f. Limitations.

A dies indebted to K, and by his will gives large estates to his three sons, B, C and D, and directs that B shall pay one-half of his debts, and that C and D shall each pay one-fourth. B qualifies as executor of C and dies, and by his will gives an estate to E for life, and at his death to the eldest son of E living at his death, E not having a son at the death of B. K had sued B in equity to recover his debt, and after B's death and before E had a son, the suit is revived against the executor of B and against E, and after the birth of E's son there is a decree for a sale of a part of the land devised by B for the payment of B's half and C's fourth of the debt, and the land is sold and conveyed to the purchaser, the son of E not being a party to the suit. On the death of E his son brings ejectment to recover the land sold, against a party claiming under the purchaser under the decree. Held, the debt due to K not having been barred at the death of A, his will created a charge upon the lands devised to his three sons B, C and D, for the payment of his debts in the proportions named therein; and this charge

would prevent the bar of the statute of limitations as to the real estate taken by the sons under the devise to them. *Baylor v. Dejarnette*, 13 Gratt. 152.

In *Johnston v. Wilson*, 29 Gratt. 379, it is said: "In some of the earlier cases it was held that a devise for the payment of debts had the effect of reviving debts already barred by limitation; but this doctrine has been long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. *Burcke v. Jones*, 2 Ves. & Beam. 275; 7 John. Ch. R. 293; *Tazewell v. Whittle*, 13 Gratt. 329; *Baylor v. Dejarnette*, 13 Gratt. 152; 1 Rob. Prac. 346."

### g. Equity Jurisdiction.

P., as surety for M. by covenant binding his heirs, warrants title of slaves to G. and after, by will, charges his real estate with his debts, and devises it subject to such charge; the slaves being recovered from G.'s executors by title paramount, and sold under a decree in chancery for \$1,940, G.'s executors, without establishing their claim in an action at law against P.'s executor, file bill in equity against him and P.'s devisees, suggesting deficiency of personal assets, and praying an account thereof, and that the debt of \$1,940 may be satisfied out of the real estate. Held, the case is properly relievable in equity. *Poindexter v. Green*, 6 Leigh 504.

### 3. Charge of Legacies.

#### a. Intention of Testator.

Whether legacies are a charge upon real estate devised is a question of intention upon the part of the testator, for real estate is not chargeable with the payment of pecuniary legacies, unless the intention of the testator so to charge it is expressed in the will, or such intention appears by implication. *Read v. Cather*, 18 W. Va. 263; *Thomas v. Rector*, 23 W. Va. 26; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378; *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754; *Todd v. McFall*, 96

Va. 754, 32 S. E. 472; *Smith v. Mason*, 89 Va. 713, 17 S. E. 3; *Wood v. Sampson*, 25 Gratt. 845, 848; *Crouch v. Davis*, 23 Gratt. 63; *Lewis v. Thornton*, 6 Munf. 87.

The law as to charge of legacies on land, as expounded by the Virginia and West Virginia cases, is very well settled. "Real estate is not chargeable with pecuniary legacies, unless the intention so to charge is expressed in the will, or such intention appears by implication." *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378; *Thomas v. Rector*, 23 W. Va. 26. "Whether legacies are a charge upon real estate is a question of intention on the part of the testator." *Read v. Cather*, 18 W. Va. 263. *Downman v. Rust*, 6 Rand. 587, lays down that if "the personal fund be inadequate, or there be expressions in a will tending to show that the testator had the land in his mind, the court will make them (legacies) a charge on the land, rather than they shall go unpaid." 2 Lomax, Ex'rs, 90, 171, says: "Roper, after reviewing the cases in which legacies were charged by implication, has observed that they afforded solid ground for inferring the intention of the testator to charge the real fund or its produce with legacies, in aid of the personal estate. The real property was devised, and there were expressions connected with that devise which afforded a reasonably plain inference that the land or its produce should be taken subject to legacies. But where the intention to subject the real estate to legacies is merely probable or conjectural, and there are no expressions to charge, except such as are capable of being otherwise satisfied, a court of equity will not, on conjecture or private persuasion, affect the real estate with payment of legacies. Where, indeed, an unprovided child or creditors are the persons endeavoring to establish the charge, the court will incline in their favor, if the inference of intent to charge be dubious; but, where

the question is between mere voluntary legatees and the heir or the devisee, the court will require satisfactory conviction of the intent to charge the realty with legacies." *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754, 755.

Realty is chargeable with legacies, if the will discloses such intent. *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

Though legacies do not stand upon as high ground as debts, yet, if the personal fund be inadequate, or if there are expressions in a will tending to show that the testator had the land in his mind for their payment, they are a charge on the land devised. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754; *Downman v. Rust*, 6 Rand. 587.

Where legacies are given they are, in general, not a charge on realty; but if the testator had in mind the land for their payment, if his intent was that the land should pay them, they are payable out of it. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754; *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

It is universally conceded that as a general rule the personal estate is the natural primary fund for the payment of legacies. Whether they are chargeable on the land, when the personal property proves deficient, is always a question of intention. When the charge is not created in express terms, it may be established by implication. And in seeking for the expressed intention of the testator, his words are to receive that interpretation which a long series of decisions has attached to them; unless it is very certain they were used in a different sense. *Crouch v. Davis*, 23 Gratt. 62, 94.

**Intention Must Be Clear.**—As a general rule the personalty is not only the primary but the only fund for the payment of legacies. The testator, however, may charge the land, and this may be done either expressly or by implication; but in any case the inten-

tion to charge must be clear—so clear as to admit of no reasonable doubt. Hence, when the land is not charged and there is a deficiency of personalty, the legacies abate to the extent of such deficiency. *Lee v. Lee*, 88 Va. 805, 807, 14 S. E. 534.

#### **Parol Testimony to Show Intention.**

—"According to the English rule that intention is to be derived exclusively from the provisions of the will; and parol evidence is inadmissible to aid in ascertaining that intention. 1 *Rop. Leg.* 451 (576, 4th Ed.); *Parker v. Fearnley*, 2 *Sim. & Stu.* 592. In Virginia the rule is not so strict, and parol evidence is admissible. *Downman v. Rust*, 6 *Rand.* 587; *Clarke v. Buck*, 1 *Leigh* 487, 490; *Trent v. Trent*, *Gilmer* 174." *Read v. Cather*, 18 W. Va. 263, 267.

See *Wood v. Sampson*, 25 *Gratt.* 845, 848, holding that "whether general pecuniary legacies are chargeable on real estate is always a question of intention," and laying down the rule that this intention is to be obtained from the facts and circumstances and not from parol evidence of declarations of intention of the testator.

#### **b. Particular Expressions and Circumstances as Constituting Charge Considered.**

**In General.**—In the American and English Encyclopædia of Law, vol. 13, p. 110, it is said: "The personalty is not only the primary, but the only fund liable for the payment of legacies, unless they are charged upon the realty by express direction or by necessary implication. What language will amount to an express charge must always be a matter of construction and interpretation, depending upon the terms employed in each individual case. A charge will be implied if the language of the will indicates that the testator intended the legacies to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appear that in giving the lega-



cies he had the real estate in mind." Quoted in *Smith v. Mason*, 89 Va. 713, 715, 17 S. E. 3.

"Does a charge upon the real estate arise by implication? What words are sufficient to create a charge by implication has been the subject of much discussion in the adjudicated cases. It has been held, that where the land is devised "after debts and legacies paid" and "I will and devise that all my debts, legacies and funeral expenses shall be paid and satisfied in the first place; Item, I give and devise," etc., are sufficient words to create a charge upon the realty (1 *Rop. Leg.* 672-3); also, where a testator gives the residue of his estate real and personal "not herein before disposed of" and "all the rest, residue and remainder of his real and personal estate," and "all the rest and residue of his goods and chattels and estate." 2 *Lomax Ex'ors* 167 (87). *Read v. Cather*, 18 W. Va. 263, 268.

**Devise "after Payment of Legacies."**

—And an intention to charge the real estate is likewise inferred where a testator devises the real estate, after a direction that debts and legacies be first paid, or previously paid; or devises the remainder of his estate, real and personal, after payment of debts and legacies; or the devise is declared to be made after they are paid. *Lupton v. Lupton*, 2 *Johns. Ch.* 614; *Lee v. Lee*, 88 Va. 805, 14 S. E. 534; *Todd v. McFall*, 96 Va. 754, 762, 32 S. E. 472; *Read v. Cather*, 18 W. Va. 263.

**But where the testator gives legacies without directing who shall pay the same,** or out of what fund they shall be paid, the personal estate being the primary fund for the payment of legacies, the legal presumption is, that he intended they should be paid out of his personal estate only, and if that is not sufficient the legacies fail. *Read v. Cather*, 18 W. Va. 263.

**Directing Legacies to Be Paid.**—The real estate will not be charged with the payment of legacies, unless the inten-

tion of the testator to that effect is expressly declared, or clearly to be inferred from the language and disposition of the will; and it is not sufficient that debts or legacies are directed to be paid—that alone does not create the charge; but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. *Read v. Cather*, 18 W. Va. 263, 267.

A., by will, required P., his devisee and executor, to pay his fifteen named slaves three thousand dollars. By codicil, A. directs P. to pay the three thousand dollars out of any surplus he might have, without interfering with the other provisions of the will. Held, the legacy was not charged on the real estate, but on the surplus after satisfying the other provisions of the will. There being no surplus, the legacy failed. *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

By second clause of his will, testator directed that one thousand dollars out of his personal estate be paid, within not more than one year after his decease, to his cousin. By a codicil, he mentioned five five-hundred-dollar railroad bonds, out of which the executor was empowered to pay the legacy. By third clause, he directed all his real and personal estate to be sold, and the proceeds invested for certain purposes. Before his death, testator disposed of the bonds, and invested the proceeds in real estate. The personal estate was exhausted in the payment of his debts. Held, the legacy was not charged upon and payable out of his real estate. "In the third clause the testator provides, after directing this legacy to be paid out of the personal estate: 'I next devise all my estate, real and personal, or of any description whatever, to,' etc. This is a devise to the executor upon certain stated trusts. And if the legacy had been given generally, without direction as to the fund for its satisfaction, then it would seem to come within the rea-

soning of *Crouch v. Davis*, 23 Gratt. 62, and *Wood v. Sampson*, 25 Gratt. 845, 847." *Smith v. Mason*, 89 Va. 713, 716, 17 S. E. 3.

Where the testator, owning real and personal estate, makes his will, beginning, "It is my will and desire that all my just debts be paid; after that I wish C to have 1,000 dollars, provided my estate will admit of it;" also bequeathing to the same C the greater part of his personal chattels, specifically, but making no mention of his real estate, which descends to his heir at law, and the whole personal estate proves insufficient to pay debts and the 1,000 dollar legacy; it was held that both the testator's debts, and C's legacy are charged by the will on the real estate descended. *Clarke v. Buck*, 1 Leigh 487.

**No Part of Realty Specifically Devised.** — "Where pecuniary legacies alone are first given, and no part of the real estate is specifically devised, and there is a residuary clause, devising and bequeathing the residue of the real and personal estate, this operates to charge the entire property with the legacies." This well-established rule of interpretation is founded on the idea that in such a case the "residue" can only mean what remains after satisfying the previous gifts. It is like the case where a testator directs his debts and legacies to be first paid, and then devises real estate; or where he devises the remainder of his estate, real and personal, after payment of debts and legacies; or devises real estate after payment of debts and legacies. In these cases the real estate is charged, because such is the manifest intention of the testator. *Hill, Trustees*, 360; *Lewis v. Darling*, 16 How. 1; *Reynolds v. Reynolds*, 16 N. Y. 257; *Wood v. Sampson*, 25 Gratt. 845; *Downman v. Rust*, 6 Rand. 587." *Lee v. Lee*, 88 Va. 805, 808, 14 S. E. 534.

An intention to charge the real estate with the payment of legacies is inferred where pecuniary legacies alone

are first given and no part of the real estate is specially devised, followed by a residuary clause devising and bequeathing the residue of the real and personal estate; or where a testator devises his real estate, after a direction that debts and legacies be first paid; or devises the remainder of his estate, real and personal, after the payment of debts and legacies; or the devise is declared to be made after they are paid. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

**Disposition of Personality in Form of Residue.**—C. died in 1865, leaving the following will: "I, Thomas Cather, of the county of Taylor, and state of West Virginia, do therefore make, ordain, publish and declare this to be my last will and testament—that is to say: First, after all my lawful debts are paid, the remainder or residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my wife, Barbara, her interest and support upon the home farm. To my daughter, Emily Read, two thousand dollars, to be paid in four equal annual payments, the first payment fifteen months after my decease; and to my grandson, Guy R. C. Read, one thousand dollars, to be paid in two equal annual payments, the first within one year after Emily's last payment is due. To my son, Flavius Josephus, all the land I own on the north side of a line (the R. Lowe land of 22 acres included) running from a white oak corner to lands of Moses Husted, standing near to and south of the site of an old stillhouse, known as Francis Coplin's, running thence south eighty-seven (87) east sixty (60) poles to a white oak; thence north fifty (50) east thirty-six (36) poles to F. Coplin's corner; thence north with said Coplin's lines 2.25 or 30 a. To my son, Fabricius Augustus, all the residue of my lands in Taylor and Upshur counties. My personal property to be equally divided between my three children, Emily, Flavius J. and Fabricius Augustus."

tus, or their heirs, etc. I likewise make, constitute and appoint my son, Fabricius Augustus, to be executor of this, my last will and testament, hereby revoking all former wills." Held, the legacies in favor of Emily Read and Guy R. C. Read are not charges by implication upon the land devised to Fabricius Augustus Cather. *Read v. Cather*, 18 W. Va. 263.

"In this case there is a strong circumstance to show, that the testator did not intend to charge his real estate. He first gives the legacies, then specifically devises the real estate and then says: 'My personal property to be equally divided between my three children Emily, Flavius J. and Fabricius Augustus or their heirs, etc.' From this provision it is apparent, that the testator contemplated, that after the payment of debts and legacies there would be a residue of personal property, which he gives to his three children, in which event it would have been unnecessary to charge the specified devise of the real estate with the pecuniary legacies. Even where a testator uses such terms in a part of his will, as would imply an intention on his part to charge the realty, as where he says, 'as to my worldly estate I dispose of the same after legacies paid,' this implication is rebutted, where it appears by a disposition of personal estate in the form of a residue, that the testator anticipated a surplus of personal estate after the payment of legacies." *Read v. Cather*, 18 W. Va. 263, 269.

**Bequest Subject to Legacies.**—Where a will stated that the testator bequeathed all his "personal property" to his nephews, subject to certain legacies hereinafter specified," and then devised all "real property" to the nephews, followed by a bequest, "payable from my estate," it was held that the land was not chargeable with the payment of this last legacy, where the personal property was insufficient to

pay it. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

A testator bequeaths his personal property "subject to certain legacies hereinafter mentioned" to his nephews, and devises his real estate to the same nephews for life, with remainder in fee to their heirs, and then gives certain pecuniary legacies "payable from my estate." "The time of payment of the legacies and the division of the real estate was postponed for several years in order to provide, as stated in the will for the payment of a farm recently purchased. The personal estate was not sufficient to pay the debts and legacies. Held, the personal estate alone is liable for the payment of the legacies, and the real estate is not bound to contribute to the legacies the amount diverted to pay debts of the testator. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

**Cases Distinguished.**—"The case at bar differs widely from the cases of *Crouch v. Davis*, 23 Gratt. 62, and *Wood v. Sampson*, 25 Gratt. 845, in which it was held, that the legacies were charged on the land. The conclusion that they were so charged was deduced from the fact that, in the wills construed in those cases, pecuniary legacies alone had been first given, and no part of the real estate been specifically devised, and there was a residuary clause, devising and bequeathing the residue of the real and personal estate, thus blending the two kinds of property into a common fund, and thereby plainly manifesting a purpose to make no distinction between them. It was, therefore, held in those cases, as the well-established doctrine of both English and American courts, that, inasmuch as pecuniary legacies alone were given, and the will contained no previous devise of any part of the real estate, the residue could only mean what remained after satisfying the legacies." *Todd v. McFall*, 96 Va. 754, 761, 32 S. E. 472.

**Where the testator gives pecuniary legacies, and devises lands to others,** the law presumes, unless the intention is clear otherwise, that he intends the legacies to be paid out of his personalty. The personalty is the primary fund for debts and legacies. But where he gives land to a devisee, and requires him to pay a legacy, there can be no presumption that the testator intended the devisee to pay legacies out of the personalty, rather than realty—to make it a mere personal obligation on the devisee, rather than a charge on the land he derived from the testator. Indeed, it should be a presumption the other way; that is, he meant the land to be good for the legacy, because he obliged the devisee to pay the legatee. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754, 755.

**Devise to Executor for Certain Stated Trusts.**—Where a testator bequeathed a certain sum of money in the second clause of his will, directing it to be realized out of his personal estate, and in a codicil he designated a particular fund out of which he empowered his executors to pay the legacy; and in the third clause of the will, after directing the legacy to be paid out of the personal estate, provided: "I next devise all my estate, real and personal, or of any description whatever," to the executors for certain stated trusts, it was held, that the real estate could not be charged with the payment of the legacy. *Smith v. Mason*, 89 Va. 713, 17 S. E. 3. See also, *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852.

**When Personalty Proves Deficient.**—In *Smith v. Mason*, 89 Va. 713, 715, 17 S. E. 3, the following language of Judge Staples, in *Crouch v. Davis*, 23 Gratt. 62, is quoted and approved: "It is universally conceded that, as a general rule, the personal estate is the natural primary fund for the payment of legacies. Whether they are chargeable on the land, when the personal property proves deficient, is always a

question of intention. When the charge is not created in express terms, it may be established by implication."

In *Lee v. Lee*, 88 Va. 805, 807, 14 S. E. 534, the court, citing *Crouch v. Davis*, 23 Gratt. 62, said: "As a general rule the personalty is not only the primary but the only fund for the payment of legacies. The testator, however, may charge the land, and this may be done either expressly or by implication; but in any case the intention to charge must be clear—so clear as to admit of no reasonable doubt. Hence, when the land is not charged and there is a deficiency of personalty, the legacies abate to the extent of such deficiency."

Although legacies do not stand upon as high a ground as debts, yet if the personal fund be inadequate, or if there by expressions in a will, tending to show that the testator had the land in mind, a court will make them a charge on the land, rather than they shall go unpaid. Thus, where a single woman, having but little personal property, and real estate of considerable value, having only one brother, who would have been her heir and distributee, by her will bequeaths pecuniary legacies to two of her friends, as tokens of affection, and makes the brother executor, and residuary legatee, she must be considered as intending that the legacies should be paid out of the land. *Downman v. Rust*, 6 Rand. 587, cited in *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754.

The executor in 1864 filed his bill to have the direction of the court in the administration of the estate; and under an order of the court authorizing him to invest the moneys in his hands in confederate or state bonds, he invested in confederate bonds. These, and nearly the whole of his testator's personal estate, became worthless by the results of the war. And it turns out that he owed a considerable amount of debts. Held, the legacies,

as well as the debts, are a charge upon the real estate. *Crouch v. Davis*, 23 Gratt. 62.

**Charge in Codicil.**—Where a testator by will gave one of his sons a tract of land, but since the making of the will, the house on the land was destroyed by fire, and by codicil he then bequeathed to that son, "out of any money due and belonging to my estate," a sum to rebuild, it was held that the legacy was not a charge upon any of the testator's lands. *Lee v. Lee*, 88 Va. 805, 14 S. E. 534.

**A testator owning an interest in partnership real and personal property** has the right, as respects the objects of his bounty, to distinguish between the two classes of property, and treat the personal estate as personalty, and the real estate as realty, and declare out of which fund pecuniary legacies shall be paid. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472.

#### **c. Rule Where Devisee Is Also Executor.**

Formerly the fact that the devisee is also executor and is directed to pay the legacies as executor, was held to be a material element in arriving at an intent to charge the legacies on the real estate; but in *Parker v. Feamley*, 2 Sim. & Stro. 592, it was held, that where a testatrix directed her legacies to be paid by her executor, to whom she afterwards devised all her real estate, and the residue of her personal estate after payment of debts and funeral expenses, that the legacies were not charged on the real estate. *Read v. Cather*, 18 W. Va. 263, 269.

But in *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852, and *Downman v. Rust*, 6 Rand. 587, the former rule seems to be adhered to. In *Bird v. Stout*, the court said: "And the fact that Wesley M. Bird is executor and a devisee also is important. The case of *Downman v. Rust*, 6 Rand. 587, is exactly in point." See also, opinion of Judge Carr, in *Downman v. Rust*, 6 Rand. 587, in

which he cites early English cases in support of this proposition.

Thus where a will gives several pecuniary legacies, and then gives a sum of money to three children, and "the residue of my estate, real and personal," to a brother and three sisters, and appoints that brother its executor, such will creates a charge on the land for the legacy of those children. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852.

A direction to the executor, who is also a devisee, to pay legacies has been held, however, not to be conclusive that it was the intention of the testator to charge their payment upon the land devised to him. *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

#### **d. Charge on Lands Specifically Devised.**

The rule is that specific devises of land are not chargeable with legacies, unless the intent is apparent. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754; *Lynch v. Spicer*, 53 W. Va. 426, 430, 44 S. E. 255.

Whether legacies are a charge on land devised is a question of intent of the testator. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754.

"The presumption is, as between the specific devisee and pecuniary legatee, that the testator intends the money legacy to be paid first out of the personal property and next out of the real estate which is included in the residue." *Underhill on Wills*, § 396; 19 Am. & Eng. Ency. Law 1313, 1356. *Lynch v. Spicer*, 53 W. Va. 426, 430, 44 S. E. 255.

#### **e. Equitable Conversion of Realty.**

See the title **CONVERSION AND RECONVERSION**, vol. 3, p. 498.

"The effect of conversion is to impress the property with the character of the property into which it is to be converted, even before a change in form. Thus where there is a conversion of realty, the realty to be converted will be distributed as if personalty." *Paige on Wills*, § 708. *Taze-*

well *v. Smith*, 1 Rand. 313, quoted in *Lynch v. Spicer*, 53 W. Va. 426, 430, 44 S. E. 255.

"Where the testator, by provisions in his will, converts the real estate into personalty out and out, legacies are entitled to payment out of the proceeds of such realty in case the personalty is sufficient." 19 Am. & Eng. Ency. Law 1360. *Lynch v. Spicer*, 53 W. Va. 426, 430, 44 S. E. 255.

"Argument is made that legacies are not payable out of realty. They are, if such is the intent, as shown above. But another answer to this argument is that the will does not devise the land to Ella Spicer, but only money. The home farm is personalty for all purposes of the will, as it converts realty into personalty at death of testator. *Brown v. Miller*, 45 W. Va. 213, 31 S. E. 956; *Board v. Blair*, 45 W. Va. 812, 32 S. E. 203. Whether or not this conversion plays any part to show that the testator intended the legacies to be paid out of it, it is certain that the argument that legacies are not payable out of land has no force, because it was personalty at the moment the will spoke. In fact, the testator directed a sale, because otherwise there was nothing to pay legacies." *Lynch v. Spicer*, 53 W. Va. 426, 430, 44 S. E. 255.

**Illustrative Cases.**—A provision in a will authorizing the executors to sell certain real estate on the request of the testator's wife, and to invest the proceeds, does not work a conversion of such realty, so that it will be treated as personal property for the purposes of administration, but the title thereto passes to the devisee, where the widow made no request. *Meade v. Campbell*, 2 Va. Dec. 669.

A legatee is not entitled to charge land devised to colegatees for a deficiency in her share of the personal property paid to her by the executor, where it is shown he distributed the personal property to her colegatees

without reference to her right to a proportion thereof. *Meade v. Campbell*, 2 Va. Dec. 669.

#### f. Residuary Clause.

##### (1) In General.

The residuary legatee gets the residuum only after paying all debts and legacies. *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

Where it is manifest from the whole will, that it was the design of the testator, that the legacies should be paid at all events, the implication is, that the residuary devisee or legatee shall only have the remainder after satisfaction of the previous disposition. *Thomas v. Rector*, 23 W. Va. 26; *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852; *Lynch v. Spicer*, 53 W. Va. 426, 428, 44 S. E. 255.

"It is one of the most elementary principles of the law of distribution that the residuary personal estate must first bear the burden of the debts of the decedent, and that the residuary legatees can take nothing until all debts and prior dispositions have been satisfied, consequently, though, of course, the residuary legatees contribute inter sese, in that each must contribute his proportionate share of the debts of the estate, and can only receive his proportion of the surplus remaining over and above all debts and legacies, they can not call upon any other legatees to contribute or abate with them, whether these legatees be specific, demonstrative, or merely general, although the residuary personal estate is wholly exhausted." *Lynch v. Spicer*, 53 W. Va. 426, 431, 44 S. E. 255.

**Use of Word "Balance."**—"The question is whether they are to be paid their legacies out of the land or whether Ella Spicer gets its proceeds free of those legacies. It is the word 'balance' that has strong import. It means after excluding what has been before given. It is a residuary clause. The word 'balance' operates as a resid-

uary clause. *Paige on Wills*, § 500. Any word importing residue so operates. *Schouler on Wills*, § 522; 2 *Lomax Ex'rs*, ch. 5, § 2, p. 305; 18 *Am. & Eng. Ency. Law* 723. Therefore, taken alone, this word imports that Ella Spicer gets only what is left after legacies already given, and debts. True, realty is not chargeable with pecuniary legacies unless the intent appears. *Thomas v. Rector*, 23 W. Va. 26. But it does appear from the word 'balance.'" *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

**Illustrative Cases.**—A testator having two sons and two daughters living, eight grandchildren of a deceased daughter, and the widow and two children of a deceased son, to provide for, gave to one of the sons valuable real estate and one thousand dollars out of his personal estate; to the other valuable real estate, imposing upon him, as a condition subsequent, the support of his mother, testator's widow; and to the widow of the deceased son and her two daughters other real estate; and then disposed of the residuum of his estate as follows: "I will and bequeath that after all the bequests of this, my last will, is complied with, that the remainder of my personal property be equally divided between my children, and grandchildren of my daughter, Sarah, who was married to Henry E. Cale; to my daughter, Mary Jane, now married to Ethbell Falkenstein; my daughter, Margaret, now married to Joseph Michael; J. W. Feather and Michael E. Feather. I will and bequeath that my two daughters, Margaret Michael and Mary Jane Falkenstein each receive one thousand dollars apiece out of my personal property before the above last-named division is made." Held, that each of the eight children of Sarah Cale takes one-twelfth of the personal property, after payment of the specific legacies charged thereon. *Collins v. Feather*, 52 W. Va. 107, 43 S. E. 323.

A will gives pecuniary legacies in-

dicating no other fund for their payment, and there is no other personalty for their payment, and then directs a farm to be sold "and after paying all my debts, the balance to go to my daughter, Ella Spicer, except" certain other after-named legacies. Ella Spicer takes as residuary legatee, and all the legacies are to be paid out of the proceeds of the farm. *Lynch v. Spicer*, 53 W. Va. 426, 44 S. E. 255.

Where by the clauses of the will prior to the residuary clause, which provides that the remainder of the estate, real and personal, be equally divided, etc., no general legacies, but only specific devises, are given. Held, testator meant the residue after deducting what had been specifically given, and not the residue after the payment of the general legacies. *Lee v. Lee*, 88 Va. 805, 14 S. E. 534.

## (2) Blending Real and Personal Estate in Residuary Clause.

An intention to charge the real estate with the payment of legacies is inferred where pecuniary legacies alone are first given and no part of the real estate is specifically devised, and there is a residuary clause devising and bequeathing the residue of the real and personal estate, thus blending the two kinds of property into a common fund, and thereby plainly manifesting a purpose to make no distinction between them. An intention to charge the real estate is likewise inferred where a testator devises the real estate, after a direction that debts and legacies be first paid, or previously paid; or devises the remainder of his estate, real and personal, after payment of debts and legacies; or the devise is declared to be made after they are paid. *Todd v. McFall*, 96 Va. 754, 32 S. E. 472; *Crouch v. Davis*, 23 Gratt. 62, 94, opinion of Staples, J.; *Lee v. Lee*, 88 Va. 805, 14 S. E. 534; *Smith v. Mason*, 89 Va. 713, 17 S. E. 3; *Wood v. Sampson*, 25 Gratt. 845; *Siron v. Ruleman*, 32 Gratt. 215; *Downman v. Rust*, 6 Rand. 587.

Where pecuniary legacies alone are first given, and no part of the real estate is specifically devised, and there is a residuary clause, devising and bequeathing the residue of the real and personal estate, this operates to charge the entire property with the legacies. This rule of interpretation is founded upon the idea that the testator, in blending his real and personal estate into a common fund, plainly manifests his purpose to make no distinction between them. And inasmuch as the will contains no previous devise of any part of the real estate, the residue in such case can only mean what remains after satisfying the previous gifts. This is the well-established doctrine of both English and American courts. *Crouch v. Davis*, 23 Gratt. 62, 94.

Where a testator by will gives several pecuniary legacies, but does not, in the residuary clause, separate the real and personal estate, but blends them together, and gives his brother and three sisters the residue of both, shows that he had his mind on both as a fund to answer for the legacies, hence the legacies will be charged upon the entire residue including the residuary real estate. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852; *Elliott v. Carter*, 9 Gratt. 541, 550.

Where a testator after providing for the payment of several pecuniary legacies, without designating out of what estate they should be paid, but declares that they shall be paid by his executor "out of his estate," and in his will does not make any specific devise of his real estate or any part thereof, but blends the real and personal property together as one fund in the residuary clause, he manifests an intention to charge the land with the payment of the legacies, if the personal property should not be sufficient to pay the same. *Thomas v. Rector*, 23 W. Va. 26.

**Introductory Words.**—Even where the testator uses introductory words, which would raise by implication a

charge upon the real estate, that implication is rebutted where he disposes of his personal estate in the form of a residue after the gift of legacies. *Read v. Cather*, 18 W. Va. 263.

**Legacy in Codicil.**—In *Lee v. Lee*, 88 Va. 805, 14 S. E. 534, the court refused to hold a legacy given by a codicil a charge upon real estate disposed of by a clause in the will blending the real and personal property.

#### g. Extent of Charge.

A testator devised to the president and professors of a college, and their successors in office forever, 500 bushels of corn "to be paid them annually on the 25th of December, for the establishment and support of a free school; directing that 1,000 acres, part of a certain tract of land, to be laid off by metes and bounds within twelve months after his decease," stand pledged forever, for the full and complete execution of this devise. By other clauses, he bequeathed sundry pecuniary legacies to a large amount; directing particularly, in each bequest, payment to be made by his executors. He also emancipated all his slaves, and devised to his sisters all the residue of his estate. It was decided, that the devise to the free school was not a charge upon the estate generally, but upon the 1,000 acres of land only. *President, etc., William and Mary College v. Hodgson*, 6 Munf. 163, cited in *King v. Sheffey*, 8 Leigh 614, 616.

#### h. Sale of Property Charged with Legacies.

**In General.**—Where a will charges with a legacy land devised to a person, and he conveys it to a third person, who retains in his hands, of the purchase money, a sum to pay the legacy, promising his grantor to pay it, such grantor may maintain a bill in equity against his grantee, making the legatees parties, to compel the payment of such fund on the legacy, and to enforce the charge on the land. *Bird v. Stout*, 40 W. Va. 43, 20 S. E.



852; *Burwell v. Fauber*, 21 Gratt. 446; *Hughes v. Tabb*, 78 Va. 313.

**Illustrative Cases.**—B., by his last will and testament, devised 143 acres of land to his brother, M., for life, remainder to his two sons. He then gives to his natural son \$300, and to his nephew \$200, as specific legacies; and directs that said legacies be paid out of his money, if there be sufficient available cash left at the time of his death to pay the same; but, if he did not die possessed of enough money to pay said specific legacies, then he directed that his said brother might pay them, or that said land should be sold, and, after paying said legacies from the proceeds of said sale, he gave the balance to his brother M., and by a subsequent clause of said will the testator directed and commanded that under no circumstances should the said property be sold for less than \$4,000; and he further directed that said legacies should not become due and payable unless his brother M. could pay them or said sums could be realized from his available cash at the date of his death, or until the said sum of \$4,000 could be realized from a sale of said land. Held, that the intention of the testator was that under no circumstances should said land be sold by his executor or under the provisions of his will for a sum less than \$4,000, and that said legacies should not be due and payable unless his brother M. paid them, or they were realized from his available cash at the time of his death, or said land brought \$4,000 under a sale thereof made by his executor or under the directions of his will; and he did not intend that a sale thereof, made under a decree obtained against said estate by one of his creditors for a less sum than \$4,000, should defeat the payment of said legacies. *Broderick v. Broderick*, 35 W. Va. 620, 14 S. E. 157, Holt, J., dissenting.

F devises by his will, a tract of land named H, with his personal property, for the payment of his debts; another

tract, named P, to his two sons, N and T, subjected to charges of an annuity of \$200, in favor of his wife, and a legacy of \$1,000 to another son, J, and \$1,500 to his daughter K, and he appoints N and T his executors. He had been administrator c. t. a. of H, and soon after his death his administration account was settled, showing amounts due to the legatees of H. N and T, as executors, sell to the widow the tract H, for \$2,700, of which \$1,200 is given in lieu of her annuity, and she releases the charge upon the P land; and she gives her bond, with a lien on the H land, for the amount of J's legacy. Within eight months after the death of F, his sons N and T sell the P tract to B for \$7,000; their deed referring to F's will for their title, and they covenanting to remove all charges. But a few days after this deed, G, as administrator de bonis non of H, filed his bill against F's executors and devisees, B and the legatees of H, to recover the amounts reported to be due from F to the estate of H. Held: The legatees of H being parties, and concurring with the plaintiff, he may maintain the suit. B had constructive notice of the provisions of the will of F, and that the H land had been sold by N and T to pay charges upon the P land, and was bound therefore to enquire whether the debt of F, which was directed to be paid out of the H tract, had been discharged. B being a purchaser with constructive notice, his land is liable to satisfy the charges upon it; and two of these charges having been satisfied out of the H tract, the creditors are entitled to be subrogated to the rights of these legatees, and to the extent of these charges, to have the land of B subjected to the satisfaction of their claims. There having been a decree against the sureties of F, on his bond as administrator c. t. a. of H, in favor of the creditors, and they having paid the decree, have a right to be substituted to the creditors' rights against the land of B.

*Burwell v. Fauber*, 21 Gratt. 446, approved in *Hughes v. Tabb*, 78 Va. 313.

Where a single woman, having but little personal property, and real estate of considerable value, having only one brother, who would have been her heir and distributee, by her will bequeathes pecuniary legacies to two other friends, as tokens of affection, and makes the brother executor, and residuary legatee, she must be considered as intending that the legacies should be paid out of the land, and they were decreed to be a charge upon it. The devisee of the land on which such charge is made, having conveyed the land in trust for payment of his own debts, and the land being sold by the trustees, under the deed, the purchaser having notice of the legacies, is bound to see to the application of the purchase money, and the land held to be chargeable in his hands with the payment of the legacies. So held, not on the ground that the purchaser is guilty of fraud, but on the principle of caveat emptor. *Downman v. Rust*, 6 Rand. 587, cited in *Lamar v. Hale*, 79 Ga. 159; *Rorer Iron Co. v. Trout*, 83 Va. 415, 416, 2 S. E. 713; *Woodwine v. Woodrum*, 19 W. Va. 67, 73.

A leases to B for twenty years; with liberty to B of surrendering the lease at any time before on payment of five shillings. A devises the rents during the lease to his five daughters and the fee simple afterwards to his son, P, who sells to A, who surrenders the lease; this surrender shall not disappoint the daughters' legacies; but A will be decreed to pay the rents. *Graham v. Woodson*, 2 Call 249.

A legacy to J. is charged as a lien on a tract of land of P., part of which J. purchased at a sale never confirmed. Held, sale should be confirmed, and the principal and interest of the purchase money should be charged upon the legacy. *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531.

R died in 1854, leaving a widow and seven children—four sons and three

daughters. By his will, after providing for his widow, he gave to his daughter, H, and each of his four sons a specific parcel of land, to Henry one-half of a tract called Bull Pasture; and he provided that each of his sons should pay a sum named towards paying testator's debts. The charge on Henry's land was \$1,000, payable in two and five years. He then said, after his debts were paid his daughters, P and S, to have an equal portion with the balance. The whole of the Bull Pasture tract was under a deed of trust to secure a debt due by the testator to B, and the one-half not given to Henry was sold to pay that debt. Henry paid to the executor two small sums, amounting to \$298.20, and sold the land to J, who sold it to Siron—they having notice of the charge; and Siron paid to the executor \$722.50 in 1863, in confederate treasury notes and banknotes, it being understood that if the parties entitled would not receive the notes they were to be returned; but they were not returned, though the executor stated the parties refused to receive them. Upon a bill by the executor to subject the land to pay the charge of \$1,000, minus the two items amounting to \$298.20; held, if the testator intended that the sums charged upon the lands devised to the sons should be applied to the payment of his debts, including that due to B, and that the half of the Bull Pasture farm and the personal property not specifically bequeathed, so far as it was not needed for debts, should go to his daughters, P and S, or be applied for their benefit, this property, having been applied to the payment of the debts, which the charges against the devisees were intended to pay, P and S will be turned over to the charges against said land. If the intention was to raise by these charges, a fund for the payment of the legacies to P and S, as well as the debts, they are, of course, entitled to whatever remains of the fund after the payment of debts:

and as the debts are all paid, they are entitled to the aggregate amount. The charges on the land were not made simply for the payment of debts, nor were they in any sense contingent, but are absolute in their nature, and constitute an unconditional testamentary provision made by the father for his daughters. It was competent for the executor of R and his duty to file his bill against Henry and his alienees to enforce the charge upon the land, in default of the payment of said money in whole or in part, to collect the same and dispose of it according to the provisions of the testator's will. *Siron v. Ruleman*, 32 Gratt. 215.

**Following Proceeds of Land Charged.**—A testator devised lands to a devisee, charged with an annuity to another, and to pay it the devisee sold a certain tract of land, "White Marsh." In the suit, the devisee convened the annuitant and the purchaser of the land, and with the assent of the annuitant, the court ratified the sale and allowed the devisee to collect one-third of the purchase money for his own use, and secured two-thirds on "White Marsh," the interest thereon to be paid to the devisee to meet the annuity. Subsequently the purchaser of "White Marsh" failed, and the court resold the land. After selling "White Marsh," however, the devisee purchased another tract, "Ditchley" with the proceeds thereof. It was held, upon a bill filed by the annuitant, alleging that "Ditchley" had been paid for with a part of the proceeds of "White Marsh," and was therefore liable for the deficiency of his annuity, that the interest on the deferred payment secured on "White Marsh" was made payable to the annuitant, as an equivalent for the annuity given him by the will, so far at least, as the annuity affected "White Marsh," or the amount of the proceeds of sale which was paid to the devisee; and even if "Ditchley" was paid for with money so paid to the devisee, no charge

thereon would attach in favor of the annuitant. *Tabb v. Tabb*, 82 Va. 48.

**Effect of Legatee's Delay in Enforcing Legacy.**—In *Lewis v. Thornton*, 6 Munf. 87, a general charge upon the estate of a testator, for the payment of legacies, in aid of a particular fund provided for that purpose, was not enforced against bona fide purchasers of the lands, after a great lapse of time, because it might admit of a doubt whether, by the terms of the will, the charge was upon the land itself, or only upon the profits thereof; because the lands might be presumed to be exonerated by requisition of security from the devisees for the payment of the legacies; and above all, because the testator left a personal estate abundantly sufficient for that purpose; which estate was wasted by the executors.

**i. Liability of Dower Lands.**

Testator charged on land devised to one son a sum of money to another. Held, debt so charged is paramount to any claim of the heirs and widow of devisee to the land, who must pay it proportionally. Amount payable by widow is the present worth of the annual interest on one-third of the debt (at compound interest), for the probable period of her life, ascertained from the tables of mortality. "The amount which the widow is to pay, as her contribution to the principal, is such a sum as would equal the aggregate of her payments of annual interest (if she were to pay it during her life), reduced to cash, calculating at compound interest. The computation is made by taking from the tables of mortality her probable duration of life, and, having thus ascertained approximately for how many years she would continue to pay the annual interest, the present cash value, at compound interest, of each payment to be estimated, and the aggregate is the amount the widow must contribute. *Wilson v. Davisson*, 2 Rob. 384; Am. Alm., 1835, p. 84; 1 Lom. Dig., 126, 51; 4 Sim., 182 (*Earl of Portman v. Taylor*); *Pugh v. Rus-*

sell, 27 Gratt. 789, 801." *Harper v. Vaughan*, 87 Va. 426, 12 S. E. 785.

The remainder, after the death of the widow, in the land devised to her for life, having been given to some of the devisees, their proportion of the debts is according to the value of their interest at the death of the testator. The shares of some of the devisees in said remainder, are charged with the payment of certain legacies. The present value of the legacies at the death of the testator is also to be abated from such present value of the remainder, and the proportion of the debts is according to the value of the remainder so ascertained. The legacies charged upon the remainder in the land, are to bear a portion of the debts according to their value at the death of the testator. *Gaw v. Huffman*, 12 Gratt. 628.

"The personalty being first liable to the payment of a decedent's debts, it is true that there should be no distribution either to the widow or to the other distributees until the debts are paid, and there can be no resort for their payment to the realty until the personalty has been exhausted. But when that has been exhausted either by devastavit or distribution, the realty in the hands, not of the widow, because she takes and holds her life estate in one-third thereof by a title which is paramount to the rights of creditors, but that of the heirs must be subjected to the payment of the ancestor's debts. They, and not she, are in possession of something to which the creditors have a better right, and must refund." *Alexander v. Byrd*, 85 Va. 690, 700, 8 S. E. 577.

#### **j. Personal Liability of Devisee.**

A legacy may be made a charge not only on the land, but may also be made a personal demand against the devisee. *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23.

If a testator devise to two of his sons certain lands, rated at a certain

sum, allowing them to pay his other children equal shares of that sum, by installments; such devisees, and those claiming under them, are personally responsible (in proportion to their respective estates), for the payment of such installments, with lawful interest from the times when payable; and (in aid of such responsibility), the lands so devised are liable. *Shobe v. Carr*, 3 Munf. 10.

#### **k. Title of Devisee.**

The rule that when a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, he takes an estate in fee, has no application when the estate of the devisee is defined and fixed by the will. *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23.

#### **l. Interest on Legacy.**

See the title **WILLS**.

It is undisputed general rule that although a legacy vests, where no special intention to the contrary appears, at the death of the testator, it does not begin to carry interest until a year afterwards. But where the legacy is charged solely on land, or given to a child, and directed to be paid by a devisee of land, in order to make the portion of such child equal that of the devisee of the land, it should bear interest from the date of the death of the testator. *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23.

#### **m. Abatement of Legacies.**

See the title **WILLS**.

Testator may charge legacies on land expressly or by implication, but the intention must be clear. Where land is not so charged, and there is a deficiency of personalty, the legacies must abate to the extent of such deficiency. *Lee v. Lee*, 88 Va. 805, 14 S. E. 534.

#### **n. Rights of Creditors of Legatee.**

A conveys real and personal property in consideration of a sum of money and of an annuity for the life of the grantor if she survives the grantee, from the death of the grantee; and in the deed the grantee covenants that

his estate shall pay to the grantor, if she survives him, the annuity. Held, this does not create a charge upon the property conveyed, so as to entitle the grantor to subject the same to the payment of the annuity after the death of the grantee, in preference to other creditors of the grantee. *McCandlish v. Keen*, 13 Gratt. 615.

#### 4. Charge of Support and Maintenance.

See the title SUPPORT AND MAINTENANCE, and references given.

Where there is nothing in a conveyance for the support of the grantors to show an intention to charge their support and maintenance on the land, it will constitute a mere personal obligation of the grantees. *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. 314; *McClure v. Cook*, 39 W. Va. 379, 20 S. E. 612.

A devise to A., provided he would support B., was held to create a charge upon the land devised. *Page, Wills*, § 751. *Isner v. Kelley*, 51 W. Va. 82, 41 S. E. 158, 160.

R., by his will, after giving to a trustee certain stocks, the interest of which was to be applied to the support of his sister, J., and at her death to two of her daughters by name; and a like trust for the support of R., a daughter of J., gave to D., a son of J., land and stocks; "subject, however, to the full and comfortable maintenance and support of his mother and sister, R., during their natural lives." The mother died and the stocks left for the support of R. became worthless. Held, the land left to D. is liable for the support of R. in preference to any debt of D. *Cockrille v. Dale*, 33 Gratt. 49.

F. devised to J. and H., sons of his daughter, C., 100 acres of land (describing it), "upon the following conditions, viz.: The said J. and H. are to take care of, and prove for, all of the reasonable wants of my daughter, C., during her lifetime, provided she resides with them." Held, that such

care and provision for all the reasonable wants of C. are a charge upon the land devised. *Isner v. Kelley*, 51 W. Va. 82, 41 S. E. 158.

#### 5. Charge of Annuities.

See the title ANNUITY, vol. 1, p. 386.

**In General.**—An annuity is a legacy charged on the whole estate, not specifically devised. *Trent v. Trent*, *Gilmer* 174, 188.

**Sale of Property Charged.**—Testator devised lands to J. charged with an annuity to P. To pay it J. sold "White Marsh." In a suit, J. conveyed the annuitant, P., and the purchaser, H. The court, with the assent of P., ratified the sale, allowed J. to collect one-third of the purchase money for his own use, and secured two-thirds on "White Marsh," the interest thereon to be paid to P. so as to meet the annuity. For several years all went well. But H. failed. The court resold "White Marsh" for a sum insufficient to raise the annuity. P. instituted suit to subject the other lands to supply the deficiency. It was decided by this court (see *Hughes v. Tabb*, 78 Va. 313) that the said arrangement exonerated "White Marsh," at least, from the encumbrance of the annuity. After selling "White Marsh" in 1870, J. purchased "Ditchley." In 1872 he made a trust deed on it to secure a debt to the P. E. T. Seminary. In March, 1884, sale was advertised under the trust deed. P. filed his bill alleging that "Ditchley" had been paid for by J. with part of the proceeds of the sale of "White Marsh," and was therefore liable for the deficiency of his annuity, and obtained an injunction to the sale. Held, the interest on the deferred payment secured on "White Marsh" was made payable to P. as an equivalent for the annuity given him by the will, so far at least, as the annuity affected "White Marsh," or the amount of the proceeds of sale which was paid to J.; and even if "Ditchley" was paid for

with money so paid to J., no charge thereon would attach in favor of P. *Tabb v. Tabb*, 82 Va. 48.

### E. CONTRIBUTION AND EXONERATION.

See the title CONTRIBUTION AND EXONERATION, vol. 3, p. 480.

#### 1. Between devisees and legatees.

The principle which lies at the foundation of the right of a legatee or devisee to marshal the assets, is the presumed intention or inclination of the testator in his favor. *Elliott v. Carter*, 9 Gratt. 541.

The legatees have no right to call upon the devisees to contribute to the payment of their legacies unless the real estate devised be expressly charged. *Allen v. Patton*, 83 Va. 255, 2 S. E. 143; *Elliott v. Carter*, 9 Gratt. 541, 550. See also, *Gaw v. Huffman*, 13 Gratt. 628.

A legatee has no right to call upon the devisee to contribute to the payment of the legacy, unless the real estate be charged with its payment, not even where the personal property has been applied in exoneration of the land from a mortgage debt or vendor's lien, if the debt was contracted and the mortgage or lien on the land was created by the testator himself. *Elliott v. Carter*, 9 Gratt. 541; *Wythe v. Henniker*, 2 Myl. & Ke. 635; *Waring v. Ward*, 7 Vesey 332; *Cumberland v. Codrington*, 3 Johns. Ch. 229; 2 *Jarman on Wills* (Bigelow's Ed.), 683; 2 *Spence's Eq. J.*, 833; 2 *Sugden on Vendors*, 680; and *Adam's Equity*, 261 and note. *Todd v. McFall*, 96 Va. 754, 763, 32 S. E. 472.

Where lands not chargeable with the payments of debts are sold for that purpose, the devisee thereof may subject lands devised to pay the debts to reimburse him. *Cranmer v. McSwords*, 24 W. Va. 594.

Where land subject to pay debts of the testator is devised one-fourth to one devisee and three-fourths to another, a judgment against them should

be separately against each for his pro rata share of the debt with a reservation to the plaintiff to proceed against the interest of either for any deficiency after exhausting the interest of the other. *Pugh v. Russell*, 27 Gratt. 789.

In the case of *Carter v. Barnadiston*, 1 P. Wms. 505, the testator being seized in fee of two different manors, by his will charged all his real estate with the payment of his debts, and devised the two manors to different persons. He afterwards mortgaged one of these manors to secure the payment of the sum of 4,000 pounds and interest, and then died. The lord chancellor held that the devisee of the mortgaged manor was entitled to call upon the devisee of the other, to contribute to the payment of the mortgage debt. Cited in *Elliott v. Carter*, 9 Gratt. 541, 551.

So in the case of *Heveningham v. Heveningham*, 2 Vern. R. 355 (also stated in 1 Eq. Cas. Ab. 117), where the testator charged his real estate with the payment of his debts, and then devised different portions to several persons, it was held, that the devisees should contribute rateably according to the value of the respective subjects devised to them, to satisfy the charge. Cited in *Elliott v. Carter*, 9 Gratt. 541, 552.

**Contribution between Specific Legatees and Devisees.**—It was said by Lee, J., in *Elliott v. Carter*, 9 Gratt. 541, 550, that "In the case of *Long v. Short*, 1 P. Wms. 403, it would seem to have been held that specific legatees and devisees of real property not charged with payment of debts, were bound to contribute rateably for payment of debts due by specialty. But the authority of this case has been greatly doubted; 2 *Jarman* 547n, b; and it would appear to be greatly shaken, if not entirely overthrown by the cases just cited, and especially the case of *Mirehouse v. Scaife*, 2 Mylne & Craig 695, in which the distinction endeav-

ored to be maintained between specific and residuary devisees is utterly repudiated, and the principle applicable to both held to be identical."

**The Decree.**—To the point that the lands of all the devisees should bear their rateable portion of the debts of the decedent in the first instance, instead of decreeing against one, and turning him around upon the others for contribution. *Foster v. Crenshaw*, 3 Munf. 514 is cited in *Ryan v. McLeod*, 32 Gratt. 367, 374.

A judgment at law being obtained against one of two obligors, in a joint and several bond, and no proceedings to enforce it appearing, a court of equity ought not to charge the lands of the other obligor, in possession of his devisees, without having made the obligor, against whom the judgment was rendered, or his representatives, parties to the suit. *Foster v. Crenshaw*, 3 Munf. 514.

## 2. Exoneration of Encumbered Lands.

"Where lands of a decedent descend or are devised subject to a mortgage, or other specific incumbrance, created by the decedent for an obligation of his own contracting, or assumed by him as his proper debt, his personal estate, since it constitutes the natural fund for the payment of all his debts, and has been increased by the consideration for which the incumbrance was given, is primarily liable at common law for the discharge of the lien; consequently, as a general rule, the heir or devisee of such encumbered lands is entitled to have the property exonerated by the discharge of the lien out of the personal estate." 19 Am. & Eng. Ency. Law (2d Ed.) 1317; *Pleasants v. Flood*, 89 Va. 96, 15 S. E. 504; *Dandridge v. Minge*, 4 Rand. 397; *Elliott v. Carter*, 9 Gratt. 541.

### Incumbrance by Former Owner.

The rule that the personal estate shall be first applied to the payment of mortgages, is founded on the principle that the debt was originally a personal

one, and the charge of the real estate merely a collateral security. But where this principle fails, the rule does not take effect. Thus, when the mortgage debt was contracted by one person, and the lands so mortgaged descended to another, his personal estate will not be liable to the payment of the money. *Pleasants v. Flood*, 89 Va. 96, 15 S. E. 504.

If a testator does not charge his real estate with the payment of his debts, but, after making his will, encumbers a portion of his real estate by a specific lien, the devisee of such portion, as between him and the devisees of other real estate, takes it cum onere. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

Where a will does not charge the real estate devised with the payment of debts, a devisee, whose land has been encumbered by the testator, has no right to resort to the lands of other devisees for contribution. *Frasier v. Littleton*, 100 Va. 9, 14, 40 S. E. 108.

Section 2665 of the Virginia Code, making real estate of decedents assets for the payment of debts, does not give a devisee of encumbered lands a right of contribution from devisees of unencumbered lands. The object of the statute was to do away with the distinction between debts chargeable on decedents' lands at common law and simple contract debts, and not to disarrange the order of liability of the assets of a decedent's estate which had been firmly established. *Frasier v. Littleton*, 100 Va. 9, 40 S. E. 108.

**Laches and Lapse of Time.**—A general charge upon the estate of a testator, for the payment of legacies, in aid of a particular fund provided for that purpose, was not enforced against bona fide purchasers of the lands; after a great lapse of time; because it might admit of a doubt whether, by the terms of the will, the charge was upon the land itself, or only upon the profits thereof; because the lands might

be presumed to be exonerated by requisition of security from the devisees for payment of the legacies; and, above all, because the testator left a personal estate abundantly sufficient for that purpose; which estate was wasted by the executors. *Lewis v. Thornton*, 6 Munf. 87.

### 3. Exoneration of Personal Out of Real Estate.

The personal estate, being the primary fund for the payment of debts, may yet, by the decedent's will, if he clearly so intends, be exonerated, and the real estate be primarily charged. 3 Min. Inst. (2d Ed.) 584.

**Statute (Va. Code, 1887, § 2665)** makes decedent's real property assets for the payment of his debts in the order in which his personal estate is directed to be applied; but it recognizes his right to charge his land, but not his personality, for such of his debts as he may prefer. *Deering v. Kerfoot*, 89 Va. 491, 16 S. E. 671.

Charging the land does not exonerate the personality; to accomplish that result it must appear that the testator intended not merely to charge the realty, but to discharge the personality, and this intention may be shown where there are express words or a plain intent in the will to make such exoneration. *New v. Bass*, 92 Va. 383, 23 S. E. 747; *Elliott v. Carter*, 9 Gratt. 541, 549; *Swann v. Housman*, 90 Va. 816, 20 S. E. 830; *Dunn v. Amey*, 1 Leigh 465.

**Where Realty and Personality Equally Charged.**—Though the personal property is applicable to the payment of debts before the real property, where neither species is expressly charged by the terms of a will, yet where both are equally and expressly charged, they stand on the same footing and each must contribute its rateable share of the common burden. For this proposition, see *Elliott v. Carter*, 9 Gratt. 541, cited and approved in *Murphy v. Carter*, 23 Gratt. 477, 489. See *Elliott v. Carter*,

9 Gratt. 541, also cited in *Cockerille v. Dale*, 33 Gratt. 49.

"The principle which lies at the foundation of the right of a legatee or devisee to marshal the assets, is as has been intimated, the presumed intention or inclination of the testator in his favor. But where, as in the case now in judgment, the testator has charged his whole estate, as well the real property devised as the personal bequeathed, with the payment of his debts, there can be no stronger presumption of an inclination in favor of the devisee than of the legatee, both being equally the objects of the testator's bounty; and between persons so taking, equity will not interfere unless the testator has shown clearly some ground of preference or priority of the one over the other. 1 Story's Eq. Jur., § 565. And if in such a case the property other than that specifically devised and bequeathed, prove inadequate to meet the charge, it should seem that equity to supply the deficiency, would apply its maxim that equality is equity, and levy it equally and rateably upon the property so devised and bequeathed. The principle of contribution in such a case for the purpose of meeting the common charge resting alike upon the different subjects of property disposed of among the several objects of the testator's bounty, is dictated by a plain and obvious rule of justice, and is, I think, fully sanctioned by authority." *Elliott v. Carter*, 9 Gratt. 541, 551.

Testator directs all his debts to be paid by his executors; and for this purpose charges all his estate, real and personal. He gives one-half of his slaves to B and the other half to C and E. And he directs his executors to sell his lands and other personal property; and he gives the proceeds of sale equally to C and E. Held, B, C and E must each contribute rateably to the payment of the debts. *Elliott v. Carter*, 9 Gratt. 541.



**Legacies Charged and Legacies Not Charged.**—

"This exemption of real estate devised extends as well to the case of a deficiency of personal assets for the payment of legacies as of debts; the legatees having no right to call upon the devisee to contribute to the payment of their legacies, unless the real estate be expressly charged. But in either case the right thus asserted on the part of the devisee to hold the estate devised, as against the legatees, free from liability for debts or legacies, is to be confined to the case of a devise of real estate not charged with the payment of debts or legacies; for it is equally clear that where the estate devised is so charged, it is applicable before legacies, and the legatees have the right to have the assets marshaled in their favor. The legacies not being charged with the payment of debts while the real estate devised is so charged, the legatees will be regarded as more the objects of the testator's bounty than the devisee; and where the personal estate is not sufficient to pay both the creditors and the legatees, the latter will be entitled to charge the real estate devised so far as the personal estate has been applied in the payment of debts." *Elliott v. Carter*, 9 Gratt. 541. See also, *Pleasants v. Flood*, 89 Va. 96, 15 S. E. 504.

**4. Exoneration of Surety by Principal.**

See the title CONTRIBUTION AND EXONERATION, vol. 3, p. 484.

The principal debtor's land should be first subjected to the exoneration of the land of the sureties. *Horton v. Bond*, 28 Gratt. 815, 825; *Bell v. McConkey*, 82 Va. 176.

In a suit by creditors to reach the debtor's property conveyed in trust for his wife and children, where the deed is valid and upon good consideration as to the children, one of the creditors, who holds the debtor as a surety on a promissory note, will be required to apply on his claim any available property of the principal, who is a party de-

fendant, in exoneration of the land conveyed, provided it can be done without too great delay or prejudice to the rights of the creditor. *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615.

**F. PLEADING AND PRACTICE.**

**1. The Bill.**

**In General.**—"This principle is of frequent application in equity whenever it is required in order to work exact justice, even though the bill were not framed specially to secure that relief. But the bill is also often drawn with that express object, and then it should be in behalf of the plaintiff and all other creditors who shall choose to come in and contribute to the costs of the suit; and where it is to marshal assets and for their due administration, the heirs and devisees of the testator should be made parties. (1 Bart. Ch. Pr., § 92, p. 293; *Stephenson v. Taveners*, 9 Gratt. 398.)" 4 Min. Inst. (3d Ed.) 1362.

**Sufficiency of Allegations.**—"Numerous cases decided by this court hold that the personal estate is the primary fund for the payment of debts. It is an almost, if not quite, universal rule, both in England and America. 4 Kent's Com. 420. Except, where by will, the personal estate is exempted from the payment of debts and the real estate charged therewith, resort can never be had to the real estate of a decedent for the payment of his debts, unless the personal property is insufficient to pay them. There is no pretense here that such is the case in this instance. On the contrary, the bill alleges that the personal estate in the hands of the executors is sufficient for the payment of the debt, as plaintiffs are informed and believe, and it is not alleged that the personal estate is insufficient to pay all the testator's debts. For the purpose of testing the sufficiency of the bill on demurrer, its allegations must be taken as true. Hence, plaintiffs admit the absence of any necessity for resorting to the real es-

tate as well as of any right to demand relief against the heirs and devisees." *McConaughy v. Bennett*, 50 W. Va. 172, 180, 40 S. E. 540.

In *Sommerville v. Sommerville*, 26 W. Va. 484, the bill was held sufficient to charge the land descended to the heirs with the ancestors' debts.

**Bill against Infant Heirs.**—Upon a bill against infant heirs, to marshal assets, it is error to decree a sale of the lands descended, without giving the infant heirs a day after their attainment to full age, to show cause against it. *Tennent v. Pattons*, 6 Leigh 196.

**Bill by Simple Contract Creditors.**—See ante, "Marshaling in Aid of Simple Contract Creditors," III, B.

Upon a bill by simple contract creditors to marshal assets, it is competent for the court in its discretion, to decree a sale of the real estate in the hands of the heirs, some of whom are infants, for the payment of the debts. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent. *Cralle v. Meem*, 8 Gratt. 496.

But a simple contract creditor, having obtained a judgment by default against an executor, can not maintain a suit in equity, for marshaling assets, against devisees of the landed property, until he has fully prosecuted his claim at law against the executor and his securities. *Mason v. Peter*, 1 Munf. 437.

## 2. Parties.

### Parties Plaintiff.

**Heirs and Devisees.**—Where the bill is to marshal assets and for their due administration, the heirs and devisees of the testator should be made parties. *Stephenson v. Taveners*, 9 Gratt. 398.

A bill to marshal assets and for their administration, should be on behalf of the plaintiff and all other creditors, and the heirs and devisees of the testator should be parties. But if the

proper parties are not made, the bill should not be dismissed, but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account had been made in some other creditor's suit having the same object. *Stephenson v. Taveners*, 9 Gratt. 398.

**Legatees.**—Where the court construes the will as creating a charge on land for the payment of legacies, the right of the legatees themselves to sue in equity to subject the land is unquestionable, first, because they are owners of the charge, and second because they can sue at law for the deposit in the grantee's hands, or in equity. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852, citing *Miller v. Lake*, 24 W. Va. 545.

**Nonresident Heirs.**—A creditor of a deceased debtor may proceed against his nonresident heirs as absent defendants in equity, to marshal the assets, and thus subject the land descended to them. *Carrington v. Didier*, 8 Gratt. 260, citing *Tennent v. Pattons*, 6 Leigh 196.

### Parties Defendant.

**Executors and Administrators.**—When the covenantor, before suit brought, has died testate, and the relief sought is only the establishment of the claim against the estate, and the bill does not pray for a sale of the testator's real estate, marshaling of the assets and settlement of the estate, the only necessary and proper parties defendant are the executors of the will. *McConaughy v. Bennett*, 50 W. Va. 172, 40 S. E. 540.

To a bill filed to subject the real estate in the hands of heirs, to a debt of the ancestor, the administrator of the ancestor is a necessary party, and the personal assets should be first applied to the payment of the debt, for the relief of the heirs. *Beall v. Taylor*, 2 Gratt. 532.

**Suit to Subject Lands Descended.**—In a suit to subject lands, descended to

the heir, to the payment of the debts of the ancestor, the personal representative of the ancestor is a necessary party. *Sommerville v. Sommerville*, 26 W. Va. 484.

**"Unknown devisees."**—Where the widow is a defendant in a suit to subject the realty to the payment of decedent's debts, and has not elected to take the value of her dower in money, her dower should be assigned before an out and out sale of the realty is decreed. Where the bill alleges that there are devisees and proceeds against them as "unknown devisees," under § 11, ch. 124, Code, although the domicile of the deceased was well known and the names of the devisees easily ascertainable from the will, the court should require such devisees to be made parties by name before selling the realty in which they have an interest. *Kilbreth v. Root*, 33 W. Va. 600, 11 S. E. 21.

**Residuary Devisees.**—R died in 1854, leaving a widow and seven children—four sons and three daughters. By his will, after providing for his widow, he gave to his daughter, H, and each of his four sons a specific parcel of land, to Henry one-half of a tract called Bull Pasture; and he provided that each of his sons should pay a sum named towards paying testator's debts. The charge on Henry's land was \$1,000, payable in two and five years. He then said, after his debts were paid his daughters, P and S, to have an equal portion with the balance. The whole of the Bull Pasture tract was under a deed of trust to secure a debt due by the testator to B, and the one-half not given to Henry was sold to pay that debt. Henry paid to the executor two small sums, amounting to \$298.20, and sold the land to J, who sold it to Siron—they having notice of the charge; and Siron paid to the executor \$722.50 in 1863, in confederate treasury notes and banknotes, it being understood that if the parties entitled would not receive the notes they were to be re-

turned; but they were not returned, though the executor stated the parties refused to receive them. Upon a bill by the executor to subject the land to pay the charge of \$1,000, minus the two items amounting to \$298.20; held, in 1867 P and S and their husbands filed their bill in the circuit court of Pendleton against R's executor and his devisees and legatees to enforce the payment of their legacies. The executor answered, and in 1872, the suit was dismissed agreed. No decrees subjecting the land devised to Henry to the charge should be made until P and S were made parties in this cause, and inquiry made as to the adjustment made between them and the executor. *Siron v. Ruleman*, 32 Gratt. 215.

### 3. The Decree.

**In General.**—There are two devisees, one of whom owns one-fourth of a tract of land, and the other three-fourths; and the land is held to be liable to pay a debt of their testator. The decree should be separate against each for the payment of his pro rata share of the debt, with a reservation to the plaintiff to proceed against him for so much of the share of the other as can not be made out of that other's part of the land. *Pugh v. Russell*, 27 Gratt. 789.

**Decree for Accounting.**—In general, the personal assets of a decedent, so far as they have not been administered, should be administered under the direction of the court, and applied to the payment of the debts of the decedent in relief of the realty descended to the heir or devised to the devisee, in a suit or proceeding to subject the realty to the payment of decedent's debts; hence the court should not decree the sale of the realty of a decedent to pay a judgment lien before the accounts of the administrator have been settled, and the unadministered assets, if any, ascertained. *Kilbreth v. Root*, 33 W. Va. 600, 11 S. E. 21.

As the devisees or heirs are enti-

tled to have the distributive share of the deceased partner in the assets of the firm applied to the relief of the land, and as the responsibility of the surviving partner to these representatives of the deceased exists only after the partnership affairs are settled, and the right of participation is only in the balance after payment of all social debts, therefore there should be an account and audit of the debts and credits of the firm, and a settlement of the partnership accounts inter sese, before a decree to sell the land of the deceased partner. *Kilbreth v. Root*, 33 W. Va. 600, 11 S. E. 21.

**Equity Gives Complete Relief.** — When lands, held by several devisees in the same will, are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees (or the money received, or claimed, in lieu thereof), in rateable proportions, and not against

the land of the one only, with liberty to that one to sue the others for contribution. *Foster v. Crenshaw*, 3 Munf. 514.

A judgment (by default at least) against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, is not evidence against such heirs or devisees in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt; and the reason assigned is, that there is no privity between the representative and such heirs or devisees. It was so held by this court at an early day (1810) in *Mason v. Peter*, 1 Munf. 437, and the decision has been since repeatedly recognized as authority. *Foster v. Crenshaw*, 3 Munf. 514. See the title **FORMER ADJUDICATION OR RES ADJUDICATA**, vol. 6, p. 304.

### **Masonic Lodges.**

See the title **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 2, p. 344.

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See the title **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 2, p. 344.

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### I. Definitions and Distinctions.

See post, "When Relation Exists," II.

**Meaning of Words "Master and Servant."**—"A preliminary remark is essential regarding the employment, in the law, of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose." *Merriman v. Thomas*, 103 Va. 24, 27, 48 S. E. 490.

**Master Defined.**—"Mr. Minor says that a master is one who exercises personal authority over another." 1 Min. Inst. (3d Ed.) 179; *Ginter v. Shelton*, 102 Va. 185, 188, 45 S. E. 892.

**Servant Defined.**—"In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business." *Merriman v. Thomas*, 103 Va. 24, 27, 48 S. E. 490.

"A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit



of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." *Merriman v. Thomas*, 103 Va. 24, 27, 48 S. E. 490.

"A servant," says Wood's Master and Servant, § 1, "strictly speaking, is a person who, by contract or operation of law, is for a limited period subject to the control of another in a particular trade, business, or occupation." *Ginter v. Shelton*, 102 Va. 185, 188, 45 S. E. 892.

The primary definition given by the Century dictionary is: "One who serves or attends, whether voluntarily or involuntarily; a person employed by another, and subject to his orders; one who exerts himself or herself or labors for the benefit of a master or employer." And the Standard dictionary defines a servant as: "A person employed to labor for the pleasure or interest of another; especially, in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer; an employee. Specifically, a person hired to assist in domestic matters, living within the employer's house, and making part of his family; hired help." Webster is to the same effect. *Ginter v. Shelton*, 102 Va. 185, 188, 45 S. E. 892.

"The term servant is not however restricted to persons engaged in menial, or even in domestic, service. It is applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong." *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479, 492, 44 S. E. 439.

A bookkeeper is a servant in the broad sense in which that term is employed in the law. He has no representative capacity. He acts under the direction and control of his employer,

and his occupation has no relation to the transaction of business with third persons. *Merriman v. Thomas*, 103 Va. 24, 28, 48 S. E. 490.

A gift by will "to all servants in my employ at the time of my death fifty dollars each" will, in the absence of anything in the will or in the circumstance surrounding the testator to show a contrary intention, include laborers on the farm of the testator. The word "servants," especially in connection with the word "all" preceding it, will be deemed to have been used in a comprehensive sense, and will not be restricted to domestics. *Ginter v. Shelton*, 102 Va. 185, 45 S. E. 892. See the title WILLS.

**Classes of Servant.**—The word "servant" embraces many classes. It is a generic, and not a specific, designation. *Ginter v. Shelton*, 102 Va. 185, 189, 45 S. E. 892.

The several classes of servants are, first, slaves; secondly, menial servants; third, apprentices; fourth, laborers; fifth, stewards, bailiffs, factors, agents, etc. 1 Minor's Inst. (3d Ed.) p. 179; *Ginter v. Shelton*, 102 Va. 185, 188, 45 S. E. 892.

**Servants Distinguished from Agents.**—See the title AGENCY, vol. 1, p. 243.

## II. When Relation Exists.

See ante, "Definitions and Distinctions," I.

**In General.**—Where one has voluntarily chosen another to serve him, upon knowledge or belief in his skill or care, and has power to give him orders which he is bound to receive and obey, and has the power to discharge him for misconduct, the relation of master and servant exists between the parties; and whether such servant was appointed by the master directly or intermediately through the intervention of an agent authorized by him to appoint servants for him can make no difference. *Muse v. Stern*, 82

Va 33; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386.

The power to discharge a servant, and not his actual discharge, is one of the evidences of the relation of master and servant. *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386.

It has been said that the right to control appears to be the conclusive test by which to determine whether the relation exists. *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479, 492, 44 S. E. 439.

**Between Persons Riding in Carriage and Driver.**—Where one member of a firm, who individually owned a horse and carriage, sent his servant with it to meet and convey the other partner to the store, and while returning, the driver recklessly drove against a third party, knocking him down and injuring him, it was held, that the relation of master and servant did not exist between the persons riding in the carriage and the driver, and the mere fact of his presence in the carriage at the time of the injury did not render him liable for the driver's negligence. *Muse v. Stern*, 82 Va. 33. See also, *Fry v. County of Albemarle*, 86 Va. 195, 9 S. E. 1004. See post, "Liability of Master to Third Persons for Acts of Servant," VII.

**Between Insurance Company and Medical Adviser.**—The relation of master and servant subsists between an insurance company and its medical adviser in the exercise of a right of examination for injuries alleged to have been sustained and the company must answer for injuries, resulting from the negligence or misconduct of its agent in the premises. *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479, 44 S. E. 439. See the title LIFE INSURANCE, ante, p. 340.

**Between Lessor Railroad and Lessee's Servants.**—Where railroad company has, by legislative authority, leased its road and transferred the exclusive possession and control thereof to another company, it can not be held

liable for injuries thereon sustained by a servant of the lessee though the lessee's negligence upon the theory of master's liability to his servants. *Virginia, etc., R. Co. v. Washington*, 86 Va. 629, 10 S. E. 927. See the title RAILROADS.

**Province of Court and Jury.**—Section master, going on hand car to load scrap iron, allowed the plaintiff to go along if he would assist. On return, hand car collided with a train, injuring plaintiff, who sued the company. At trial, the court instructed the jury as follows: "The court, being of opinion that it could not be fairly inferred from the testimony that plaintiff was either a passenger or an employee of the company, and that it was fairly inferable that he was aware of the rules of the company prohibiting persons from riding on the hand cars." It was held, that such an invasion of the province of the jury as entitled plaintiff to a new trial. *Tyler v. Chesapeake, etc., R. Co.*, 88 Va. 389, 13 S. E. 975.

### III. Duration of Contract of Hiring.

A contract to continue for the period of a year, with salary payable monthly, does not make it incumbent on the employee to aver and prove that he performed the entire year's service, or was prevented from performing it, by the employer, as a condition precedent to the former's recovering anything. If the whole is to be done on one side, before anything is done on the other, then the promises are dependent. But if something is to be done on the one side, before the whole is to be done on the other, then the promises are independent. *Matthews v. Jenkins*, 80 Va. 463.

### IV. Wages of Servant.

#### A. RIGHT TO WAGES.

**Implied Contracts for Wages.**—Generally, as to implied contracts for com-

pensation, see the title IMPLIED CONTRACTS, vol. 7, p. 301.

C. P. and M. P. owned adjoining farms, were both unmarried, were cousins, lived together at the house of M. P., eating at the same table and each furnishing supplies therefor, for a period of at least forty years, until the death of C. P., during which time they kept no accounts between them, never made a settlement, neither presented a bill to, nor made a claim against, the other; a part of the stock on the farms, they owned in common, and a part separately and individually; but the stock was fed indiscriminately from the products, and upon both farms; no contract or agreement was made or existed between them for the payment of any board by him, or that either should pay to, or receive from the other anything for services rendered. It was held, that the relations existing between the parties, and the circumstances were such as to raise the presumption that all such services were gratuitous and neither expected to make any charge against the other or to pay anything to the other. *Hanly v. Potts*, 52 W. Va. 263, 43 S. E. 218.

**Condonation of Servant's Misconduct Entitles Servant to Wages.**—Where the servant is guilty of such misconduct as furnishes sufficient ground for dismissal and the master still retains him in his service until the expiration of his term, he will be deemed to have waived or condoned the misconduct and will be compelled to pay the wages agreed upon. *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992.

In a suit by A. to recover against B.'s estate for services rendered B., A. testified that B. agreed to give her for her services fifty cents a week, to keep her in clothes and to give her \$500 at his death; and that a short time before his death she heard him tell his sole heir and distributee that there was \$500 in a chest which belonged to A., which last statement was corroborated by a

disinterested witness who was present when it was made. A.'s father testified that about three weeks before B.'s death, B. told him that he had promised A. \$500 if she would stay with him until he died, and this was to be exclusive of her wages, that he had counted it out and given it to her, but that she had given it back to him for safe keeping. Another witness stated that B. had always said that he intended to leave A. ample means to take care of herself if she stayed with him, but that he never mentioned the amount. At B.'s death \$500 was found in the place designated by B. and was treated for a time by B.'s administrator as the money of A. It was held that the evidence was sufficient to show a contract upon B.'s part to pay \$500 for services rendered, and as the evidence showed that they had been faithfully performed A. was entitled to recover. *Copeland v. Copeland* (Va.), 24 S. E. 218.

#### B. AMOUNT.

**Construction of Contract for Wages Out of Profits.**—C., a manufacturer of tobacco, in 1849 employs G. in his business, and agrees to give him one-fourth of the net profits of all the tobacco manufactured by C. G. dies in January, 1860, and G.'s administrator files his bill against C. for an account and payment. C. answers and says there is an account on his books called "factory account," which shows correctly the net profits of the business. This account, however, is only brought up to December, 1858, as the business of 1859 was not closed. Upon the suggestion of the commissioner directed to take the account, C. and G.'s administrator agree to a mode of settlement based upon the factory account. And they agree that the account for 1859 shall be settled upon the same principles. A lot of tobacco manufactured in 1858 and 1859 C. claims is not within the terms of the agreement. As G. was to have one-fourth of the net prof-

its on all tobacco manufactured, the account of 1859 must be settled so as in effect to bring this lot into the factory account, and allow G. one-fourth of the profits of it. *Chieves v. Gary*, 24 Gratt 414.

In *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483, it was held, that the proper construction of the contract in suit was that, while the time of service was from April to April, the time of profits sharing was from January to January, that the term of service began in April, but in January following the defendant was to share in the profits of the preceding twelve months in such proportion as the term of service bore to the whole year.

**Amount Conditional upon an Event within Master's Control.**—Where an employee's compensation in addition to his regular salary is conditional on the event only that there are sold specific lands in excess of a certain amount, there is no implied agreement that his employer will put the bonds on the market. *Winter v. Southern Loan, etc., Co.*, 2 Va. Dec. 456.

**Interest.**—Where an employee is to receive a share of the profits annually in lieu of wages and his share of the profits is retained by the employer after the end of the year, it bears interest from the date it was due. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483.

### C. EFFECT OF ACCOUNT STATED.

Where a servant received of the master a statement of the account between them for services, and accepted the same without objection, and continued in his employment for more than a year, the presumption arises that he agreed to the correctness of the account. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483. See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

### D. LIEN OF SERVANT.

As to lien of laborers for wages, see the title LIENS, ante, p. 332.

### E. STATUTORY PROVISIONS TO PROTECT SERVANT.

#### 1. Prohibition of Payment in Scrip or Store Orders.

As to the constitutionality of such statute, see the title CONSTITUTIONAL LAW, vol. 3, p. 202.

#### 2. Regulation of Manner of Weighing Coal in Order to Ascertain Compensation of Miners.

As to constitutionality of such statute, see the title CONSTITUTIONAL LAW, vol. 3, p. 202.

### F. ACTION FOR WAGES.

**Declaration.**—On a covenant in which the plaintiff engaged to serve the defendant as his overseer, for one year; and the defendant, to pay to the plaintiff a certain part of all grain "made on the plantation (after deducting the seed), oats excepted; a declaration charging that the defendant did not, at the close of the year, pay to the plaintiff such part of the grain "made on the plantation" (without setting forth what crop was made), is good after verdict. *Laughlin v. Flood*, 3 Munf. 255.

**Evidence.**—In an action of general indebitatus assumpsit, for services rendered as an overseer, or of quantum meruit for like services, the plaintiff can not give in evidence proof that the defendant had employed him as an overseer, and was to pay him a certain quantity of tobacco. In such case, he should declare upon the special agreement. *Wells v. Winfree*, 2 Munf. 343.

**Province of Court and Jury.**—The question whether a servant was discharged by the master or voluntarily abandoned the service without sufficient cause, is for the jury. And if there is evidence tending to establish either of these, and an instruction is asked which correctly propounds the law on such view, it is error to refuse it. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483.

## V. Discharge of Servant.

### A. GROUNDS.

#### Necessity for Existence of Grounds.

—A servant may recover if he is discharged without sufficient cause regardless of the motive which induced the master to discharge him. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935.

**Incompetence.**—A master may discharge the servant if he does not do the work he was employed to do in a reasonably skillful manner. But reasonable skill is all that is required, unless the servant professes a higher degree of skill, and contracts to perform the work in the best manner. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935.

In every case of a contract of employment where the parties know each other, and the purpose of each other, at the time of entering into it, and the terms of the contract are not to the contrary, the servant only engages to perform such services as he can perform. If a person engages to do service which he can not perform his incompetence is cause for discharge. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

**Breach of Contract by Servant.**—So where the servant breaks his contract with the master this is sufficient ground for his discharge. The law only requires that there should be an actual breach of the express or implied conditions of the contract in order to justify the discharge, and, if such cause in fact exist, the master may avail himself of such breach in an action brought against him for damages resulting from the alleged wrongful dismissal. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935.

**Grounds of Discharge Unknown to Master.**—Where a sufficient cause for the discharge of the servant, though not the inducing motive for the discharge, nor even known to the master, it will justify the discharge, and the

master may avail himself of it in defense of an action for damages for an alleged wrongful dismissal, but an instruction to that effect should not be given when all existing causes were known to the master at the time of the discharge, as the instruction is then without evidence to support it. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935.

### B. WRONGFUL DISCHARGE.

#### 1. Measure and Elements of Damage.

**In General.**—The rights of the parties are to be determined by the terms of the contract, and, in the absence of any stipulation for other damages, the plaintiff can only recover the actual damages sustained by reason of the breach. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935; *Willoughby v. Thomas*, 24 Gratt. 521; *Maury v. Chesapeake, etc., R. Co.*, 27 Gratt. 698.

If a servant is discharged without cause, he may treat the contract as absolutely broken by the master, and, in an action thereon, recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, less any sum he might have earned already or might thereafter earn in other service, as well as the amount of any loss the defendant sustained by the loss of his services without the master's fault. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

In an action to recover damages for an alleged breach of a contract whereby the defendant, in consideration of certain agreements on the part of the plaintiff, and the assignment to the defendant of certain patents, stipulates that it will retain him in its service for a certain period at an agreed price per month, and will issue to a trustee for his benefit an agreed amount of its stock, to be delivered to the plaintiff at the end of the agreed pe-

riod of the service, provided he fulfills his part of the contract, if within the period of service the defendant discharges the plaintiff without just cause, the plaintiff is entitled to recover the actual damages sustained by him by reason of not being allowed to complete his period of service. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935.

**Remote Damages.**—Where the servant sues for damages for breach of the contract of service, the jury can not take into consideration other elements of damages than those which were caused by the dismissal. *Crescent Horse Shoe, etc., Co. v. Eynon*, 95 Va. 151, 27 S. E. 935; *Willoughby v. Thomas*, 24 Gratt. 521.

**Discharge of Person Employed to Act as Trustee in Railroad Mortgage.**—See the title RAILROADS.

## 2. Action for Wrongful Discharge.

**Effect of Death of Master Prior to or Pending Suit.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 32.

**Declaration.**—A declaration in assumpsit based on a claim of plaintiff against a railroad company for personal injuries, which plaintiff claims was compromised by defendant agreeing to give plaintiff employment at a stipulated per diem as a track walker, as long as defendant kept a track walker on the section designated, and from which service he was wrongfully discharged, which fails to allege a complete accord and satisfaction, is bad on demurrer. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

A declaration in assumpsit based on mutual promises, which fails to allege the promises made by plaintiff and that defendant "in consideration of such promises" undertook and promised to do the things alleged, is demurrable. *Grover v. Ohio River R. Co.*, 53 W. Va. 103, 44 S. E. 147.

If the servant has suffered special damages to character by reason of dis-

charge, he can not recover, however meritorious the claim may be, under a declaration which does not allege them. *Lee v. Hill*, 84 Va. 919, 922, 6 S. E. 473.

It does not necessarily follow, that, because an employee is discharged, even wrongfully and without just or reasonable cause, he has or will suffer any loss or injury thereby, except the loss of the benefit of his contract for service; and therefore, under a mere general or ad damnum claim of damage, he can not recover special damage for loss of character, or any otherwise, beyond compensation for the loss of his contract. The law does not imply special damage; and to prevent a surprise on the defendant who has pleaded the general issue, merely, to a declaration which does not aver special damage in anywise, the plaintiff will not be permitted to give evidence of special damage upon the trial. *Lee v. Hill*, 84 Va. 919, 921, 6 S. E. 473.

**Burden of Proof as to Grounds of Discharge.**—The burden is upon the defendant to show that the discharge was for good cause, and a verdict for the plaintiff should not be set aside unless it is clearly wrong. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

**Admissibility of Evidence.**—Where, in an action of trespass on the case by the servant against the master for a wrongful discharge, the declaration makes no averment of malice or of special damage beyond loss of employment and wages, evidence of special damage to the character of the servant by reason of discharge, is irrelevant and inadmissible. *Lee v. Hill*, 84 Va. 919, 6 S. E. 473.

## VI. Liability of Master to Servant for Personal Injuries.

### A. IN GENERAL.

The test of liability is the negligence of the master, not the danger of the employment, though the danger of the

employment may determine the ordinary care required in the case. *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999.

## **B. NECESSITY FOR EXISTENCE OF RELATION OF MASTER AND SERVANT.**

A master owes the same degree of care to a servant working with his knowledge and consent as if he had directed him. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976. See ante, "When Relation Exists," II.

## **C. DUTIES OWED BY MASTER TO SERVANT.**

### **1. Personal Character of Duties.**

**In General.**—It is well settled that the duties owed by the master to the servant are personal and nonassignable and that if they are delegated by the master to an agent, the latter's negligence in performing them is the negligence of the master. *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 142, 45 S. E. 915; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 109, 25 S. E. 226; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232.

"The doing of these things is a duty of the master to the servant for the latter's safety. The master can either perform these duties personally, or he may delegate their performance to some one else, whom the books call 'vice principal,' because he stands, as to these duties, in the place of his master; but if either fails in the performance of duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rest on the master as a duty to the servant, it is

the act, purely, of a fellow servant, and the injured servant must look to him, not to the master. These duties falling on the master to perform are called in the law books 'nonassignable duties,' because he owes them to the servant, and he can not assign them to another to perform, and exempt himself from liability for their misperformance." *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

**The duty of providing safe machinery and appliances**, and of keeping the same in proper repair, is the personal duty of the master, and where, under the rules of a railroad company, the duty of seeing that the couplings and brakes of the cars of his train are in good order before starting, and of inspecting them when his train stops for water or other trains, is delegated to a conductor of a freight train while his train is between terminal points, and the brakemen of such train are placed under the direction of such conductor, the conductor is not, in the matter of inspecting and seeing that the couplings and brakes of the cars of his train are in good order, a fellow servant with said brakeman; and if one of such brakemen, in pursuance of orders of said conductor, between terminal points, attempts to couple cars which have been in a wreck, and thereby had the deadlocks crushed and the drawheads twisted, and in such attempts sustains injury, the company is liable therefor. But whether fellow servant or not, under the facts of the case at bar, the proximate cause of the injury was the defective condition of the machinery, and the company is liable. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 109, 25 S. E. 226.

A railroad company can not divest itself of the duty of providing safe machinery and appliances so as to relieve itself from responsibility for the nonperformance thereof, by delegating the duty to any of its servants in any of its departments; and if it does delegate this duty to any of its servants

and vest him with controlling or superior authority in regard thereto, the negligence of such servant is the negligence of the company. *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37, 38; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

**Liability of Master for Neglect of Servant Performing Personal Duties.**—See the title FELLOW SERVANTS, vol. 6, p. 8.

## 2. Right of Servant to Rely on Performance of Duties.

**In General.**—In the absence of notice to the contrary, a servant is warranted in assuming that the master has performed his nonassignable duties. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31; *McCreery v. Ohio River R. Co.*, 43 W. Va. 110, 27 S. E. 327; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 167, 9 S. E. 990; *Ayers v. Richmond, etc., R. Co.* 84 Va. 679, 5 S. E. 582; *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 543, 14 S. E. 372; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576, 586; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 519, 3 S. E. 123.

It is not error to instruct that it is employer's duty to use ordinary care to provide reasonably safe and suitable machinery, and that in absence of notice to the contrary, employee is warranted in assuming that employer has performed his duty in so providing. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890, citing *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015.

A servant has the right to presume that a foreman of the company, whose duty it is to ascertain the running of the trains on the track and to take precaution to prevent collision, has performed the duty required of him and is not guilty of negligence. Thus,

where a servant voluntarily got upon a hand car in foggy weather, and no flag was sent out in advance, and no precaution taken to prevent a collision, this being the duty of the foreman as required by the rules of the company, it was held that as the servant had not been informed of the negligence of the foreman in performing his duty, the conduct of the servant was a voluntary assumption of risk of collision only with trains which the foreman could not have ascertained would have been on the track, had he used due diligence to obtain information, and that the company was liable to the servant for an injury received by a collision with an extra train which could have been discovered by the foreman if he had exercised due diligence. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

## 3. Duties Stated and Applied.

### a. Duty to Provide Safe Place of Work.

#### (1) Statement of Rule.

It is a general principle of the law of master and servant that the master shall use ordinary care and diligence to provide a reasonably safe place in which his servant is to work, considering the character of the work in which he is engaged, and the master will be held liable for injuries to the servant which result from the omission to use such care. *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *Virginia, etc., Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857; *Persinger v. Alleghany Ore. Co.*, 102 Va. 350, 46 S. E. 325; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582; *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 519, 3 S. E. 123; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 543, 14 S. E. 372; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614;



Norfolk, etc., *R. Co. v. Cromer*, 99 Va. 763, 764, 40 S. E. 54; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 261, 17 S. E. 890; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 63, 34 S. E. 525; *Atlantic, etc., Co. v. West*, 101 Va. 13, 42 S. E. 914; *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 752; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511; *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, 4 S. E. 339; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *Norfolk, etc., R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 286; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 46 S. E. 802; *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278; *Riley v. West Virginia Cent. etc., R. Co.*, 27 W. Va. 145; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31; *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573; *McCreery v. Ohio River R. Co.*, 43 W. Va. 110, 27 S. E. 327; *Trump v. Tidewater Coal, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

## (2) Applications of Rule.

### (a) Factories and Buildings.

**Hole in Floor over Which Servant Is Engaged in Running Truck.**—A servant was assigned to a duty which

necessitated his rolling a truck over a dangerous hole in the floor of a factory. The master knew of the hole and of its danger. Near the hole was a board which seemed to fit the opening, and had apparently been used for that purpose, but it was not safe simply to lay the board over the hole, without nailing it down, as immediately beneath the hole a large screw ran which conveyed cement from one portion of the building to another, and this was liable to become clogged, and to prize up the covering. This fact was known to the master but not known or communicated to the servant. The servant laid the board over the opening, and while rolling the truck over it, the board from some cause moved, and his foot passed into the hole and came into contact with the screw, which inflicted the injury for which this action was brought. The jury having found for the plaintiff, this court refuses to set aside the verdict as contrary to the evidence. *Virginia, etc., Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577.

### (b) Railroads.

#### aa. Duty to Make Up Trains.

**In General.**—The duty to properly "make up" a train for a trip is one of the nonassignable duties of the master. *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000.

But, if on the trip, the conductor, without the knowledge or consent of the master, changes the "make up," and, in consequence of that change, while proceeding on his journey, an injury is inflicted on a brakeman of another train travelling on the same track, the master (as the law stood until recent changes were made), is not liable, as the negligence complained of is that of a fellow servant. *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000. See the title FELLOW SERVANTS, vol. 6, p. 1.

**Position of Lumber Car in Front of Train.**—A rear brakeman was killed by the defective loading of a lumber car

in the front of the train, while attempting to cross over it. He had no duties calling him to that part of the train, the cars in front of the lumber car being supplied with air brakes. It was held, that no negligence was shown in the position the car occupied in the train, though such cars were generally placed in the rear. *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248.

**bb. Railroad Track and Roadbed.**

Where the place in which the servant is engaged to work is rendered dangerous and unsafe by reason of the act of God, the master is not liable for injuries resulting to the servant therefrom. Thus in a case in which an engineman was injured owing to the roadbed having become washed away by violent rains, the company having used due diligence in inspecting the roadbed, it was held that the plaintiff could not recover. *Binns v. Richmond, etc., R. Co.*, 88 Va. 891, 14 S. E. 701.

While the master must use ordinary care in the construction and maintenance of a safe place in which the servant is to work, he is not liable for defects not arising from his own negligence, and which could not have been discovered by the exercise of ordinary care. Thus a railroad company is not liable for injuries sustained by an employee by the sliding out or giving way of the foundation on which an embankment rests, where it was made by a different company a long time before the accident, and there is no obvious defect in its construction. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

In action for damages for death by defendant's negligence, a train of six cars was run along a coal wharf, upon a wooden structure, twenty-five feet high and 300 feet long. At the end was only a log chained to the wharf. The chain gave way and let the cars pass over the end, killing the plaintiff's intestate, who was a brakeman. The defendant had ordered timbers four

years before to build a deadlock, but it was not built. It was held, that negligence on part of defendant company caused death of plaintiff's intestate, and it is liable. *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 13 S. E. 475.

**cc. Railroad Bridges.**

**(aa) Nature and Extent of Duty.**

**Railroad Bridges Erected by Independent Contractors.**—It is not an essentially hazardous undertaking to substitute a new railroad bridge for an old one without the interruption of traffic, and a railroad company may employ an independent contractor to substitute such new bridge and if care be exercised in the selection of a suitable and reputable contractor, and the company retains no control or direction over the manner of executing the work, it is not liable for the negligence of the contractor. *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. 525. See the title INDEPENDENT CONTRACTORS, vol. 7, p. 363.

**(bb) Overhead Bridges.**

**In General.**—It seems to be a settled principle of law that it is negligence for a railroad company to operate its railroad with an overhead bridge too low for its employees, whose duty require their presence on top of the cars, to pass under when standing on the cars in the discharge of their duties. *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 19 S. E. 166; *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709, 49 Am. Rep. 394; *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. 824; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

It is negligence for a railroad company to operate its road with an overhead bridge only twenty-eight and a half inches above the tops of its cars. *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899.

Where a brakeman was struck and thrown from his train and killed by a low overhead bridge which he could not see, on a dark night, while his back was turned towards the bridge and his mind and body actively engaged in the effort to apply the brakes and stop the train before it reached the bridge in obedience to the rapidly repeated alarm whistle signals given by the engineer, it was held, that the company was liable. *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 351, 354, 18 S. E. 559.

#### dd. Depot Platforms.

While it is the duty of a railroad company to use ordinary care to provide a reasonably safe place to its employees in which to perform their duties, it can not be said that there was a lack of such ordinary care where a depot agent, whose duty it was to keep himself advised, and to report to the company, on the condition of the depot platform and grounds of the company, was injured by a defect in the platform which had been in daily use by himself and the public for several years, when there was nothing about its appearance to excite a suspicion of danger, and the defect was so obscure that it would not have been disclosed on the most careful inspection. *Atlantic, etc., R. Co. v. West*, 101 Va. 13, 42 S. E. 914.

#### ee. Obstructions on or Near Track.

**In General.**—One of the nonassignable duties of a railroad company towards its employees is that of providing a reasonably safe place in which to work and with respect to persons engaged on trains this duty requires the company to keep its track clear of unnecessary obstructions. *McCreery v. Ohio River R. Co.*, 43 W. Va. 110, 27 S. E. 327, citing *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 583, 21 S. E. 727.

"Upon grounds of public policy, as

well as of private right, no duty of the railroad company should be more unrelentingly exacted than the duty of constant watchfulness to make and keep the track safe and clear. \* \* \* No cases lay down this doctrine more fully and broadly than the cases of *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 37; *Riley v. West Virginia Cent., etc., R. Co.*, 27 W. Va. 145; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610 and *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31." *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573.

**Stump Near Track.**—Where a railroad company fails to keep its track free from obstructions, or allows structures to remain dangerously near the same, it is liable to the servant for an injury received in consequence of such neglect. Accordingly the company was held liable where a brakeman, unfamiliar with the fact that a stump was dangerously near the track, was ordered to see if the wheels were sliding, and, who, while looking with his head outside the train, was struck by the stump, the existence of which was known to the employee of the company who gave the order unaccompanied by any special warning. *Riley v. West Virginia Cent., etc., R. Co.*, 27 W. Va. 145. See also, *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870.

**Boom of Derrick Swinging over Track.**—The fact that the boom of a derrick was permitted to swing across the tracks, forming a deadly and unnecessary obstruction, was held to furnish ample grounds to sustain the inference of negligence, notwithstanding evidence that the proper employee of the company had attempted to firmly secure the boom but a short time previous. "The derrick was not an obstruction itself, for it was not even dangerous. But the negligence consisted in the insecurity of the boom, which could have been so easily avoided, either by dismantling it, or

fastening it back in such condition that it could not have been swung loose by the force of the wind." *McCreery v. Ohio River R. Co.*, 43 W. Va. 110, 27 S. E. 327.

**(c) Mines.**

**Duty to Keep Passageway Safe.**—A dark tunnel, leading through a hall to a coal mine, in another hill back of it, used by the owner of the mine, for hauling coal from it, by means of an electric motor, and also by the miners in going to and returning from their work in the mine, with the knowledge and consent of the owner, and as the usual and customary way of ingress and egress, is a place in respect to which the owner of the mine owes to his employees the duty of ordinary care for their safety when so using it. *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 85, 46 S. E. 802.

**Duty as to Ventilation.**—It is the duty of the operator of every coal mine to provide ample means of ventilation, and to cause air to be circulated through the headings and working places, so as to dilute, render harmless, and carry off dangerous and noxious gases. *Graham v. Newburg Orrel Coal, etc., Co.*, 38 W. Va. 273, 18 S. E. 584.

It is the duty of a mine operator to employ a competent fire boss to examine with safety lamp, immediately before each shift, working places and other places where dangerous and noxious gas is known to exist, or is liable to exist. *Graham v. Newburg Orrel Coal, etc., Co.*, 38 W. Va. 273, 18 S. E. 584.

**Duty to Keep Mine Free from Fire Damp.**—The owner of a coal mine is not required to resort to the most expensive methods for keeping his mine free from fire damp in order to escape responsibility to his servant working in the mine for injury caused by an explosion of fire damp. If he has reasonably safe methods in use for the proper ventilation of the mine and uses

reasonable care to keep the mine properly ventilated and the fire damp expelled therefrom, he will not be responsible. He is not held to extraordinary care. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 286.

**Duty to Provide Boss to Look after Safety of Mine.**—It is also his duty to employ a competent mining boss to keep careful watch over the ventilating apparatus and the air ways, traveling ways, pumps, and drainage, and to see that proper breakthroughs are made, as required by law, and that all loose coal, slate, or rock overhead in the working places and along the haulways be removed or carefully secured, so as to prevent danger to persons employed in the mine, and to provide props and timbers for the mine, and perform other duties required of him by law. *Graham v. Newburg Orrel Coal, etc., Co.*, 38 W. Va. 273, 18 S. E. 584.

**(d) Excavations.**

Defendant company was cutting through side of a mountain a horizontal opening to lay railroad track to zinc mines. The cut was eighteen feet deep and twelve feet wide in strata of thin slate, with loose slip clay between, with perpendicular banks and no artificial supports. Deceased was inexperienced and ignorant of the treachery of the clay. Defendant knew the danger, and regarded it a question of "profit against risk" to put in supports. Deceased was placed at work in the bottom of the cut, in the afternoon after a rain, which made the place more dangerous; and was killed by a slide of clay from the side of the bank. It was held, that the defendant was guilty of negligence in working the cut without supports to the banks, and also in doing so in the afternoon after the rain. *Bertha Zinc Co. v. Black*, 88 Va. 303, 13 S. E. 452.

Defendant had plaintiff employed in making excavations that demanded much caution. "Ground hog holes" were dug eighteen inches wide and

thirteen feet deep instead of six or eight feet deep as usual, with sides unsupported. "Boss," without examining as to the safety of the work, ordered plaintiff, who was unaware of the increased dangers thereof, to go in and dig the hole deeper. The sides caved in and disabled plaintiff for life. It was held, that the defendant is liable. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849.

### (3) Place Rendered Unsafe by Manner of Doing Work.

It is the duty of the master to furnish and maintain a reasonably safe place in which the servant is to work, and this duty is personal to the master. But if the place is reasonably safe in the first instance, and is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done, in doing which an injury is inflicted, the master is not liable for such injury. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

### b. Duty to Provide Safe Machinery and Appliances.

#### (1) Statement of Rule.

It is a general rule of the law of master and servant that the master shall use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the use of the servant, and the master will be held liable for an injury to the servant, which results from the omission to exercise such care and diligence. *Atlantic, etc., R. Co. v. West*, 101 Va. 13, 42 S. E. 914; *Wright v. Southern R. Co.*, 101 Va. 36, 42 S. E. 913; *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784; *Norfolk, etc., R. Co. v. Donnelly*, 98 Va. 853, 14 S. E. 692; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 752; *Richmond, etc., R. Co. v. Risdon*, 87

Va. 335, 12 S. E. 786; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, 4 S. E. 339; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990; *Norfolk, etc., R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 407, 28 S. E. 578; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576, 586; *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. 963; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821; *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349; *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 45 S. E. 915; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 13 S. E. 475; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467; *Giebell v. Collins*, 54 W. Va. 518, 46 S. E. 569; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va.

569, 33 S. E. 293; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 37; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 617; *Trump v. Tidewater Coal, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140.

A master is bound to observe all the care which the exigencies of the situation reasonably require in furnishing machinery adequately safe to be used by the servant. *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

A master is not bound to furnish safe and sound machinery for the use of the servant. It is his duty to use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the servant. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285.

Where, in an action by a servant against his master, it is admitted that the master was negligent in supplying defective appliances, the only issue involved being as to the servant's notice of the defects, error in instructing as to the master's duty to furnish proper appliances is not prejudicial to the master. *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342.

"If therefore, the master knows, or would have known, if he had used ordinary care to ascertain the facts, that the machinery, instruments, or appliances, which he has provided for the use of his servants, are defective and unsafe, and the servant is thereby injured, the master is liable. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25

S. E. 226." *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 45 S. E. 915.

### (2) Duty to Provide Best or Latest Appliances.

#### Duty to Provide Best Appliances.—

The master is not bound to furnish for his workman the safest and best machinery nor to provide the best methods for the work, in which he is engaged, in order to save himself from responsibility for injuries to his servant. If the machinery and appliances, which he has, be in common use and are such as can with reasonable care be used without danger to the employee, it is all that can be required of the employer. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 807, 22 S. E. 869; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511.

The master, in performance of his duty to his servants, is not bound to furnish the best known appliances, but such only as are reasonably safe; the test is not whether he has omitted to do something which he could have done, nor whether better machinery might have been obtained, but whether his selection was reasonably prudent and careful, and whether the machinery provided was in fact adequate and proper for the use to which it was to be applied. *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 787, 40 S. E. 54.

If the machinery and appliances, which the master has, be in common use, and are such as can, with reasonable care, be used without danger to the employee, it is all that can be required of the employer. *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569;

*Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293.

An employer may even have in use a machine or appliance for its operation, shown to be less safe than another in use, without being liable to its employees for the nonadoption of the improvement, provided that the employee be not deceived as to the degree of danger which he incurs. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 340, 12 S. E. 786.

#### **Duty to Provide Latest Inventions.**

—A master is not bound to use the newest or latest inventions, for he is not an insurer of the safety of the servant; he is liable for the consequences, not of danger, but of negligence. *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. 963; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 807, 22 S. E. 869; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293.

"All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is a test of the latter; for in regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe', means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unending test of negligence in methods, machinery, and appliances is the ordinary usage of the business." *Bertha Zinc Co. v. Martin*, 93 Va. 791, 807, 22 S. E. 869.

A master is not bound to exchange machinery for every supposed improvement. *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786.

**Application of Rules.**—Where reasonably adequate means have been provided to prevent cars on a siding from drifting on to the main track, it can not be said that the removal of a derailing switch is negligence as a matter of law. Courts and juries can not dictate to railway companies a choice between methods all of which are reasonably adequate for the purposes to be subserved. *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898.

In *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54, it was held, that in view of the evidence in the case which tended to show that the cars on the siding were provided with all the appliances, and that all of the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction, that the duty of ordinary care which the defendant owed to its servant could only be met by providing a derailing switch to prevent the moving of cars from the siding to the main track.

And, where the plaintiff's intestate and a fellow servant, employees of defendant railroad company, in obeying an order, adjusted a "push pole" from the corner of a tender to the corner of a car on a parallel track, for the purpose of pushing the car, but as the engine started one end of the pole slipped, throwing intestate under the wheels, whereby he was killed, it was held that the plaintiff could not recover on the ground that the defendant was negligent in not supplying the corner of the tender and car with "sockets" in which to place the pole, when the plaintiff's evidence showed that such "sockets" were a new invention, not in general use. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370. But see *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680, for a contrary holding.

**(3) Duty to Furnish Completed Appliance.**

It is the duty of the master to use ordinary care and diligence to provide for his servants reasonably safe and suitable appliances for the work to be done, and, while it is within the sphere of the servant rather than of the master to adjust and adapt the implement to the work in hand, according to its varying needs, the master's duty is not discharged by simply furnishing an unskilled servant with sound and suitable material for the construction or erection of an appliance which requires the exercise of such skill, judgment and knowledge of mechanical forces in order to render it safe and suitable for the work to be done as an unskilled servant could not be expected to have. *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467. See post, "Derricks and Hoisting Apparatus," VI, C, 3, b, (4), (b).

**(4) Applications of Rules.****(a) Railroad Machinery or Appliances.****aa. Locomotives.**

**Failure to Provide Drip Cock for Throttle Valve.**—It is not negligence to fail to provide a "drip cock" for the throttle valve of a stationary steam engine which is provided with a cylinder cock, through which accumulated water can pass in safety from the throttle valve, and which, in point of fact, has served that purpose for many years. *Moore Lime Co. v. Johnston*, 103 Va. 84, 48 S. E. 557.

**Failure to Provide Socket on Tender to Hold "Push Pole."**—Where a tender was not provided with the usual socket in which to place the end of a "push pole" for the purpose of pushing cars upon a track running parallel with the engine, and in consequence of this defect a "push pole" which the plaintiff was holding slipped and broke so as to throw the plaintiff in front of the advancing tender, it was held, that the company was liable. *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680, 683. But see *Norfolk, etc., R. Co. v. Jack-*

*son*, 85 Va. 489, 8 S. E. 370, wherein it was held, that the employer was not required to furnish sockets for "push poles" where the evidence showed them to be new inventions, not in general use. See also, ante, "Duty to Provide Best or Latest Appliances," VI, C, 3, b, (2).

**Knowledge or Ignorance of Defects by Servant.**—It has been held, that an instruction that, if a locomotive engine is in defective, dangerous condition, and the defendant company knew it, and by conduct, actions, or words lulls its engineer into a feeling of security, whereby he is killed, the company is liable, is erroneous, because it omits altogether the element of the engineer's ignorance of the defective and dangerous condition of the locomotive. *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261, citing *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

**bb. Cars.****(aa) Brakes.**

A brakeman has the right to assume that the brakes when applied will stop the train, and where the brakes were out of order, worn, and inefficient and the brakeman was ignorant of the inefficiency of the brakes, and the negligence of the defendant company in failing to keep the brakes upon its cars in safe condition, was the proximate cause of the death of the deceased, the company was liable. *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 351, 354, 18 S. E. 559.

A railroad company is not liable for an injury inflicted on a fireman on one of its trains occasioned by impact with cars which drifted upon its main line just before the accident, either in consequence of some unknown person tampering with brakes that were in good order and sufficient to hold the cars, or of negligence on the part of a fellow servant of such brakeman. *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898.



In action by brakeman injured by reason of defective brake on car in defendant's yard, this instruction given on plaintiff's motion: "If the jury believe that the injury was caused by a defect in the chain on the brake of defendant's car, without any fault on plaintiff's part, and that the defect was known to the defendant, or might have been known by a careful inspection of said chain and brake, then they should find for plaintiff;" was held proper. *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372.

#### (bb) Couplings.

**In General.**—It was the personal, nonassignable duty of the railroad company to furnish, and keep in repair, a reasonably suitable and safe coupling apparatus. *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573, 574.

The "three link couplings," if made when the cars are still, according to the known rules of a railroad company, were held not to expose a coupler to perils beyond those incident to his employment and assumed by him. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511.

**Where cars had been in a wreck** and the dead blocks were crushed and the drawheads twisted, it was held, that the company was liable for an injury sustained by a brakeman in consequence of such defects. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 109, 25 S. E. 226.

**Mismatched Coupling.**—The use of cars of unequal heights and mismatched couplings in the same freight train is not negligence per se in furnishing safe machinery. *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

"To hold that a railroad company was negligent in supplying safe and suitable machinery to its servants unless every car in a train was of the same height, would, in our opinion, be requiring an extraordinary degree of

care on its part. The effect of such a requirement would be to compel such company to have all its own cars changed to or made the same height, or to have only cars of the same height placed in the same train. It would also be required to have the railroad companies whose cars pass over its line make their cars of the same height, or put only those of the same height in the same train, or transfer all freight at its terminal points to other cars, or cease to do business with connecting lines. Such a rule would be impracticable as well as expensive and burdensome to the railroad company, and would require the company to exercise not reasonable, but extraordinary care in supplying and maintaining suitable machinery and instrumentalities to its servants in the performance of the work required of them, and that, too, when the defect complained of was obvious and patent, and could be seen as easily by them as by the master." *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 671, 22 S. E. 496.

"Whether their use on cars in a passenger train would constitute negligence, it is unnecessary to decide, as the decision of the cause must turn upon the application of the other well-settled principles hereinbefore stated." *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 107, 27 S. E. 821.

#### (cc) Ladders.

Plaintiff, a brakeman in defendant company's employ, attempted to get down from a car on front end of train, to uncouple engine. The bottom rung of the car ladder was missing, and while feeling for it in the dark with his foot, the engineer, without awaiting the usual signal, suddenly backed the engine against plaintiff and injured him. The bumper on end of car was broken off so that the tender came close to it. Plaintiff was not aware the bumper was broken. The train was made up under the supervision of the regular car inspector. It was held, that the

defective condition of the car was the proximate cause of the injury, and the defendant was liable. *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429.

While train was standing, conductor required plaintiff, a brakeman, to get up on a freight car and let off a brake. Unknown to him the ladder's upper round was broken, and as he was attempting to get on the top, conductor signaled engineer to back up, and a dead block being taken out, the cars came together and crushed plaintiff. It was held, that the defendant company was liable. *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990.

Where the evidence shows that the defendant company was guilty of negligence in not providing and keeping a ladder on a freight car next to the caboose car in repair, so as to make it safe for the conductor of the train to pass up and down it in the discharge of his duties, and the conductor by reason of the defective ladder, while in the discharge of his duties, fell and sustained severe injuries and was permanently disabled, he was held entitled to damages. *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576.

M. was on 24th of December, 1879, conductor of freight train on R. & D. R. R., running from Greensboro to Richmond. A car was taken into train during the night at Burkeville, the handle of the ladder whereof had been broken off long enough for the fracture to appear weather worn. Next morning at Powhatan station, M., attempting to descend this ladder, face towards it, caught at, and would have caught the handle, had it been in its place, but fell and was killed. In suit by personal representative of M. for damages, defendant demurred to the evidence. It was held, that the defendant was guilty of negligence in permitting the car ladder to remain out of order, which negligence caused M.'s death, and renders defendant liable for

damages. *Richmond, etc., R. Co. v. Moore*, 78 Va. 93.

**(dd) Bumpers and Deadlocks.**

In *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429, a brakeman, in attempting, on a dark night, to climb down the ladder on the front of a freight car next to the engine, was crushed by the engine's suddenly coming back up on him while feeling with his foot for the bottom rung of the ladder, which was missing—a fact of which he was ignorant. The bumper on the car was broken, which made it possible for the engine and car to come together and cause the injury. It was held that it was the company's duty to furnish proper cars and to keep them in good order; and that no negligence could be imputed to the plaintiff in this case, because the train having been made up in the night, under the supervision of the regular inspector, the plaintiff had no opportunity to discover the defect; and that therefore the railroad company was liable.

**(ee) Foreign Cars.**

Railroad companies are entitled to presume that cars delivered to them by connecting companies are in proper condition. *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274.

Where an injury results to the servant of a carrier from the defective condition of cars in its use, but owned by another company, the carrier can not escape liability for the injury on the ground that the cars do not belong to them, as, in such case, the owner of the cars will be deemed to be the agent of the carrier, and it will be held to the same liability as if it had owned the cars. *New York, etc., R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444.

**cc. "Push Poles."**

Where a "push pole" furnished by a railroad company for the purpose of pushing cars upon a track running parallel with the locomotive was cross grained and defective, owing to which it broke and threw the plaintiff in

front of an advancing tender, it was held, that the company was liable. *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680.

**(b) Derricks and Hoisting Apparatus.**

A hoisting apparatus for raising building materials to the second and third stories of a warehouse, which is not a simple appliance to be moved from place to place about the building easily adjusted, but is an instrumentality constructed and put in position for the purpose of remaining in that position until the completion of the building; which is operated by a steam engine; and which requires for its construction and setting up ready for work, such skill, judgment and knowledge of mechanical forces as the ordinary laborer could not be expected to have, is an appliance with respect to which the master is required to exercise care to see that it is safe, and the master does not perform his duty when he merely furnishes suitable material to make the apparatus, and with which to rig and set it up. *Parlett v. Dunn*, 102 Va. 459, 465, 46 S. E. 467.

**(c) Unguarded Machinery.**

Where employer leaves a large rapidly revolving cogwheel unprotected, so that tongs carrying large masses of iron are liable to be caught and taken into it and the pieces thrown all about the room with such force as to kill any person with whom they come in contact, after having been warned by a skillful workman to encase it, such employer held liable for an injury to an employee resulting from the tongs catching in the cogs. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890.

**(5) Knowledge or Ignorance of Defects as Affecting Master's Liability.**

**(a) Knowledge or Means of Knowledge by Master.**

A servant can not recover for an injury suffered, in the course of his employment, from a defect in the ma-

chinery or appliances used by the master, unless the master knew, or ought to have known, of the defect, and the servant was ignorant of such defect, or had not equal means of knowledge. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 491, 8 S. E. 370.

Where an injury occurs to an employee of a railway company through a defect in the machinery or implements furnished to the employees by the company, knowledge of such defect must be brought home to the company, or it must be proved that it was ignorant of the same, though its own negligence or want of care, before the company can be made liable. *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39.

**(b) Knowledge or Means of Knowledge by Servant.**

Where a foreman and his assistants have equal knowledge of the danger accompanying an act about to be done, even if the foreman requests its performance, and injury ensues to the assistant, the employer can not be made liable. Notwithstanding the request, the assistant can comply or not, as he chooses, and if he does comply, he takes his chances of the perils surrounding the situation. *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713, citing *Shrobe v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Dennison v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721. See post, "Knowledge of Defects and Dangers," VI, E, 3, c.

**(6) Latent Defects.**

Where the danger consists in some latent defect, which is not apparent by the use of ordinary diligence on the part of the master, and a servant in performing his work is thereby injured when he had the same chances of observation as the master, no liability attaches to the master. *Skidmore v. West*

Virginia, etc., R. Co., 41 W. Va. 293, 23 S. E. 713, citing *Shrobe v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Dennison v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721.

**c. Duty to Provide Sufficient Force of Competent Servants.**

**Statement of Rule.**—It is the duty of the master to exercise reasonable care, in providing and retaining sufficient and suitable servants, for the conduct of the business and if he is negligent in this respect he will be liable to a servant who sustains injury owing to the incapacity or insufficiency of his fellow servants. *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 407, 28 S. E. 578; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 110, 25 S. E. 226; *Norfolk, etc., R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342; *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740; *Trigg v. Lindsay*, 101 Va. 193, 195, 43 S. E. 349; *Myers v. Falk*, 99 Va. 385, 38 S. E. 178; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Torian v. Richmond, etc., R. Co.*, 84 Va. 192, 4 S. E. 339; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Ayers v. Richmond, etc., R. Co.*, 84 Va. 679, 5 S. E. 582; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278; *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610, 617; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Williams v. Thacker Coal, etc., Co.*, 44 W. Va. 599, 30 S. E. 107. See also, the title FELLOW SERVANTS, vol. 6, p. 1.

It is the duty of an employer to exercise reasonable care to ascertain the character, habits, and fitness of his employees for the discharge of their duties, and, by proper supervision and superintendence, to keep himself so informed. *Norfolk, etc., R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342.

It is the duty of a railroad company to provide competent men for its service. But it is not error to substitute in an instruction the word "efficient" for the word "competent" when the relation in which it is used makes the two words equivalent. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 110, 25 S. E. 226.

**Duty of Mine Operator to Employ Competent Boss.**—It is the duty of an operator or agent of a coal mine to employ a competent mine boss under and according to the provisions of § 11, p. 995, Code, 1891, Append., and, having done so, he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss. *Williams v. Thacker Coal, etc., Co.*, 44 W. Va. 599, 30 S. E. 107.

**Operating Dangerous Machinery with Insufficient Force.**—The general rule, which exempts the master from liability to his servants for injuries received by them in the course of the employment, does not apply where he undertakes to run dangerous machinery with insufficient help, in consequence of which the servant is injured. Such conduct on the part of the master, he said, is negligence, and constitutes a recognized exception to the general rule. *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365.

For example, the plaintiff, a boy thirteen years of age, was in the service of the defendant corporation, being engaged in the weaving department of its

cotton mills, "to sweep the floor, carry water, and fill the buckets with quills." The dangerous machinery of the weaving departments was at the time being operated with insufficient help, and an employee of the defendant, acting as its agent, called on the plaintiff for help, and ordered him into a position of danger, the result of which was irreparable injury to him. The defendant corporation was held liable in damages for the injury thus sustained by the plaintiff. *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

**Servants in Charge of Locomotives.**—It is the duty of a railroad company to see that the persons in charge of their engines and trains are competent to fill their respective positions. Accordingly it is held that where an engineer, without authority so to do, places an inexperienced and incompetent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employees by such fireman's unskillful management of the engine, for the reason that it is a breach of the duty the company owes to its employees to exercise ordinary care in providing and retaining competent servants. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

An engineer, with the knowledge and permission of the conductor, who was the representative of the company, left his engine to be operated by an inexperienced fireman. Whilst making a flying switch, by the improper management of the engine by that fireman, the brakeman was killed. It was held, that the company was liable. *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884.

**Servants in Charge of Stationary Engines.**—It is not negligence to employ as engineer of a stationary steam engine a youth eighteen years of age, of more than average intelligence, who for more than a year prior to his employment as a regular engineer had been put in charge as supernumerary,

and frequently ran the engine for days at a time, and who displayed special efficiency in operating machinery. *Moore Lime Co. v. Johnston*, 103 Va. 84, 48 S. E. 557.

**Duty to Employ Competent Surgeons.**—If a master assumes the responsibility of employing a surgeon to attend his servants, he must use reasonable care in the selection of the surgeon. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740.

To hold a master liable for the incompetency of a surgeon employed by him, but who is paid by monthly contributions from the servants' wages, to attend his servants, it must be alleged and proved that the injury complained of resulted from the incompetency of the surgeon, and further, that there was a want of reasonable care in his selection, or that he was retained in service after actual notice of his unfitness, or proof of such acts of negligence as would have affected the master with notice had he exercised due oversight and supervision. The act complained of may of itself be sufficient to establish the incompetency but not the master's knowledge thereof. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740.

Whether a surgeon is registered as a physician in the clerk's office of the county court of the county in which he practices is immaterial on an issue involving his competency as a surgeon. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740.

**Evidence.**—The presumption is that the master discharged his duty, and the burden is on the servant to prove negligence in selecting and continuing an unfit surgeon. *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740; *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349; *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

The burden of proving negligence in selecting and continuing an unfit servant is on the plaintiff. He must prove the specific act of negligence on which

the action is founded, and this, of itself, may in some cases prove incompetency, but not notice thereof to the master. *Trigg v. Lindsay*, 101 Va. 192, 43 S. E. 349.

When an action is founded on the incompetency of a fireman temporarily in charge of an engine, the plaintiff must prove that the fireman was so inexperienced in the management of the engine that it was not an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and fit for the employment; that he was guilty of mismanagement of the engine by reason of his experience and unskillfulness; and that such mismanagement was the proximate cause of the plaintiff's injury. *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

A master's knowledge of the incompetency of a servant, or of defects in machinery, may be established by showing either actual knowledge, or such frequent acts of incompetency on the part of the servant, or the existence of the defects for such length of time that the law would presume knowledge. *Myers v. Falk*, 99 Va. 385, 38 S. E. 178.

"To hold the company liable for the incapacity of the surgeon, it was necessary to aver and prove that it was guilty of negligence in selecting an unfit surgeon, or if reasonable care was exercised in the selection of a surgeon who afterwards proved to be incompetent, notice of his incompetency by reason of his inherent unfitness, or by previous specific acts of negligence, from which incompetency might be inferred; or either actual notice to the master of such unfitness or bad habits; or constructive notice by showing that the master could have known the facts, had he used ordinary care in oversight and supervision, or by proving general reputation of the surgeon for incompetency or negligence; and that the injury complained of resulted from the incompetency proved. 'The mere fact

of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him. \* \* \* Evidence of only one other negligent act of the servant in fault is not usually sufficient.'" *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 27, 45 S. E. 740, citing *Myers v. Falk*, 99 Va. 385, 38 S. E. 178.

#### d. Duty in Regard to Inspection and Repair.

**Statement of Rule.**—Not only is it the duty of the master to provide a safe place of work, and safe machinery and appliances, but he must exercise reasonable care to keep them in a safe condition by inspecting and examining them from time to time, and repairing such defects as are discoverable by the exercise of ordinary care. *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 45 S. E. 915; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 228, 13 S. E. 429; *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 351, 355, 18 S. E. 559; *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 709, 49 S. E. 991; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 109, 25 S. E. 226; *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 37; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 407, 28 S. E. 578; *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386; *Unfried v. Baltimore, etc., R. Co.*, 34 W. Va. 260, 12 S. E. 512; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

"Negligence on the part of the corporation may consist of acts of omission or commission, and it necessarily follows that the continuing

duty of supervision and inspection rests on the corporation. For it will not do to say that, having furnished suitable and proper machinery and appliances, the corporation can thereafter remain passive. The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed. In ascertaining whether this has been done or not the character of the business should be considered, and anything short of this would not be ordinary care." *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 228, 13 S. E. 429; *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 351, 355, 18 S. E. 559.

Unless the master knows, or would have known, if he had used ordinary care, that machinery and appliances have become defective and unsafe, he is not liable for injuries resulting therefrom. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 45 S. E. 915.

**Duty as to Railroad Tracks and Roadbeds.**—It has been held, that it is the duty of a railroad company not only to furnish a reasonably well constructed railway and tracks for the use of its employees, but it must also exercise continued supervision over the same and keep them in good and safe repair and condition. *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145.

**Railroad Engines, Cars, etc.**—It is the duty of such railroad company to guard its employees from injuries resulting from unsound, unsafe, and defective engines, cars, and appliances, by having the same continuously inspected by persons competent to perform that duty. *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432.

So where a brakeman was injured by the breaking loose of a hand hold attached to a car which it was necessary for him to take hold of in the perform-

ance of his duty, and the defect was one that could have been discovered by careful inspection of the car, the company was held liable for the injury, though the proximate cause of the injury was the negligence of the inspector charged with the duty of inspecting the appliances. *Cooper v. Pittsburg, etc., R. Co.*, 24 W. Va. 37.

Failure of an inspector to use due care to discover and repair defects in the coupling apparatus of a train renders the company liable. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 109, 25 S. E. 226.

**Facts Charging Master with Duty to Inspect Appliances.**—Where facts exist which are sufficient to cause a man of ordinary prudence and caution to believe that the instrumentalities are in such condition that their continued use will cause them to break or give away, and endanger the life of the servants, the master is liable if he does not forthwith use reasonable diligence and care to discover and repair the defect. Thus where the plaintiff, a fireman, was injured in an accident due to the failure of the company to suitably inspect the coupling pin after it had been subjected to a strain which was likely to have injured it, and which ought to have suggested to the company the propriety of an inspection, the company was held liable for the injury. *Norfolk, etc., R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367.

A servant had his leg broken by reason of a chain which was worked with a ratchet breaking. The evidence showed that while the plaintiff was working the ratchet, the noise made by the chain was heard. The work was stopped, and again the same noise was heard, and the ratchet again stopped. The plaintiff was afraid that the chain would break and injure him, but the defendant being present assured him that there was no danger and ordered him to continue work. The court held, that when the defendant saw that the men were fearing the chain would

break, it was his duty, before ordering them to proceed, to examine it, to see that it was safe, and as he did not examine it his liability depended upon whether or not an examination by him would have disclosed defects which ought to have been known to him, and which he could have avoided by proper care and caution. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

Where the injury to a servant is caused by a latent defect in machinery provided by the master, but there is evidence tending to show that the machinery had been taken to pieces by the master's servant for the purpose of repairing other portions thereof, and that the defect complained of must then have been disclosed, but was not remedied, the liability of the master is a question of fact to be determined by the jury under proper instruction from the court, and their verdict will not be disturbed unless plainly contrary to the evidence. *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 45 S. E. 915.

#### **e. Duty to Make and Publish Rules to Promote Servant's Safety.**

##### **(1) Duty to Adopt Rules.**

##### **(a) Statement of Rule.**

It is the duty of a master who is engaged in a complex business which requires definite rules for the protection and safety of his servants, to adopt rules for that purpose, and a failure to do so is such negligence as renders him responsible for all injuries resulting therefrom. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 281, 9 S. E. 1015; *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604; *Wright v. Southern R. Co.*, 101 Va. 36, 42 S. E. 913; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 407, 28 S. E. 578; *Richlands Iron Co. v. Eikins*, 90 Va. 249, 261, 17 S. E. 890; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Madden v. Chesapeake, etc., R. Co.*, 28

W. Va. 610; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Flannegan v. Chesapeake, etc., R. Co.*, 40 W. Va. 436, 21 S. E. 1028; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

##### **(b) For What Work Rules Are Required.**

It is impossible to formulate rules to govern its employees in the performance of every simple service they may be called on to discharge. Something must be left to the care and discretion of the employees themselves. *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604.

The occasional moving of cars by hand on a railroad siding is not a work of such nature as to require the promulgation of rules for the government of servants engaged in such moving. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

##### **(2) Duty to Publish Rules.**

A rule of a railroad company will not be binding on its employees unless they have knowledge of it. *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. 819; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Criswell v. Pittsburgh, etc., R. Co.*, 30 W. Va. 798, 6 S. E. 31.

Judge Brannon says in *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 613, 16 S. E. 819: "Before we can say that the plaintiff's action shall be defeated by the mere existence of a rule, we must find that he had knowledge of it." *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83, 88.

It is not required that the master should see to it, personally, that notice comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent servants to receive and transmit the necessary orders, the negligence by them in performing it is a risk of the employment that the co-



employee takes when he enters the service. *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444.

### (3) Abrogation of Rules.

A disregard of rules with the acquiescence of the company or neglect to enforce them, is tantamount to their suspension. *Wright v. Southern R. Co.*, 101 Va. 36, 42 S. E. 913.

"For it is settled law that an employee will not be absolved from the imputation of contributory negligence for violating a rule of the master, made for his own, as well as for the protection of others, because that rule is habitually disregarded, unless it appears (and the burden is upon the plaintiff to show this) that it was done with the knowledge of the master, or he had so neglected to enforce it as that his conduct amounted to a suspension of the rule. *Wright v. Southern R. Co.*, 101 Va. 36, 42 S. E. 913." *Driver v. Southern R. Co.*, 103 Va. 650, 657, 49 S. E. 1000.

A car repairer was killed while repairing a car on a siding provided for that purpose. He was struck by a car set in motion by a shifting engine, without notice of its approach. No signal was placed on the car he was repairing, and if the rule of the company requiring such signals to be placed on cars undergoing repairs was ever sufficiently promulgated, it was disregarded so uniformly and continuously, with the knowledge and practical acquiescence of those charged with its enforcement, as to warrant the jury in finding that the company had been guilty of negligence. It was held, that on a demurrer to the evidence by the defendant, judgment should have been rendered for the plaintiff. *Wright v. Southern R. Co.*, 101 Va. 36, 42 S. E. 913.

### (4) Effect of Servant's Disobedience of Rules.

See post, "Disregard of Rules," VI, E, 3, h, (1).

## f. Duty to Warn or Instruct Servant.

### (1) In General.

"It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience, or want of capacity of the servant, and failing to do so, is liable for the damages suffered through such neglect." *Giebell v. Collins Co.*, 54 W. Va. 518, 523, 46 S. E. 569; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83, 85; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 628, 27 S. E. 509.

The master must not only give the servant warning of danger, but he must also give him such instruction as will enable him to avoid injury, unless both the danger and means of avoiding it, while he is performing the service required, are apparent. But he is not bound to anticipate extraordinary, unusual or improbable occurrences which involve inattention on the part of the servant. *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870; *Gay v. Southern R. Co.*, 101 Va. 466, 44 S. E. 707.

### (2) Necessity.

#### (a) To Whom Duty Is Owed.

##### aa. Servants Working Outside Scope of Employment.

If the servant is working outside the scope of his employment, but under the direction and for the benefit of his master, greater care is required of the master in giving warning of dangers than if he was working in the regular line of his employment. *Virginia, etc., Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577.

Thus where a servant is ordered to temporarily work in another department of the master's general business where the work is of such a different character that it can not be said to be within the scope of his employment, he does not, by obeying such orders, nec-

essarily assume the risk incident to the work. *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927.

**bb. Servants Engaged in Engrossing Duties.**

The servant has a right to assume, when placed in a situation of danger, where engrossing duties are required of him, that the master will not, without proper warning, subject him to other perils unknown to him, and from which the work exacted necessarily distract his attention. *Michael v. Roanoke Machine Works*, 90 Va. 492, 496, 19 S. E. 261.

**cc. Servants Having Knowledge or Means of Knowledge of Danger.**

A servant who has been engaged for a number of years in the work of the master, and who has full knowledge of its danger, is not entitled, while engaged in his usual employment, to special warning of dangers reasonably to be apprehended. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

The failure of the foreman and fellow servant of a gang of hands engaged in moving cars on a siding to give warning of the approach from behind of a car by which a member of the gang is injured, is not negligence for which the master is liable, although it had been customary for the foreman to give such warning under like circumstances. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

In an action to recover damages for an injury to a brakeman, occasioned by a rear end collision of railroad trains, it is not negligence on the part of a master to fail to notify the crew of a train that another train is to follow shortly thereafter, and to put the crew of the forward train in charge of an engine that fails to make steam and breaks down on the trip, but is otherwise safe, where the rules of the master make ample provision for protection of the crew in such an emer-

gency. *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000.

**dd. Inexperienced Servants.**

**In General.**—It is the duty of the master to inform the inexperienced servant of dangers ordinarily incident to the service, and if he fails to do so, and the servant has no opportunity to observe them, he will not be held to have assumed risks not obvious to one of his age, experience, and judgment. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 628, 27 S. E. 509; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

Where the danger or hazard is patent, if through youth, inexperience, or other cause, the servant is incompetent to fully understand and appreciate the nature and extent of the hazard, the master owes him the duty to warn him of them fully. *Turner v. Norfolk*, etc., R. Co., 40 W. Va. 675, 22 S. E. 83, 85; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

But this duty applies only to dangers which are known or ought to have been known to the master, and which the servant, on account of inexperience, is ignorant of, and which he can not reasonably be expected to discover by the exercise of ordinary care. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 628, 27 S. E. 509.

**Duty to Warn and Instruct Servant as to Dangers Incident to New Machinery.**—"Since it is the duty of the master to use due diligence to see that the servant is not exposed to unnecessary risks in the course of his employment, he is bound, before an employee is put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for his duty." *Giebell v. Collins Co.*, 54 W. Va. 518, 523, 46 S. E. 569.

**ee. Children.**

**In General.**—The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers con-

nected with the business, and of instructing him how to avoid them. *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 595, 46 S. E. 908; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 628, 27 S. E. 509; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

"Persons who employ children to work with dangerous machinery or in dangerous places should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution in the exercise of such care in that behalf it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment, which dangers, from their youth and inexperience, they may not comprehend or appreciate, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom." *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 595, 46 S. E. 908.

**Where a boy under twelve years of age** was employed in a mill where he had to pass frequently through a room filled with machinery, belts and pulleys, without any warning from the master as to dangers from the machinery, and how to avoid them, and, while playing with a belt on the moving machinery, received the injury complained of, the master was held liable. *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908.

**Right to Rely on Superior Knowledge of Employer or Foreman.**—A minor has the right to rely upon the superior skill and knowledge of the foreman having authority over him, and if, in obedience to such foreman's

directions, he runs into unknown dangers, against which it is the duty of the foreman to warn him, but which duty such foreman negligently fails to perform, he can not be held to be guilty of contributory negligence or to have assumed the risk of such dangers. *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83.

**(b) Warning of Latent Defects or Dangers.**

**In General.**—Where there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 22 S. E. 83; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

It is only when the servant is ignorant of the impending danger, and the employer is not, and the employer fails to warn the servant of such danger, that the master's liability attaches. *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713, citing *Shrobe v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Dennison v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721.

**Place of Work Rendered Unsafe in Servant's Absence.**—If the place was originally safe, but has become unsafe during the absence of the servant, and he is ignorant of this fact, and can not discover it by the exercise of ordinary care, it is the duty of the master to inform him of it, and, in his absence, this duty devolves upon the foreman of the gang as a vice principal, and his statements, made in the presence of the servant, as to the condition of the premises, are admissible as evidence in an action by the servant against the master for injuries resulting from such

unsafe condition. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

**(c) Notice of Change of Schedule.**

If the injury sustained by the deceased was the result of a change of the usual train from an accommodation train of moderate rate of travel, to what is known as a lightning express train of a rate of travel from twenty-five to thirty-five miles per hour, and of a change of schedule of the time of running the train passing the point at which the deceased was killed, and said changes were by the chief authority of the railroad company, and the death of the deceased was without fault on his part, and the company had not given notice of said changes to their employees, of whom deceased was one, so as to enable them to avoid the danger; it was the duty of the said company to give such notice, and their failure to do so was negligence of the company, for which it is responsible in damages. *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. 805.

**(3) Sufficiency of Warning or Instructions.**

**Nature and Extent of Warning or Instruction Required.**—The master will not have discharged his duty in this regard unless the instructions and precaution given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same state as if he were an adult. *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 595, 46 S. E. 908.

**Necessity for Warning to Come from Usual Source.**—Where it is the duty of the master to warn the servant, the servant has the right to expect that the warning shall come from the usual source and in the usual manner, and a warning given in an unusual manner and coming from an unusual and unexpected source will not charge him unless it is actually heard by him. Thus, where a servant, in the exercise

of due care, received an injury by being struck by a rope, one end of which was attached to a car and the other to an engine, and which suddenly became taut by the application of steam, it appeared that a foreman, who was not a fellow servant with the injured servant, instead of waiting for the servant to receive the usual notification of the starting of the engine, himself called to the servant that the engine was about to start, and ordered the engineer to start the engine at once. It also appeared that owing to the confusion of starting and to the fact that the notice came from an unusual and unexpected source, it was unheard by the servant. It was held, that the failure to give the servant the usual notice was negligence for which the company was liable. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232.

**Duty to Repeat or Renew Instructions or Warnings.**—Employers of infants must continue to repeat instructions until they know the danger is fully understood and appreciated. And, in view of the proneness of children to forget, they must from time to time renew these instructions, warnings and cautions. *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 596, 46 S. E. 908.

**4. Degree of Care Required.**

See the title NEGLIGENCE.

**In General.**—It is well settled that in performing the duties owed to his servants, the master is only required to exercise ordinary or reasonable care and diligence. *Norfolk, etc., R. Co. v. Stevens*, 97 Va. 631, 34 S. E. 525; *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 283; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576, 580; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Norfolk, etc., R. Co. v. Jackson*, 1 Va. 680; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *McDonald v.*

Norfolk, etc., R. Co., 95 Va. 98, 27 S. E. 821; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511; *South-west Imp. Co. v. Andrew*, 86 Va. 270, 280, 9 S. E. 1015; *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 523; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890; *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. 455; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 407, 28 S. E. 578; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 244, 13 S. E. 475; *Riverside Cotton Mills v. Green*, 98 Va. 58, 60, 34 S. E. 963; *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *Persinger v. Alleghany Ore, etc., Co.*, 102 Va. 350, 352, 46 S. E. 325; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Parlett v. Dunn*, 102 Va. 459, 460, 46 S. E. 467; *Norfolk, etc., R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 671, 22 S. E. 496; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 709, 49 S. E. 991; *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342; *Norfolk, etc., R. Co. v. Ampey*, 83 Va. 108, 109, 25 S. E. 226; *Norfolk, etc., R. Co. v. Wade*, 102 Va. 141, 142, 45 S. E. 915; *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726; *Richmond, etc., R. Co. v. George*, 88 Va. 223, 13 S. E. 429; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813, 814; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278, 279; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

The master must provide for the

safety of his servant, as far as can reasonably be expected under the circumstances; but he is not obliged to take more care of his servant, than he would be expected as a prudent man to take of himself. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285.

The measure of care, which a master must take to avoid responsibility for injury to his servant, is that which a person of ordinary prudence and caution would use, if his own interests were to be affected, and the whole risk were his own. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

A master who has used ordinary care in the choice of instrumentalities and methods of doing work is not to be adjudged negligent for not conforming to another method believed by some to be less perilous than the one adopted, as even the skilled and experienced will differ as to such matters. *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467.

#### **Extraordinary Care Not Required.**

—An instruction which implies that extraordinary care is required of a master to provide for the safety of the servant should be refused. The law only requires ordinary care and diligence, and such an instruction is calculated to mislead the jury. *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821.

A count in a declaration is faulty, where it avers that the defendant was bound to have furnished a push pole "constructed in the best and safest manner, and of the best material," as it is his duty only to use ordinary care to provide safe and suitable materials and appliances for the business. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 498, 8 S. E. 370.

As to duty to provide best or latest appliances, see ante, "Duty to Provide Best or Latest Appliances," VI, C, 3, b, (2).

#### **Master Not an Insurer or Guarantor.**

—The law is well settled that the mas-

ter is not required to be a guarantor or insurer of the servant's safety. *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 407, 28 S. E. 578; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Riverside Cotton Mills v. Green*, 98 Va. 58, 60, 34 S. E. 963; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 491, 8 S. E. 370; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 281, 9 S. E. 1015; *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Jackson v. Norfolk, etc., R. Co.*, 43 W. Va. 380, 27 S. E. 278.

"Absolute safety is not attainable, and employers are not insurers of their employees. They are liable for the consequences, not of danger, but of negligence. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869." *Riverside Cotton Mills v. Green*, 98 Va. 58, 60, 34 S. E. 963.

**Care Required of Master in Hazardous Employments.**—"The master is not required to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285." *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54.

The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would and do exercise under like circumstances. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914, citing *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869.

**Distinguished from Care Required of Carrier of Passengers.**—There is a vast difference between the degree of care which a railroad company owes to a passenger and to an employee. In the former case the law holds the

company liable for the slightest neglect, and requires it to repel by satisfactory evidence every imputation of such negligence; whereas, in the latter case, it is bound to use only ordinary care. It is not the insurer of the safety of its employees, and in an action by the employee the burden of proving negligence is upon the plaintiff. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522. See the title CARRIERS, vol. 2, p. 671.

**What Constitutes Ordinary Care.**—Ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would have exercised. *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. 455; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 805, 22 S. E. 869; *Persinger v. Alleghany Ore, etc., Co.*, 102 Va. 350, 40 S. E. 325; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 244, 13 S. E. 475; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

By ordinary care is meant such watchfulness, caution and foresight as under all the circumstances of the particular service a corporation controlled by careful, prudent officers ought to exercise. *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 340, 12 S. E. 786.

It is the master's duty to anticipate and provide against consequences that may be reasonably expected to occur, but he is not bound to foresee and provide against that which reasonable and prudent men would not expect to happen. *Persinger v. Alleghany Ore, etc., Co.*, 102 Va. 350, 46 S. E. 325.

##### 5. Proximate Cause.

**Necessity for Master's Negligence to Be Proximate Cause of Injury.**—In order for a master to be liable to a serv-

ant for an injury sustained in the service, the master's negligence must be the proximate cause of the injury. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Richmond, etc., R. Co. v. Burnett*, 88 Va. 338, 14 S. E. 372; *McCoy v. Norfolk, etc., R. Co.*, 94 Va. 132, 37 S. E. 788; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 671, 22 S. E. 496; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

Generally, as to proximate cause, see the title **NEGLIGENCE**.

A person may admit moral guilt of a wrong in cases where he is not legally liable; hence an instruction to the effect that, although the defendant admitted his negligence caused the injury, the plaintiff is not entitled to recover, unless the evidence including such admission shows that the defendant was negligent, and that such negligence was the proximate cause of the injury, is not improper, and, when asked, should be given. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

An instruction to the effect that if the jury believe that the defendant was negligent, and that such negligence was the proximate cause of the injury complained of, they must find for the plaintiff, although they believe another person's negligence intervened between the negligence of the defendant and the injury, is erroneous. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

**What Constitutes.**—The proximate cause of an injury is the last negligent act contributing thereto, and without which such injury would not have resulted. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

If the original act was wrongful, and would naturally, according to the natural course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing

by those which were innocent. But, if the original act only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

"If an injury has resulted from a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which is remote." *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 673, 22 S. E. 496.

**Effect Where Attempt to Escape Contributes to Injury.**—If defendant's negligence was the proximate cause of the injury, the plaintiff, being without fault, is entitled to recover, even though by his attempt to escape he contributed to his own injury. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71.

**Concurring Negligence of Master and Fellow Servant.**—See the title **FELLOW SERVANTS**, vol. 6, p. 1.

**A Question for Jury.**—Where the evidence is not contradictory, proximate cause is a question of law to be determined by the court, and not a question of fact to be submitted to a jury. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914.

#### **D. ASSUMPTION OF RISKS BY SERVANT.**

##### **1. Distinguished from Contributory Negligence.**

The difference between assumed risk, actual or imputed, and contributory negligence arising from matters *ex delicto* and consisting of wrongdoing, has been aptly expressed as "using a known defective appliance carefully, and using a good appliance carelessly." *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356, 368, 49 S. E. 489.

**2. Assumption of Risk by Infants.**

**In General.**—The principle of the assumption of known risks and dangers is applicable to minors, when there is specific and positive evidence showing that the risk in question was comprehended. *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 46 S. E. 802; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

A minor who enters the employ of another assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding, and, in a suit against his employer because of his death by reason of the alleged negligence of his employer, it must be shown that his death was occasioned by negligence on the part of the employer, other than such apparent danger. *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 46 S. E. 802.

**A boy fifteen and one-half years old**, and of at least ordinary intelligence, who had worked with his father in such mine, and had passed through such tunnel in going to and returning from his work on several successive days, and started alone through such tunnel, after having been warned by the father to be careful, and, while passing through it, was run over and killed by the motor, must be deemed to have assumed the risk attendant upon such palpably dangerous undertaking. *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 85, 46 S. E. 802.

**Capacity a Question for Jury.**—Whether an infant employee who is injured in the service has sufficient understanding to fully appreciate the nature and extent of the hazards, so as to assume the risk thereof, or whether the master has neglected to take due precaution to inform him of them, are questions of fact for the jury, and as to which there need be no averment in the declaration. *Southwest Imp. Co. v. Smith*, 85 Va. 306, 312, 7 S. E. 365; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

**3. What Risks Are Assumed by Servant.****a. Risks Ordinarily Incident to Service.**

One entering into the employment of another for compensation assumes the risks ordinarily incident to the service. *Richmond, etc., R. Co. v. George*, 88 Va. 223, 228, 13 S. E. 429; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 624, 19 S. E. 166; *Norfolk, etc., R. Co. v. Nuckol*, 91 Va. 193, 22 S. E. 342; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 244, 13 S. E. 475; *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296; *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33; *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356, 357, 49 S. E. 489; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 45 S. E. 740; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757, 760; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709, 717; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511; *Richmond, etc., R. Co. v. Moore*, 78 Va. 93, 99; *Richmond, etc., R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *Norfolk, etc., R. Co. v. Jackson*, 95 Va. 489, 491, 8 S. E. 370; *Southwest Imp. Co. v. Smith*, 85 Va. 306, 312, 7 S. E. 365; *Sexton v. Turner*, 89 Va. 341, 343, 15 S. E. 862; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 404, 28 S. E. 578; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 645, 5 S. E. 579; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E.



123; *Moon v. Richmond, etc., R. Co.*, 78 Va. 745, 746; *Gay v. Southern R. Co.*, 101 Va. 466, 470, 44 S. E. 707; *Norfolk, etc., R. Co. v. Linda-mood*, 1 Va. Dec. 748, 751; *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Young v. West Virginia, etc., R. Co.*, 42 W. Va. 112, 24 S. E. 615; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713, 714; *Shrobe v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Dennison v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 369, 33 S. E. 293; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813, 815; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432, 435; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Davis v. Nuttallsburg, etc., Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 85, 46 S. E. 802; *Riley v. West Virginia Cent., etc., R. Co.*, 27 W. Va. 145, 146; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620, 24 S. E. 644.

When a servant enters into the employment of a master, he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise. *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386; *Sanderson v. Panther Lumber*

*Co.*, 50 W. Va. 42, 40 S. E. 368; *Cochran v. Shanahan*, 51 W. Va. 137, 41 S. E. 140; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432, 435; *Davis v. Nuttallsburg, etc., Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444.

The law presumes that the employee voluntarily assumes the risks ordinarily incident to service when he enters the service, and that his compensation is adjusted accordingly. Hence, he can not, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 491, 8 S. E. 370.

A servant engaged in the service of a master does not assume all the risks incident to his employment, but only such as are ordinarily incident thereto. *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334.

A fireman on a locomotive engine only assumes the ordinary and usual risks incident to such an employment. *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33.

**Defective insulation of wires**, which it is the duty of a line inspector of an electric company to inspect, is a risk incident to the employment, which such inspector assumes, and can not be made the ground of an action for damages by him against the company. *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296.

#### **b. Open and Obvious Defects and Dangers.**

##### **(1) In General.**

An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes that are open and obvious, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment or continue in

it with the knowledge of the danger, he must abide the consequences so far as any claim against his employer is concerned. *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 624, 19 S. E. 166; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239, 244, 13 S. E. 475; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 281, 9 S. E. 1015; *Sexton v. Turner*, 89 Va. 341, 343, 15 S. E. 862; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 645, 5 S. E. 579; *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188, 201; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 105, 27 S. E. 821; *Robinson v. Dinenny*, 96 Va. 41, 30 S. E. 442; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 339, 12 S. E. 786; *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713.

"Where an employee has notice of extra hazards in the line of his employment, and continues in the service, without any promise on the part of the master to do any act to render the same less hazardous, it will be at his own peril; for the law presumes that he intended to assume them, otherwise he would have quit the service. *Clark v. Richmond, etc., R. Co.*, 78 Va. 709." *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 295, 2 S. E. 511.

"If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the

building, premises, machine, appliance, or fellow servant in connection with which or with whom he is to labor is unsafe or unfit in any particular; and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master, in case it shall result in injury to him." 2 *Thompson on Negligence*, p. 1008. *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188, 201.

Where the employment presents special features of danger, such as are plain and obvious, a servant assumes the risk of those. *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713, citing *Shrobe v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Dennison v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721.

An employee of a railroad company who has knowledge of any danger connected with his employment which may be avoided by the use of ordinary care, and appreciates the danger to which he exposes himself, if he continues in such employment after such knowledge without protest or complaint on his part, or promise on the part of such railroad company that such danger shall be removed, will be held to have assumed the risk of such danger, and to have waived all claims for damages in case of injury. *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444.

When an employee on a construction train of a railroad company has knowledge of any danger connected with his employment, which may be avoided by the use of ordinary care, and appreciates the danger to which he exposes himself, if he continues in such employment after such knowledge without protest or complaint on his part, or promise on the part of such railroad company that such danger

shall be removed, he will be held to have assumed the risk of such danger, and to have waived all claim for damages in case of injury. *Wooddell v. West Virginia, etc., Co.*, 38 W. Va. 23, 17 S. E. 386.

**What Constitutes Notice of Defects.**

—A servant is not presumptively chargeable with notice of a peculiar and unusual state of things. Reasonable time must be allowed for him to learn of changes in the situation. He is presumed, however, to be aware of defects which are perfectly obvious to his sight, and the danger of which is apparent to any person of his mental capacity. But to charge him with notice on this ground, the defect and danger must be unquestionably plain and clear, so that if he did not see it, he must necessarily have been in fault. *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489.

**Dangers Must Be Such as Would Convince an Ordinary Man That an Accident Would Probably Ensnue.**

While the general rule of law is that an employee, knowing of defects in machinery, appliances, or in his working place, and still continuing in service, assumes the risk, and can not recover from his employer damages for injury arising from such defects, yet the rule is not without exception. Mere continuance in service with such knowledge is not sufficient to charge the servant with having assumed the risk. He need not stop in every instance of knowledge of a defect, but may run some risk by continuing service, provided the defects be not plainly dangerous, or be not such as ought to induce a prudent, careful man to believe that accident would likely ensue, and that, looking to his safety, he should not continue the work. *Graham v. Newburg, etc., Coal Co.*, 38 W. Va. 273, 18 S. E. 584.

**(2) In Place of Work.**

A servant who knows the unsafe condition of the place in which he is

working is not compelled to continue the work, but if he does continue it, without exercising ordinary prudence and care for his own safety, he must be held to have assumed not only the risks ordinarily incident to the service when he entered upon it, but such as became known to him during the progress of the work, or which were readily discernible to a person of his age and capacity in the exercise of ordinary care. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

A servant who seeks and accepts employment to work in a position that is obviously dangerous, and, with full knowledge of the danger, continues to work in that position without objection or complaint, assumes the risk. *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467.

When an employee assents to occupy the place prepared for him, and to incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and expense, have been more safe. His assent has dispensed with that part of the master's duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper grounds of complaint, even if reasonable precautions have not been taken. *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293.

A servant who has had opportunity to know of the dangerous character of overhead bridges, is taken to have assumed the risk of injury by collision thereof while standing on top of a car in performing his duties. *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Williamson v. Newport News, etc., R. Co.*, 34 W. Va. 657, 12 S. E. 824.

**(3) In Machinery and Appliances.**

**In General.**—If machinery and appliances are defective or unsuitable, and this fact is known to the servant, and

ne remains in the service, and continues to use them without giving notice thereof to the master, or without any promise from the master to render the same less dangerous, he will be taken to have assumed the risk of all danger to be reasonably apprehended from their use, and is bound to use the care and caution which the situation demands. *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821; *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 691, 19 S. E. 849; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. 963; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 492, 8 S. E. 370; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511; *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 40 S. E. 368.

A servant does not assume the extraordinary risk from defective machinery unless he has knowledge thereof and then chooses to remain in the employment. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890.

In *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211, it was said that if, through company's failure to provide appliances, etc., an employee receives injury, he may recover damages, though he knew of such default and continued without complaint in the employment.

**Defective Coupling.**—No recovery can be had from railroad company for death of brakeman resulting from use of cars having mismatched couplings, where he continues to use them over a year without company's promise to change them, as he thereby assumes the extra risk incident thereto. *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706.

A brakeman can not recover of the company damages for a personal injury inflicted on him, resulting from

the use of mismatched couplers, where it appears that, at the time of entering the service, he knew of such use, and of the danger of coupling cars with them, and continued in the service for a year thereafter without remonstrance or notice to the company, or promise on its part to make any changes, and where the danger was open and obvious, and he made the coupling in an unusual manner, and different from that in which he was instructed. Nor will the use of other dangerous appliances equally obvious and open, and known to the brakeman, render the company liable, when he has been negligent in the use of them. *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821.

In an action against a railroad company to recover for the death of a brakeman, killed while attempting to couple cars with mismatched couplers, it appeared that on entering into the service of the company, the deceased had been informed that mismatched couplers were used by the company, and had been told of the danger in making couplings with them, and had been instructed how to make them safely; that he continued to use such couplers in the service of the company for nearly a year, making no remonstrance or complaint. It was held that he must be taken to have assumed the risk and the company was not responsible. *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821; *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706.

A brakeman, entering the service of a railroad company, assumes the risk of accident arising from the use of dangerous appliances which he knew to be in use by the company at the time when he accepted service. Thus, where a brakeman, who had an opportunity to know the character of couplings used by the company by whom he was employed, was injured in coupling cars with the "three link couplings," a coupling the making of which is attended with more than or-

dinary danger, it was held, that the company was not liable. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511.

#### (4) In Method of Work.

"The servant assumes the risk of hazard of the business as the master conducts it, and if he knows the method of the service, and still remains in the service, he can not recover, although there may be a safer way or method of doing the same business. *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015." *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757, 760.

A fireman on a yard engine was struck on the head and injured by a standard projecting from a disabled car standing on a siding. There was no defect in the engine or track, and the claim of liability was based on the theory that the disabled car might have been put in a safer place than that at which it was left. It was held, that it was incident to a service of that description that broken cars might sometimes be put in the wrong place in the yard, and no sufficient notice given of that fact or of the defects in them, and hence the company was not liable. *Gay v. Southern R. Co.*, 101 Va. 466, 44 S. E. 707.

Where the method of doing the work was inhuman, and there was a safer and better way to do it, and it was folly in the servant to engage in it, but the danger was open and obvious, it was held, that there could be no recovery against the master for the injuries to the servant. *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442.

Where the plaintiff, a miner, was injured in performing work which he had sought because of the greater ease and profit incident to it, though knowing at the time that its performance was attended with extraordinary dangers, it was held that he had assumed these extraordinary risks at the time of accepting the work and the master

was not liable for the injury. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999.

#### (5) Effect of Constitutional or Statutory Provisions.

See post, "Effect of Constitutional or Statutory Provisions," VI, E, 3, c, (2).

#### c. Latent Defects and Dangers.

Where the danger consists in a latent defect not apparent by the use of ordinary diligence on the part of the master, and the servant has the same chance of ascertaining the defect as the master, no liability attaches to the master for an injury to the servant resulting therefrom. *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713.

Where a section hand in the employ of a railroad company, in company with other section hands, is engaged in clearing away a wreck under the supervision of a section boss and the supervisor of the road, and it is thought necessary to move a tender which lies on its side near the main track further from said track, and said tender inclines a little towards the main track, but nothing in its appearance indicates that the bottom of said tender has been broken loose from the body, and neither the section boss nor supervisor could by ordinary diligence discover any such fracture, or any separation from the main body, and while the section hands are engaged in moving such tender the bottom falls out and injures said section hand, he is not entitled to recover from said railroad company damages for the injury so received. *Skidmore v. West Virginia, etc., R. Co.*, 41 W. Va. 293, 23 S. E. 713, citing *Shrobe v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721; *Dennison v. West Virginia, etc., R. Co.*, 41 W. Va. 313, 23 S. E. 721.

#### d. Risks Outside Scope of Employment.

The servant assumes only such risks as are within or naturally incident to

the service, and, if he is ordered to temporary work in another department of the master's business where the work is of such a different character that it can not be said to be within the scope of the employment, he does not, by obeying such orders, necessarily assume the risk incident to the work. *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927; *Shugart v. Norfolk, etc., R. Co.*, 2 Va. Dec. 146; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248.

**e. Risks Arising from Master's Negligence.**

An instruction which assumes that the employee "takes all risks," is erroneous. Employee's contract is based on implied undertaking of company to provide safe machinery, and competent agents, and to have its roadway and structures in safe condition when he is required to go over them. *Moon v. Richmond, etc., R. Co.*, 78 Va. 745. See ante, "Open and Obvious Defects and Dangers," VI, D, 3, b.

**f. Negligence of Fellow Servants.**

Where the plaintiff was injured by the negligence of a fellow servant while assisting him in the erection of machinery, and not in its use, the injury received was one incident to the employment, and the rule requiring the master to use ordinary care to provide the servant with reasonably safe machinery with which to work does not apply. He was not engaged in the use of the machinery but was assisting in its erection. *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349. See generally, the title FELLOW SERVANTS, vol. 6, p. 1.

**g. Concurrent Negligence of Master and Fellow Servant.**

See the title FELLOW SERVANTS, vol. 6, p. 1.

**4. Effect of Misleading Assurances or Conduct of Master.**

Where an employee knows of defects in machinery, appliances, or his working place, and is by words, acts,

or conduct of his employer lulled into a sense of security, and continues in service, and is injured by reason of such defects, he is not precluded thereby from recovery of damages from his employer, if the danger be not so plain and obvious that a prudent, careful man, anxious for his safety, ought not to risk it. *Graham v. Newburg Orrel Coal, etc., Co.*, 38 W. Va. 273, 18 S. E. 584; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

**5. Remaining in Service upon Promise to Repair.**

**Express Promise to Repair.**—If a master promises to remedy a defect in machinery, or gives the servant reasonable ground to believe or infer that he will do so, the servant does not assume the risk of using it thereafter during such period of time as would be reasonably allowed to make such repairs, unless the danger is so palpable, immediate, and constant that no one but a reckless person would use it even after such promise or assurance. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 63, 34 S. E. 976; *Newport News Publishing Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

"Where the servant, being aware of the dangers of the service, complains to the master, and he promises to remedy the defect, the master is liable for injuries resulting to him therefrom, and he is not chargeable with contributory negligence by remaining in the service, unless the danger is so great that a man of ordinary prudence would not remain." *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261, 265.

"But, if the master promises to repair the defect, the presumption that the servant assumed the risk is thereby rebutted, and the master is liable for any injuries resulting to the servant from such defects, unless the danger was so obvious and imminent that neg-

ligence can fairly be imputed to the servant for exposing himself thereto; and in all cases in which this question has been raised, even where a promise to remedy the defect is shown, the right to recover has been made to depend upon the question whether the danger was so obvious and inevitable that gross negligence was fairly imputable to the servant in remaining." *McKelvey v. Chesapeake, etc., R. Co.*, 35 W. Va. 500, 14 S. E. 261, 265.

Generally, whether the continuance in the service and the use of the defective machinery amounts to such negligence as to bar recovery, ought to be submitted to the jury under proper instructions from the court. *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

**Where Servant Has Reasonable Grounds to Believe That Repairs Will Be Made.**—And, if the servant, even though he knew of the existence of the defects at the time of entering into the employment, has reasonable grounds to believe that the master has cured or will immediately cure the same, he is not guilty of negligence in remaining in the service and may recover for the injury caused by such negligence of the master. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285.

## E. CONTRIBUTORY NEGLIGENCE OF SERVANT.

### 1. Effect of Contributory Negligence.

See generally, the title NEGLIGENCE.

**In General.**—There can be no recovery by a servant whose contributory negligence was the proximate cause of his injury. *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 341, 12 S. E. 786; *Richmond, etc., R. Co. v. Moore*, 78 Va. 93, 99; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Ward v. Chesapeake, etc. R. Co.*, 39 W. Va. 46, 19 S. E. 389; *Cawley v. Winifrede R. Co.*, 31 W. Va. 116, 5 S.

*E. 318; Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. 534; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Davis v. Nuttallsburg, etc., Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296; *Humphrey v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 37 S. E. 302; *Southern R. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *Moore Lime Co. v. Richardson*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; *McDonald v. Norfolk, etc., R. Co.*, 95 Va. 98, 27 S. E. 821; *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706; *Street v. Norfolk, etc., R. Co.*, 101 Va. 746, 750, 45 S. E. 284.

If the jury finds for the plaintiff, and judgment is rendered by the trial court on the verdict for the plaintiff after overruling the motion of the defendant for a new trial, the supreme court will, when the evidence of the plaintiff and the uncontradicted evidence of the defendant, taken together, plainly show that the plaintiff's negligence was the direct cause of the injury, reverse the judgment, and grant a new trial. *Cawley v. Winifrede R. Co.*, 31 W. Va. 116, 5 S. E. 318.

In an action for death of an employee, if the evidence shows that the accident could have been averted by the employee's proper and prudent discharge of his duties, his personal representative can not maintain an action for damages by reason thereof. *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. 534; *Ward v. Chesapeake, etc., R. Co.*, 39 W. Va. 46, 19 S. E. 389.

In an action against a railroad company by an administrator for damages

for the death of his intestate, a conductor, while in charge of one of defendant's trains, it is error to refuse to instruct the jury that, if they find from the evidence in the case that the accident resulting in the death of the conductor could have been averted by the proper discharge on his part of the duties of his employment, then the plaintiff can not recover in the action, and they should find a verdict for the defendant, there being evidence tending to support the facts on which it is based; and this notwithstanding an instruction has been given at the instance of the plaintiff in the case that the jury must find for the plaintiff, under certain circumstances set out, "unless they find from the evidence that the accident could have been averted by the decedent if he had properly performed the duties of his employment, and that he was himself guilty of negligence directly contributing to the injury." *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. 534.

## **2. Proximate Cause.**

Generally, as to proximate cause, see the title NEGLIGENCE.

**In General.**—In order for a servant's negligence to bar his recovery it must be the proximate cause of the injury. *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Cawley v. Winifrede R. Co.*, 31 W. Va. 116, 5 S. E. 318; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511; *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862; *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. 534; *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. 278.

**Negligence Must Contribute to but Need Not Be Sole Cause of Injury.**—The negligence of the plaintiff, in order to bar his recovery, must contribute directly to the injury; but it is not essential to the defense of contributory negligence that the plaintiff's fault should have been, in any degree, the cause of the event by which he was

injured. It is enough to defeat him, if the injury might have been avoided by his exercise of ordinary care. The question to be determined in every case is not whether the negligence caused but whether it contributed to the injury of which he complains. This it may do by exposing him to the risk of injury, quite as effectually as if he committed the very act which injured him. Neither is it necessary that the plaintiff's negligence should have contributed to the injury in any greater degree than the negligence of the defendant. *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54. But see *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 645, 5 S. E. 579, citing *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Virginia, etc., R. Co. v. White*, 84 Va. 498, 5 S. E. 573.

## **Failure of Master to Avoid Consequences of Servant's Negligence.**

Where the master might, by the exercise of ordinary care, have avoided the consequences of the plaintiff's negligence, the servant may recover, as in such case his negligence is not the proximate cause of the injury. *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Virginia, etc., R. Co. v. White*, 84 Va. 498, 5 S. E. 573; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 645, 5 S. E. 579; *Richmond, etc., R. Co. v. Moore*, 78 Va. 93, 99; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709.

Hence, though an employee of a railway corporation is not, at the time of the collision and of his injury thereby, at his post of duty, or at the place where the rules of the company require him to be, and his conduct contributes to the accident, yet if such conduct was not the direct, immediate, and proximate cause of the accident, and it could have been avoided by the exercise of ordinary care and diligence, which the company and its vice principal failed to exert, then it is answerable to the injured servant. *Daniel v. Chesapeake, etc., R. Co.*, 36 W. Va. 397, 15 S. E. 162, 32 Am. St. Rep. 870.



**Injury Attributable to Mutual Fault.**

—There can be no recovery for an injury caused by the mutual fault of both parties. *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784.

When the evidence discloses that the injury was caused by the mutual fault of both parties, and that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, there can be no recovery of damages by the party injured, unless said injury could have been avoided after the defendant had notice of the negligence of the plaintiff, or was wanton or malicious. *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. 819.

In such case, and where there is evidence tending to show mutual negligence on the part of decedent and the defendant, and the defendant asked the following instruction: "The court instructs the jury that if they should find that the evidence in this case discloses that the injury resulting in the death of Jas. C. McCreery was caused by the mutual fault of both parties, such fault being the proximate cause of the accident, and that it would not have happened except for the failure of McCreery to properly observe the company's rules, concurring with the fault of the defendant in allowing the boom of the derrick to swing around over the tracks, there can be no recovery in this action, unless said injury could have been avoided after the defendant had notice of the negligence of the plaintiff or was wanton or malicious." It was held, that it was error to refuse the instruction. *McCreery v. Ohio River R. Co.*, 49 W. Va. 301, 38 S. E. 534.

**3. What Constitutes.**

Generally, as to contributory negligence, see the title NEGLIGENCE.

**a. In General.**

**Definition.**—Contributory negligence is such negligence on the part of the plaintiff as directly contributes to and

in part causes the injury. *Riley v. West Virginia Cent., etc., R. Co.*, 27 W. Va. 145, 146.

**Care Required of Servant in General.**

—"It may be stated, as a general proposition, that the master is under no lighter duty to provide for the safety of the servant than the servant is to provide for his own safety." *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 201.

The servant is under as great obligation to provide for his own safety from such dangers as are known to him or are discernible by ordinary care on his part, as the master is to provide for him, and the negligence of the master does not excuse the servant for the failure to exercise such care, if such failure was the cause of the injury complained of. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614.

The servant is only bound to exercise ordinary care; that is, he is only required to do that which a man of ordinary prudence would have done under like circumstances. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

A greater degree of care in avoiding dangers ought to be required from servants than from passengers and others having no privity with the company, and no special acquaintance with the operations of the road. *Moore v. Norfolk, etc., R. Co.*, 87 Va. 489, 12 S. E. 968.

In the use of machinery known to be defective, and which the master has promised to repair, the care required is such reasonable care and caution as a prudent man would exercise under the same circumstances. *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 709, 49 S. E. 991.

**b. Right to Rely on Assurances of Safety.**

Where a servant is told by the master that the machinery and appliances are in a safe and proper condition, the servant has the right to rely upon this

assurance. Thus, in a case in which the servants, believing that the machinery was out of order and about to break, stopped work, and were assured by the master that there was no danger, and told to go ahead with the work, it was held that the master was liable. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

**c. Knowledge of Defects and Dangers.**

See post, "Failure to Take Precautions against Known Dangers," VI, E, 3, d.

**(1) In Absence of Constitutional or Statutory Provisions.**

**a. In General.**

Where the servant engages in a service with knowledge of defects existing in the instrumentalities of work, or where he willfully encounters other dangers which are known to him, or are notorious, the master is not responsible for any injury occasioned thereby. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Turner v. Norfolk*, etc., R. Co., 40 W. Va. 675, 22 S. E. 83; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Davis v. Nuttallsburg, etc., Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232; *Piedmont, etc., Ill. Co. v. Patterson*, 84 Va. 747, 6 S. E. 4; *Southern Bell, etc., Co. v. Clements*, 98 Va. 1, 34 S. E. 951; *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342; *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145; *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706; *Mas-sie v. Peel Splint Coal Co.*, 41 W. Va. 620, 24 S. E. 644.

A servant having knowledge of danger about him must use diligence and care in protecting himself from harm. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999.

When a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Wood-dell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386; *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Seldomridge v. Chesapeake, etc., R. Co.*, 46 W. Va. 569, 33 S. E. 293; *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Gerity v. Haley*, 29 W. Va. 98, 11 S. E. 901; *Davis v. Nuttallsburg, etc., Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573; *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620, 24 S. E. 644.

The law presumes notice of those perils which are open and obvious, and which the employee has had the opportunity to ascertain. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 492, 8 S. E. 370.

**(b) Using Appliances Known to Be Defective.**

**In General.**—If an employee, without specific command as to time and manner, uses an obviously defective implement, the defect alike open to the observation and within the comprehension of both employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury to either. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 691, 19 S. E. 849; *White v. Newport News, etc., Co.*, 95 Va. 355, 28 S. E. 577.

A servant who knows that unsuitable appliances are being used to do the master's work, or that the appliances have not been properly adjusted, and also knows that his foreman is ignorant of the fact, is guilty of inexcusable negligence to proceed

with the work without informing his foreman thereof, and can not recover of the master for personal injuries resulting from the use of such appliances, or their improper adjustment. *White v. Newport News, etc., Co.*, 95 Va. 355, 28 S. E. 577.

Where an injury resulted from the use of unsuitable appliances when suitable appliances furnished by the master were within easy reach, and the servant occupied a place of danger knowing that unsuitable appliances were being used, without giving information thereof to the foreman, and without remonstrance, it was held, that he was guilty of contributory negligence. *White v. Newport News, etc., Co.*, 95 Va. 355, 28 S. E. 577.

**Using Defective Appliances with Extraordinary Care.**—If a servant of ordinary prudence would not have believed that he could, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing the right to complain, if, while pursuing his ordinary course, he suffers from such defect. And so, if the danger is one which a servant of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, the servant would not, by continuing his service, lose his right to recover damages suffered by him, while using such precautions. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 134, 25 S. E. 226.

If the instrumentality, by which the servant is required to perform his service, is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master can not be held liable for the resulting damage. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 134, 25 S. E. 226.

**Defects in Cars.**—Where a servant, engaged in coupling cars, was injured by reason of the alleged defective condition of the bumper or drawhead, which he had recently used, and whose condition it was part of his duty to

observe, it was held, that he was negligent and could not recover. *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145.

Where a brakeman, knowing that cars were of unequal height and that crooked links were used to couple them, went in between a car that was approaching by his own signal, and a stationary car, and used a straight link to make the coupling, thereby allowing the bumper of the former to pass under the bumper of the latter, by which means he was caught between them and injured, it was held, that the employer was not liable. *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145.

**Chalk marks, meaning "out of order,"** placed on the cars to inform the road from which they were received that the cars were out of order when received, and that the defendant company was, therefore, not liable for their repair, are not, as a matter of law, notice to a brakeman that the bumpers are defective, so as to prevent a recovery for his death caused thereby in coupling the cars. *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342.

**Defects in Rope.**—Where it was conceded that the servant lost his life by the use of a defective rope at a ferry, of which defect the master had notice, and which it was his duty to replace, still the servant had better knowledge of the condition of the rope than the master, and the defect, if any, was open and obvious, and it was contributory negligence on his part to continue to use it, and he is not entitled to recover. *Chesapeake, etc., R. Co. v. Sparrow*, 98 Va. 630, 37 S. E. 302.

**Defects in Electrical Devices.**—Where the defects in the shunt cord used by intestate caused his death, were visible to him, and yet he chose it for himself, without necessity or direction, he was guilty of contributory negligence, and there can be no recovery. *Piedmont, etc., Ill. Co. v. Patterson*, 84 Va. 747, 6 S. E. 4.

**Effect Where Servant Is Acting under Orders.**—See post, "Acting in Obedience to Orders," VI, E, 3, g.

**(c) Working in Place Known to Be Unsafe.**

The plaintiff, an employee of a telephone company, was directed by the latter's foreman to climb a pole, which had been previously condemned and marked, as were all poles needing repairs. The plaintiff knew of the mark on the pole, but it appeared safe until he had cut the last wire, when it fell, causing the injury complained of. It was held, that the question whether or not the plaintiff was guilty of contributory negligence was for the jury. *Southern Bell, etc., Co. v. Clements*, 98 Va. 1, 34 S. E. 951.

If the danger to which the servant is exposed through the negligence of the master is one which a servant of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, he does not, by continuing his service, lose his right to recover for damages suffered by him while using such precautions. *Virginia, etc., Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577.

**(2) Effect of Constitutional or Statutory Provisions.**

The provision of the constitution and of the act of assembly, that knowledge by a railroad employee of defective or unsafe machinery, ways, appliances or structures, shall be no defense to an action for an injury caused thereby, does not destroy the defense of contributory negligence, but merely abrogates the previously existing rule on that subject, which forbade recovery if he knowingly used defective machinery, and declares that such knowledge shall not of itself bar a recovery. Such knowledge, however, is still a very important factor in determining whether, with the knowledge the employee had, and in view of all the evidence in the case, he used that degree of caution required in his situation,

with reference to the appliances causing his injury. *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489.

**d. Failure to Take Precautions against Known Dangers.**

See ante, "Knowledge of Defects and Dangers," VI, E, 3, c.

**(1) In General.**

There can be no recovery by a servant against his master for an injury caused by the failure of the servant while using defective appliances to take a precaution for his own safety, which is both obvious and well known to him. *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296.

**(2) Failure to Lookout for, and Avoid Collision with, Bridges.**

**(a) Overhead Bridges.**

**In General.**—If an employee knows, or ought to know, of the dangerous condition of an overhead railroad bridge, and fails to use ordinary care to protect himself, in consequence of which he is injured by collision therewith while at work on top of a train, he is guilty of contributory negligence, and can not recover for the injury. *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462; *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 19 S. E. 166; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709; *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. 824; *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899.

**Effect of Want of Knowledge of Exact Locality at Time of Accident.**—The fact that the employee does not know of his exact locality or the proximity of the bridge, by reason of darkness, fog, or other natural or artificial causes incident to his employment, is immaterial. *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462.

**Examples.**—A railroad company is not liable for the death of a brakeman who was struck by the fourth sill of a dangerously low bridge after he had passed safely under the three first

sills by stooping and lowering his head, when he had full knowledge of the dangerous character of the bridge, and the accident was due to his negligently raising his head too soon, his own negligence being the proximate cause of the injury. *Chesapeake, etc., R. Co. v. Hafner*, 90 Va. 621, 19 S. E. 166; *Clark v. Richmond, etc., R. Co.*, 78 Va. 709. See ante, "Overhead Bridges," VI, C, 3, a, (2), (b), cc, (bb).

W. was employed as a brakeman on a freight train by the C. & O. R. Co. on the 4th day of April, 1886, and, when he applied for such service, stated that he had been employed for six months as brakeman on the same road in the year 1885. In July, 1886, the N. N. & M. V. Co. took charge of said road as lessee. On the 12th day of August, 1886, while on duty on top of his train in daylight, said W. was killed by striking his head against a highway bridge which spanned said railroad track, which was not high enough for a man erect on the car top to pass under. While he was in the service of said company on both occasions his run was between Huntington and Cannelton on a local freight train, and said bridge was between said points. When leaving Hurricane station on the morning of the accident, about ten minutes before reaching said bridge, he was warned by the fireman to look out for the overhead bridge, and was found dead about fifteen feet from the rear end of the car. In a suit by W.'s administrator against the N. N. & M. V. Co., defendant demurred to the evidence. It was held, that the demurrer was properly sustained; that, although the defendant may not have been free from blame on account of lowness of bridge, yet W.'s want of proper care contributed to the injury, and defendant is not liable. *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. 824.

C., a minor, but with his father's approval, employed as brakeman on freight train, while doing duty on top

of car by moonlight, was killed by a colliding highway bridge, not high enough for a man, erect on car top, to pass under. When employed he was warned by company's agent to look out for highway bridges, and his cobrakemen told to show him the dangerous ones. Under this bridge in daylight C. had thrice passed. That night, leaving the station next the bridge, C. was warned to look out for the bridge. On nearing the bridge cobrakeman, seeing C. erect on car top, shouted to him to stoop, but C. did not stoop. Action by C.'s administrator, company demurred to the evidence. It was held, that though defendant may have been culpable for lowness of bridge, yet C.'s carelessness contributed to injury, and defendant is not liable. *Clark v. Richmond, etc., R. Co.*, 78 Va. 709.

#### (b) Bridges Near Track.

In *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188, 59 Am. Rep. 654, a fireman, without orders and in violation of the rules of the company, opened an ash pan, whereby fire was communicated to waste in a journal box. Then without orders or necessity he stood outside of the engine on the steps of the engine and tender, and endeavored to extinguish the fire with a hose, and while so employed was struck by the side of a bridge, the dangerous character of which was well known to him, and killed. It was held, that the company was not liable.

#### (3) Using Defectively Insulated Electric Wires.

Where an intestate, an experienced lineman of an electric light company, came to his death by the passage of a current of electricity through his body occasioned by his taking hold of a wire insufficiently insulated, and, at the same time, grasping the carbon in an arc lamp, instead of separating the carbons with a dry stick, or other non-conductor, as he well knew he should have done, it was held, that there could be no recovery for the injury. *Bowers*

*v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296.

In an action against an electric light company for killing a servant, it was proved that he was sent to look for a break in the circuit while the current was on, and took with him a defective shunt cord. He found the break, and in trying to turn on the current, grasped the cord at the defective end, and, at the same time, put his other hand on the naked end of the live wire, whereby the current passed through and killed him. Had he grasped the wire above the exposed end he would not have been injured, notwithstanding the fact that the shunt cord was defective in not being insulated throughout its entire length. It was held, that the evidence failing to show negligence on the defendant's part unmixed with the servant's contributory negligence was not sufficient to sustain a verdict, for the plaintiff. *Piedmont, etc., Ill. Co. v. Patteson*, 84 Va. 747, 6 S. E. 4.

**c. Voluntary Assumption of Position of Danger.**

See ante, "Failure to Take Precautions against Known Dangers," VI, E, 3, d.

**In General.**—A servant can not recover of the master damages for a personal injury inflicted on him in consequence of his voluntary exposure of himself in a position of danger not in the line of his duty. *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

A master is not liable for an injury inflicted on an experienced servant in the possession of all of his faculties where it appears that the immediate cause of the injury was his exposure of himself to an open and obvious danger. *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604.

**Abandonment of Safe Place of Work.**

—If a servant who has been assigned a safe place to work in, voluntarily leaves it, without any reasonable and proper cause for so doing, and in con-

sequence thereof, is injured, he has no remedy against the master. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869.

**Going to a fire where dynamite is being thawed** in cold weather in order to get warm is not unreasonable, and if servants resort to the fire for that purpose with the knowledge of and without objection from the master and injury results therefrom, this is not such contributory negligence on the part of the servant as will preclude his recovery. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869.

**Dangerous Position in Adjusting Brakes.**

—The plaintiff, a brakeman, while engaged in side tracking a flat car, the train having backed into the siding, cut the car loose and signaled the train to leave it. The car not clearing the main track he signaled the train to return and push it further, and after signaling, put one foot between the iron rails loaded on the car and the end of the car, and the other outside so as to set the brake. The train returning very fast struck the car and pushed the rails forward so as to crush his foot. It was held, that the plaintiff's negligent acts were the proximate cause of the injury, and barred his recovery. *Richmond, etc., R. Co. v. DeButts*, 90 Va. 405, 18 S. E. 837.

Where a railroad employee went under a car to replace a brake, knowing that no one on the attached engine or elsewhere had been charged with any particular duty to look out and warn him of approaching danger, it was held, that his failure to notify the engineer of going under the car was such negligence as to prevent his recovery for injuries received by the starting of the train, which was preceded by ringing the bell several times. *Norfolk, etc., R. Co. v. Graham*, 96 Va. 430, 31 S. E. 604.

**Dangerous Position in Coupling Cars.**

—Where a brakeman, in attempting to withdraw the coupling pin and

uncouple a car from the engine and tender, stands with one foot on the bumper belonging to each car, and with his lantern in his left hand, leans forward, and reaches with his right to withdraw the coupling pin, which has already been withdrawn by a fellow brakeman, and the cars separating cause him to fall between the cars, and to be run over and injured, he must be regarded as negligent, and his negligence must be considered the proximate cause of his injury. *Young v. West Virginia, etc., R. Co., 42 W. Va. 112, 24 S. E. 615.*

**Standing on or Near Railroad Track.**

—One, employed by railroad company as fireman, only by the trip, while off duty, negligently placed himself in such a position that a passing train must strike him. It was held, that he can not recover for injuries so received. *Moore v. Norfolk, etc., R. Co., 87 Va. 489, 12 S. E. 968.*

An employee of a railroad company, who is engaged in mending the track of the road, who, whilst he might get further off, stands near enough to the railroad track to be struck by a train if perchance there should be an increase of speed or a change of cars, is guilty of the grossest imprudence and negligence. No man is justified in placing himself near a passing train upon any such idea or presumption, and for an injury sustained by so doing, he or his representative can not recover. *Baltimore, etc., R. Co. v. Whittington, 30 Gratt. 305.*

A railroad employee of intelligence whose duty it is to attend passenger trains and receive the mail pouch, and who seeing a train approaching, stands near the edge of the depot platform, which is twelve feet wide, can not recover for an injury inflicted upon him by reason of being struck by the train which projected tortuously from one to ten inches over said platform. His contributory negligence bars his recovery. Common prudence would have suggested to him to stand out of

harm's way. It is immaterial that he thought he was in a safe position, or that danger was not present to his mind. Such thoughtlessness is negligence, for which the company is not liable. *Norfolk, etc., R. Co. v. Hawkes, 102 Va. 452, 46 S. E. 471.*

Where a servant who was experienced in railroad operations in the yard, and its dangers, knew that a shifting engine plied back and forth in its work, and could readily see its movements, left a place of safety, and stepped into the jaws of death by going upon the track, or attempting to jump upon the tender, thus bringing the dread calamity upon himself, either through his own failure to see the train, when he could and should have seen it, or by his own recklessness, it was held, that the master was not responsible. *Beuhring v. Chesapeake, etc., R. Co., 37 W. Va. 502, 16 S. E. 435.*

**Riding on Side of Tender on Wide Car.**—A servant who, in the due course of his employment, has frequently ridden on the side of tenders of engine which passed very close to a sand house standing near the track, having barely room enough for his body between the tender and the sand house, is not chargeable with negligence for riding in a like position on a wider tender of different construction, unless he knew, or by the exercise of reasonable and ordinary care, ought to have known, it was wider and of different construction. *Norfolk, etc., R. Co. v. Cheatwood, 103 Va. 356, 357, 49 S. E. 489.*

**Riding on Truck in Front of Engine.**—Where an employee of a railroad company is being carried on a construction train to his home from his work by the railroad company, without any agreement or compensation therefor, and voluntarily takes a position standing on a small truck which is being pushed forward by the engine, contrary to repeated warnings of those in charge of the train as to the danger of so doing, and is injured by reason of

the derailment of the truck, if his riding in that position is the proximate cause of his injury, the railroad company is not responsible for his injuries thereby occasioned. *Reese v. Wheeling, etc., R. Co.*, 42 W. Va. 333, 26 S. E. 204.

**f. Failure to Discover and Remedy Defects.**

One of the duties of the servant is to be reasonably observant of the machinery he operates, and to report any defects he may discover therein to the company. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 294, 2 S. E. 511.

He must inform himself, as far as he reasonably can, respecting the dangers as well as the duties incident to the service upon which he enters. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 295, 2 S. E. 511.

**Defects in Bumpers on Car.**—A brakeman can not, as a matter of law, be held to be negligent in failing to discover that the bumpers on cars he is about to couple were rotten, and so defective as to permit the cars to come almost together, so as to prevent a recovery for his death, caused by such defects. *Chesapeake, etc., R. Co. v. Lash*, 2 Va. Dec. 342.

**Defects in Cars Picked Up in Transit.**—Conductors who are required by the rules to inspect all cars picked up in transit, can not recover for injuries received by them by reason of their failure to inspect such cars. *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274.

**Duty to Find Out whether Blast Has Exploded before Continuing to Drill.**—A number of holes had been drilled and loaded and exploded, and the blasters had returned from cover. The boss said one hole had blown out without effect and was filled with dirt, and directed the men to drill it out again. Plaintiff expressed some fear, but went to work and, whilst holding the drill, he was injured by an explosion. Whether the hole had blown out might easily have been ascertained

by either boss or plaintiff. It was held, that plaintiff's negligence, notwithstanding that of boss, was such as to prevent recovery. *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862.

**g. Acting in Obedience to Orders.**

**In General.**—Where employee acts in obedience to orders he can not be deemed guilty of contributory negligence, unless the danger be so glaring that no prudent man would encounter it, even when, like the employee, he was not entirely free to choose. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

The servant occupies a position of subordination and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 691, 19 S. E. 849.

The presumption is that a master's knowledge of machinery is superior to that of the servant, and if the servant complains of defects which the master refuses to remedy, and directs the servant to continue its use, the servant has a right to presume that the master considers the machinery in a reasonably safe condition, and may continue its use without necessarily assuming the risk, unless the defect is so palpable, immediate, and constant that only a reckless man would use it. *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 709, 49 S. E. 991.

**Orders of Vice Principal.**—"The same rule has been applied, and with sound reason, where the person injured was ordered into a service of peculiar danger, such as he did not undertake to perform, by another servant standing towards him in the relation of superior or vice principal; and if he obeys such an order and is injured he may recover damages; the law will not declare his act of obedience negligence per se; but will leave it to the jury to say whether he ought to obey or not." *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 692, 19 S. E. 849.



**Doing Dangerous Work under Orders.**—A laborer, who does not know of an unusual and increased danger known to his employer, but who goes into a ditch and digs it to twice its usual depth under peremptory orders from his master or vice principal, does not assume the risk of injuries received from a caving in of the sides of the ditch, and may recover from his negligent employer. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849.

**Using Dangerous Machinery under Orders.**—Where a servant, in obedience to the requirement of the master, incurs the risks of machinery which is dangerous, but it is reasonably probable that danger may be avoided, if extraordinary care and skill be used, and the servant uses such care and skill as the exigencies of the situation seem reasonably to demand, and yet injury results, the master is liable. The servant is only required to do that which a man of ordinary prudence would have done under like circumstances. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849.

Where a servant, in obedience to the orders of his superiors, incurs the risk of machinery, which, though dangerous, is not so much as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill, the case is not to be regarded as one of concurring negligence. *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648, 653, 14 S. E. 361.

Thus in *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, the plaintiff, a brakeman, after making several attempts to couple cars with a stick, as required by rules of the company, informed the conductor that owing to the defective condition of the couplers he was unable to make the coupling with a stick. He was then ordered by the conductor to couple the cars with his hand. The plaintiff re-

plied that the coupling could be made by hand without danger if the train was moved back slowly and with great care. The plaintiff returned to make the coupling with his hand, and was injured by reason of the train coming back with its usual speed, in response to the ordinary signal by the conductor, instead of coming back slowly and gently as the brakeman had stipulated should be done. The company was held liable.

#### **h. Disregard of Rules, Orders or Signals.**

##### **(1) Disregard of Rules.**

**In General.**—Where the employee's willful disobedience of a reasonable rule of the master is the proximate cause of the injury complained of, no recovery can be had. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 295, 2 S. E. 511; *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000; *Beall v. Pittsburg, etc., R. Co.*, 38 W. Va. 525, 18 S. E. 729, 731; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 748; *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757; *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274; *Shenandoah, etc., R. Co. v. Lucado*, 86 Va. 390, 10 S. E. 422; *Norfolk, etc., R. Co. v. Lindamood*, 1 Va. Dec. 748; *Norfolk, etc., R. Co. v. Donnelly*, 88 Va. 853, 14 S. E. 692; *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. 819; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Davis v. Nuttallsburg, etc., Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 583, 21 S. E. 727; *Norfolk, etc., R. Co. v. Houchins*, 95 Va. 398, 28 S. E. 578; *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573; *Norfolk, etc., R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462; *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188, 59 Am. Rep. 654; *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. 278.

Where an employee of a railroad company receives an injury which is

caused by his acting in direct violation of a reasonable rule made by said company for the safety of its servants, of which rule he has notice, and has promised to obey, he must be deemed guilty of contributory negligence, and can not recover damages from the company for such injury. *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813.

A brakeman who willfully and unnecessarily violates a reasonable precautionary rule, known to him, or which he must be taken to have known, can not recover for an injury, of which such violation of the rule is the direct, efficient cause. *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573.

Where a brakeman on a freight train receives an injury by reason of a collision with another train, and it is manifest from the evidence that by his own failure to comply with the duties required of him by the train rules, with which he was familiar, and by abandoning his post and going to sleep, he directly contributed to the injury he received, no damages can be recovered by said brakeman from the railroad company for said injury. *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. 819.

**Rule Where Compliance with Rules Impracticable.**—But the general rule does not apply where the master is guilty of negligence, and the servant is ordered to perform work in regard to which rules have been promulgated by the master, and it is impracticable to comply with the rules, as in such case, the master is liable for an injury sustained by the servant while performing the service. Accordingly it has been held, that a brakeman, injured through the negligence of the company while coupling cars under orders, has a right of action against the company, though the coupling is made by hand, contrary to the rules of the company, it being impracticable to use a stick as

required by the rules. *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361.

**Coupling Cars by Hand.**—Where the rules of the company require couplings to be made with a stick when practicable, the company is not liable for injuries received by brakeman while making the coupling without a stick, if the stick can be used to advantage. *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511; *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757.

Plaintiff, a brakeman, was injured while attempting to couple with a "short shackle," which he was holding up with his hand, instead of using the coupling stick, as the rules of defendant railroad required. The injury would not have happened if he had used the coupling stick; it was held, that he could not recover. *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757.

In action for personal injury, the plaintiff, a brakeman, knowing the rules of the defendant railroad company forbidding coupling or uncoupling cars except with a stick, and going in between cars with engine attached, went between them to uncouple cars with a stick, which was inefficient for that purpose, because coupling pin was tight and short. Another brakeman, without plaintiff's knowledge, signaled engineer to reverse engine enough to relieve pressure on pin. Plaintiff's hand, being between bumpers coming together, was caught and mashed. It was held, that he could not recover, because his injury was the proximate result of his own disregard of the rules. *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 784.

**Getting on and off Train While in Motion.**—Where a rule of the railroad company forbade their servants from getting on and off trains when in motion, a servant who was injured while getting off a moving engine by tripping

over wires which were exposed, failed in an action against the company. *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813.

And so where a section hand was killed in attempting to mount a passing engine, contrary to the rules of the company, of which he had notice, it was held, that the company was not liable; and it was immaterial whether or not his getting on the engine was objected to by those in charge of it. *Shenandoah Valley R. Co. v. Lucado*, 86 Va. 390, 10 S. E. 422.

**Coupling Cars While in Motion.**—

And where a brakeman is injured while violating a rule of the company which forbids the coupling of cars while in motion, he can not recover. *Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573; *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511.

**Sending Back Flagman or Putting Out Danger Signal.**—Where the proximate cause of the death of the plaintiff's intestate was his failure to comply with the rules of the company which required him, when his train was delayed more than three minutes at a regular stopping place, or when it was stopped at an unusual place, or fails to make its schedule time, to go back and put down danger signals to warn any trains moving in the same direction, it was held, that there could be no recovery. *Driver v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000.

**Running Cars Down Grade Without an Engine.**—Where, contrary to the rules of the company, a conductor allowed cars to be shifted and run down grade without an engine to control them, and while he was between the cars a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, became unmanageable and ran into the first-named cars with such violence as to cause injury to the conductor, it was held, that the conductor could not re-

cover. *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274.

**Failure to Apply Brakes Where Train Separates.**—Where the rules of a company provided that upon a train parting, the flagman should immediately apply the brakes and stop the cars, and the engineman should keep the front part of the train in motion until the detached portion was stopped, it appeared that after a train parted a distance of at least four or five miles was covered before the rear portion of the train, moving with its own momentum, overtook and collided with the front portion. It was held, in an action by a brakeman for injuries received in the collision, that the train being equipped with sufficient brakes to stop it, the proximate cause of the collision was the negligent failure of the plaintiff and his fellow servants to apply the brakes, and that therefore the company was not liable. *Richmond, etc., R. Co. v. Tribble*, 97 Va. 495, 24 S. E. 278.

**Failure to Find Out Defects.**—One of the rules of a railroad company reads as follows: "They (the brakemen) are charged with the management of the brakes, and the proper display and use of the signals. They must examine and know for themselves that the brakes, ladders, running boards, steps, etc., which they are to use, are in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in order before using." If a brakeman on a train, knowing such rule of the railroad company, also knowing that the nut on top of the standard of the brake, used to hold the brake wheel on, was off, but without putting it in proper condition himself, or reporting it to the proper parties, uses it unnecessarily to check the speed of the train, by which use the brake wheel comes off, throwing him onto the track, whereby he is injured, such brakeman is guilty of contributory negligence, at least; and in such case no

recovery should be had against the railroad company. *Beall v. Pittsburg, etc., R. Co.*, 38 W. Va. 525, 18 S. E. 729.

Where a rule of the company required brakemen to know for themselves that the brakes and appliances were in proper condition, and, in case they needed repairs, either to make the repairs themselves or report the defect to the proper parties, and a brakeman was injured while attempting to apply the brakes, knowing that a defect existed in them which he had not attempted to repair or report to the proper parties, it was held, that the company was not liable for the injury, as the brakeman's negligence in disobeying the rules of the company contributed to his injury. *Beall v. Pittsburg, etc., R. Co.*, 38 W. Va. 525, 18 S. E. 729.

Conductors who are required by the rules of the company to inspect all cars picked up in transit, can not recover for injuries received by them by reason of failure to inspect such cars. *Richmond, etc., R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274.

### (2) Disobedience of Orders.

**In General.**—A servant can not recover if his injury was the direct result of his own disobedience of orders. *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Beall v. Pittsburg, etc., R. Co.*, 38 W. Va. 525, 18 S. E. 729, 731; *Eastburn v. Norfolk, etc., R. Co.*, 34 W. Va. 681, 12 S. E. 819; *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 583, 21 S. E. 727, 729; *Harris v. Norfolk, etc., R. Co.*, 88 Va. 560, 14 S. E. 535; *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786; *Shenandoah, etc., R. Co. v. Lucado*, 86 Va. 390, 394, 10 S. E. 422.

A "frog" was dangerous, and could have been made safe by blocking, yet it was a standard frog, the same used everywhere by the defendant company. The plaintiff's intestate had been for some time employed in same yard,

over same frog, and was familiar with its character. On night of accident, yardmaster ordered him to uncouple cars, which were standing still, and then ride them back on a switch, but, instead of obeying orders, he signaled engineer to back, and stepping between the moving cars to uncouple them, got his foot caught fast in the frog, and was run over and killed. It was held, that the employee's disobedience of orders was contributory negligence, and the proximate cause of the injury, and his administrator can not recover. *Richmond, etc., R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786.

**Running Train at Forbidden Rate of Speed.**—So where an engineer running his train on a curve at a rate of speed prohibited by the company, was killed by the engine leaving the track, it was held, that the company was not liable for the injury; and the question whether or not the company had used due care in constructing the curve—due care in such case requiring the outer track to be higher than the inner—was immaterial. *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 583, 21 S. E. 727.

**Disregard of Bulletins.**—Where the road was being double tracked when the accident occurred, and bulletins were posted calling attention to the importance of keeping his train under control at such points, it was held, that a trainman could not recover for injury sustained in consequence of a disobedience of the order. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

### (3) Disregard of Signals.

The plaintiff, an engineman, started his train from a station and ran about seven hundred yards, attaining the speed of about twenty or twenty-five miles an hour, when he saw freight cars about forty yards ahead, which had been stored on the siding and had gotten loose and moved down on the main track. The freight cars had dis-

placed the switch so as to expose the danger signal which the plaintiff might have seen, as well as the cars, in ample time, if he had exercised reasonable care. Besides, he was approaching a bridge in the course of construction at a forbidden rate of speed. It was held, that he was not entitled to recover for injuries received by jumping from his engine. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

Where a rule of a railroad company provides that "a signal imperfectly displayed, or the absence of a signal where one is usually shown, must be regarded as a danger signal," a contention of the plaintiff that he was injured because of the absence of a danger signal is untenable. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

Plaintiff was injured whilst uncoupling a car from standing cars, by a pier engine and coal train running into said cars. When he went in between those cars, he saw the engine stalled on the upgrade and the train only about twenty feet from those cars. He was delayed by a tight pin. The engine gave no warning by bell or whistle, but its exhaust as it climbed the grade could be heard a long way. It was held, that plaintiff can not recover. *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579.

#### i. Acting Outside Scope of Employment.

Where a servant receives an injury while performing work which is not within the regular scope of his employment, though it is in the supposed furtherance of his master's business, the master is not liable in damages. *Shugart v. Norfolk, etc., R. Co.*, 2 Va. Dec. 146; *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248.

Thus where a fireman was killed while attempting to couple cars, it was held, that in order to recover, it was necessary for the plaintiff to show that his intestate, in acting thus out of the

scope of his employment, was doing so by the command of a superior; and that a failure to show this affirmatively was sufficient to defeat a recovery. *Shugart v. Norfolk, etc., R. Co.*, 2 Va. Dec. 146.

Where the evidence showed that a brakeman's duty did not call him to scale a car loaded with lumber, that the brake on this car was set at the only end required before the train left a station, and that it was to remain set until the next station was reached, a judgment in favor of the railroad company, in an action for the brakeman's death, caused while attempting unnecessarily to board such car, on account of the negligent manner of loading it, will not be disturbed. *Harris v. Chesapeake, etc., R. Co.*, 2 Va. Dec. 248.

#### j. Choosing More Dangerous of Two Ways of Acting.

**In General.**—It is a well-settled principle, that where a person has a choice of two ways in performing his duty, one of which is perfectly safe, and the other dangerous, and he voluntarily chooses the latter and is injured, he is guilty of contributory negligence, and the master is not liable. *Street v. Norfolk, etc., R. Co.*, 101 Va. 746, 45 S. E. 284; *Norfolk, etc., R. Co. v. Mann*, 99 Va. 180, 37 S. E. 849; *Newport News Publishing Co. v. Beaumeister*, 102 Va. 677, 681, 47 S. E. 821; *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296; *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489; *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145.

"Where an employee is confronted with two methods of performing work, the one safe, and the other dangerous, he owes a positive duty to his employer to pursue the safe method, irrespective of the degree of danger which may be involved in the unsafe method; and any departure from the path of safety will prevent his recovery in the event he is injured. Bow-

ers *v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296." *Street v. Norfolk, etc., R. Co.*, 101 Va. 746, 750, 45 S. E. 284.

**Effect of Servant's Ignorance of Safe Method.**—Where there are two ways of doing a thing, one dangerous and the other safe, both open to a servant, it is, as a rule, the duty of the servant to use the safe way, but this rule does not apply where the servant does not know of the safe way, and it is not pointed out to him, and he is not chargeable with negligence in not knowing it. *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489.

**Applications of Rule.**—A servant is guilty of contributory negligence who, knowing the danger, is injured by doing acts about machinery while in motion which he could have accomplished with safety after stopping it. *Newport News Publishing Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821.

A servant who is injured in consequence of voluntarily attempting to do a harmless act at an obviously dangerous place, when he could have readily waited until he reached a place of safety, can not recover therefor of the master. *Norfolk, etc., R. Co. v. Mann*, 99 Va. 180, 37 S. E. 849.

The plaintiff's intestate was engaged in "pinching" a loaded railroad car to its position on a pier. While so engaged he stood astride the rail, although an ample platform just outside the rails had been provided for him to stand on, and he had been repeatedly warned not to get on or between the rails, but to use the platform. While in the dangerous position described he was struck by a car being pushed by an engine and was killed. It was held, that there could be no recovery. *Street v. Norfolk, etc., R. Co.*, 101 Va. 746, 45 S. E. 284.

Where the cars are of unequal height, crooked links are necessarily used to couple them. Employee, whose

duty it was to couple them, had opportunity to know, and did know, these facts. Yet he went in between the car that was approaching by his own signal, and the stationary car, and used a straight link to make the coupling, thereby allowing the bumper of the former to pass under the bumper of the latter, by which means he was caught between them and injured. It was held, that the employer is not liable. *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145.

#### k. Acting in Emergencies.

**In General.**—"In judging of the care exercised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and if the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise, especially if his peril is caused by the defendant's fault." *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748; *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Johnson v. Richmond, etc., R. Co.*, 86 Va. 979, 11 S. E. 829; *Dingee v. Unrue*, 98 Va. 247, 35 S. E. 794; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132.

If one is placed by the negligence of another in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance in determining whether he was guilty of contributory negligence or not. *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748.

Where proximate cause of accident,

whereby intestate was killed, was want of sufficient brakes and "spraggers" to "chock" the cars used by employer, though intestate, a boy under fourteen, being placed by employer's negligence where he must adopt a perilous alternative, or where, terrified by an emergency created by employer's negligence, intestate acted recklessly and consequently suffered; it was held, that such reckless action is not contributory negligence, as persons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances. *South-west Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365.

**When the question is one of mere inconvenience, and not actual danger, some moderate risk may be taken, if there is no obvious danger.** But the plaintiff will be chargeable with contributory negligence if he runs the risk of an obvious and serious danger, merely to avoid inconvenience. *Haney v. Pittsburg, etc., R. Co.*, 38 W. Va. 570, 18 S. E. 748.

**Loss of Presence of Mind through Negligence of Master.**—Where the servant loses his presence of mind because placed in sudden imminent peril by the negligence of the master, the master is liable though the servant fails to avail himself of any means of escape. But this rule is not applicable of course in a case where the servant is ordered to leave the place in which he is working before he is confronted with the peril and disobeys the order, when by obeying the same by reasonable promptitude he might have escaped the injury. *Dingee v. Unrue*, 98 Va. 247, 35 S. E. 794; *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132.

**Injury to Eye as Excuse for Removal of Hands from Machine.**—Where a boy sixteen years of age working upon a planing machine had a shaving thrown into his eye, and while suffering from pain disengaged

his right hand and attempted to remove the shaving, and the other hand slipped from the machinery which he was engaged in operating and was injured, it was held, that it could not be said with any degree of reason that the plaintiff under the circumstances was guilty of negligence. *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

**Signal to Apply Brakes Not Sufficient to Render Brakeman Irresponsible.**—The mere signal to put on brakes when approaching an overhead bridge which is very low does not constitute such an emergency as to render a brakeman irresponsible for his acts. *Haffner v. Chesapeake, etc., R. Co.*, 96 Va. 528, 31 S. E. 899.

#### **l. Assuming Extraordinary Risks to Save Life.**

When one risks his life or places himself in a position of danger in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, such risk for such a purpose is not negligence; but the question whether the person is in such a position of danger as to bring the case within this principle is for the jury. *Johnson v. Richmond, etc., R. Co.*, 86 Va. 975, 11 S. E. 829.

#### **m. Coupling Moving Cars.**

Where a brakeman, knowing the couplings are mismatched, places a pin in a moving car, and remains between the two cars to shake the pin into position, when he might safely have made the coupling by placing the pin in the standing car, and letting it be shaken into position by the concussion, he is guilty of contributory negligence. *Norfolk, etc., R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706.

Plaintiff, employed as brakeman by defendant, had his hand crushed between the deadblocks while coupling cars. He saw the cars were coming too fast for safe coupling and signaled them to stop; he saw they did not stop;

but when they were near him he stepped in to make the coupling, and was hurt. It was held, that when he saw that none of his signals had been obeyed, it was his duty to stay out, and it was negligence in him to go in between the cars. And his injury was the immediate result of his own act. *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123.

Attempt to make the three link coupling when he may readily see that the car is in motion, and in disobedience of the defendant's rules defeats a servant's action for an injury sustained in consequence thereof. *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511.

As to disregard of rules in coupling moving cars, see ante, "Disregard of Rules," VI, E. 3, h, (1).

#### **n. Running Train at Excessive Rate of Speed.**

Running a train at a forbidden rate of speed around a curve is negligence, which defeats the right of action of the engineer, who is injured in consequence of the engine leaving the track, owing to the high rate of speed. *Robinson v. West Virginia, etc., R. Co.*, 40 W. Va. 583, 21 S. E. 727.

#### **o. Contributory Negligence of Infants.**

See the titles INFANTS, vol. 7, p. 469; NEGLIGENCE.

"In determining whether a boy sixteen years of age was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity, and experience, and although he may have been guilty of an act which in an adult would have amounted to an assumption of the risk of injury, and a waiver of the duty the master owes him, yet he can not be held to have assumed any such risk or waived any such duty, which one of his age, discretion and experience could not fully comprehend and appreciate. *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675, 676, 22 S. E. 83,

85." *Giebell v. Collins Co.*, 54 W. Va. 518, 529, 46 S. E. 569.

"The law presumes that an infant between seven and fourteen years of age can not be guilty of contributory negligence, and in an action by such infant the burden is on the defendant to overcome this presumption, by proof of intelligence and capacity. *Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34, 73 Am. St. Rep. 791." *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 593, 40 S. E. 908.

In *McDaniel v. Lynchburg Cotton Mills Co.*, 99 Va. 146, 37 S. E. 781, it was held, that the deceased, a boy twelve years and eight months old, was competent for the service he was employed to render, having both experience and capacity; that the defendant in error was not negligent in employing him on account of his youth, and was otherwise free from fault; and that the deceased came to his death as the result of his own persistent and reckless negligence, or at least was guilty of contributory negligence, with which he was properly chargeable by reason of his maturity and intelligence.

#### **F. CONTRACTS RELEASING MASTER'S LIABILITY FOR NEGLIGENCE.**

**Contracts Prior to Injury.**—A contract whereby a party stipulates for his exemption from liability for the consequences of his own negligence, is against public policy and void. This is so, independently of Code, § 1296. *Johnson v. Richmond, etc., R. Co.*, 80 Va. 975, 11 S. E. 829.

**Release Subsequent to Injury upon Agreement of Master to Give Servant Work.**—"Where an employee, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages, said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim, the employee has paid



in advance for an optional contract, and he has the right to have it remain optional." *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

If a person, having received permanent injury in the service of his employer, and claiming the injury was caused by the negligence of the latter, in consideration of an agreement on the part of the employer to give him work so long as he gives satisfaction to the foreman or superintendent under whom he works, releases his claim for damages for said injury, and is then given employment in pursuance of the agreement at wages agreed upon between them, there is no lack of certainty or mutuality in the agreement, for all its terms are settled and, by releasing his claim for damages, the employee has paid in advance for the option to do such work for his employer as he is able to do, and he can not be discharged without cause. *Rhoades v. Chesapeake, etc., R. Co.*, 49 W. Va. 494, 39 S. E. 209.

## G. ACTIONS FOR INJURIES.

### 1. Parties.

The father has the right to the custody of his infant child, with the correlative duty of maintenance, from which results his right to the child's services. And hence the father is entitled to maintain an action for loss of services against any one who wrongfully interrupts the rendering of such services, or makes the full rendering of them impossible. *Taylor v. Chesapeake, etc., R. Co.*, 41 W. Va. 704, 24 S. E. 631.

Where a party knowingly engages a minor in a dangerous employment, against the known will of the father, and the minor is injured in such employment, such party is responsible to the father for the consequent loss of the services of the minor. The gist of the action is the loss of such services. *Taylor v. Chesapeake, etc., R. Co.*, 41 W. Va. 704, 24 S. E. 631. See

the titles *INFANTS*, vol. 7, p. 461; *PARENT AND CHILD*.

### 2. Declaration.

#### a. In General.

##### Degree of Care Required of Master.

—A declaration which, fairly construed, charges that employer was bound to use ordinary care, is sufficient. *Southwest Imp. Co. v. Smith*, 85 Va. 306, 7 S. E. 365.

##### Particulars of Defendant's Negligence.

—In an action to recover damages for an injury inflicted by a defendant it is generally sufficient to aver in the declaration that the injury was inflicted by the wrongful act, neglect, and default of the defendant, without giving the particulars of his misconduct. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

##### Averment as to Right of Plaintiff on Premises at Time of Injury.

—In an action for damages against a corporation for personal injury inflicted by its servants, it is not necessary to aver in the declaration whether the plaintiff was on the premises of the defendant as a trespasser, licensee or employee, when the declaration distinctly sets forth when, where, in what manner, and under what circumstances, the plaintiff was injured by the default, negligence, or improper conduct of the defendant's servants. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

#### b. Averments as to Negligence.

##### (1) Failure to Provide Safe Place of Work.

**In General.**—An allegation that the defendant "negligently and wrongfully failed to provide a reasonably safe place to work" is stronger than if it used in lieu thereof, "failed to use ordinary care," as the former expression necessarily includes the latter. To negligently and wrongfully fail to do anything is to fail to use ordinary care in doing it; and such a declaration is undoubtedly good in so far as it

charges failure to furnish a safe place to work. *Trump v. Tidewater Coal, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035, 1036.

**Coal Mine.**—A declaration by a servant against his master for injury caused by the explosion of fire damp in a coal mine need not with particularity state the acts of omission or commission, which constituted the negligence of the master; if it is specific enough to inform the master, of what he is called upon to answer, so that he will not be surprised at the trial, it is sufficient. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285.

Declaration alleged that defendant did not use proper care for safety of plaintiff whilst engaged in working defendant's coal mines, and negligently permitted stones, slate, and coal to hang loosely in and about the roof of the mines where plaintiff was at work for defendant, and negligently failed to provide said roof with sufficient props to keep the loose stones, etc., from falling on plaintiff, etc. It was held, that the declaration sufficiently charges negligence upon defendant, and need not deny contributory negligence on plaintiff's part, and it was not error to overrule the demurrer. *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015.

### (2) Failure to Provide Machinery or Appliances.

**In General.**—A servant can not recover damages of his master for an injury inflicted on him in consequence of defective machinery and appliances, in the absence of any allegation in the declaration of such a cause of action. *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

**Failure to Exercise Due Care in Providing Appliances.**—A demurrer to a declaration in an action against a railroad which alleges that the accident at which plaintiff's intestate was killed occurred "at or near" Wilson's depot, and that the locomotive and tender,

"or one of them," ran against the deceased, and which, while distinctly alleging negligence, and that the company did not provide safe appliances, does not allege that it did not use "due, reasonable, and ordinary care to provide proper appliances," is properly overruled. *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680.

### Knowledge of Defects by Master.

A declaration by a servant against his master for an injury which properly charges the master with negligence, although it does not allege knowledge of the defect in the machinery which caused the injury, in the master, or that he ought to have known of such defect, and does not allege ignorance of such defects in the plaintiff, is sufficient. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53. But see *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370, where it was held necessary to allege knowledge or means of knowledge by master.

### Naming Tools or Appliances which Caused Injury.

—In an action to recover damages for a personal injury inflicted on the plaintiff, resulting from a failure on the part of the defendant to furnish proper tools with which to do the work assigned, where the declaration avers that it was the duty of the defendant to furnish "suitable and reasonable tools, implements or means then well known to the defendant and possessed and kept by said defendant," with which to do the work, it is unnecessary to aver what the tools were, or to furnish any bill of particulars thereof. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

### Failure to Provide Sufficient Brakes.

—In action against railroad company for the negligent killing of plaintiff's intestate, the declaration substantially averred that it was the duty of the company to have and maintain safe, sound, and suitable brakes to the cars on which the intestate was assigned to duty; that the company was guilty

of negligence in suffering the brakes to the cars on which the intestate was employed at the time of his death to become so worn and broken as to be incapable of stopping the train as quickly as otherwise they would have done, and that the intestate's death resulted directly from this negligence on the part of the defendant company. It was held, that the declaration is sufficient in law. *Beard v. Chesapeake, etc., R. Co.*, 90 Va. 351, 18 S. E. 559.

**Failure to Provide "Push Poles" and Sockets.**—In action against employer for negligence, causing death of plaintiff's intestate whilst in the discharge of the duty of his employment, a count averring that defendant failed to provide "suitable, convenient and safe appliances;" that is to say, proper push poles and sockets for same; "by reason of which said careless acts of the defendant, the deceased was injured," is demurrable for that it does not aver that defendant failed to exercise ordinary care in providing suitable and safe appliances for the business, and that the alleged defects in the push pole were, or ought to have been, known to defendant, and that deceased did not know of them, and was himself without fault. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370.

A count in a declaration averring that a push pole was not made of "strong and suitable material," is demurrable where it does not aver that its alleged defects were known to the defendant, or ought to have been. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 498, 8 S. E. 370.

A count averring that it was the duty of defendant to have furnished a push pole "constructed in the best and safest manner and of the best material" and a count averring that defendant was liable because of its failure to provide sockets for a tender and car, were held demurrable. *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370.

### (3) Failure to Provide Sufficient Servants.

"When the gist of the action is the company's negligence in not furnishing competent servants, its negligence in that regard must be distinctly alleged." *Norfolk, etc., R. Co. v. Briggs*, 1 Va. Dec. 757, 759; *Eckles v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

If the cause of the action is alleged to have been the carelessness or negligence of the defendant, in employing or retaining in his service an unfit and incompetent servant, it is necessary to aver that the servant was guilty of some act of negligence or unskillfulness directly contributing to the injury. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

Where declaration details the circumstances under which the plaintiff's intestate met his death and alleges that at the time thereof the engine was under the management of a fireman, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer. *Norfolk, etc., R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884.

### (4) Failure to Repair Defects.

Where declaration alleges that it was the duty of defendants to have kept the brakes, etc., "in sufficient repair," it was held, that it is not demurrable as charging a higher duty than the law imposes. *Richmond, etc., R. Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576, 580.

Where a declaration alleges that a master promised to repair defects in machinery, and failed and refused to do so, the word "refused" will be held to mean "did not comply with." *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

### (5) Failure to Warn and Instruct.

A declaration is insufficient in that it fails to allege that a boy did not possess the necessary experience, knowledge, and skill to appreciate and

guard himself against the increased danger, where it does allege that, after he was directed to do more dangerous work than that for which he had been employed, the defendant wrongfully and negligently "failed to instruct, caution and direct the plaintiff in discharge of the said duty." From these allegations the experience of the plaintiff is a plain inference; for otherwise it would not be wrongful or negligent for defendant not to so caution and instruct plaintiff as to his new duties. *Trump v. Tidewater Coal, etc., Co.*, 46 W. Va. 238, 32 S. E. 1035.

**c. Averments as to Contributory Negligence.**

**(1) Necessity of Denying Contributory Negligence.**

In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege in his declaration or to prove the existence of due care and caution on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it, unless the fact is disclosed by the evidence of the plaintiff, or may be fairly inferred from all the circumstances. *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. 805; *Norfolk, etc., Co. v. Gilman*, 88 Va. 239, 13 S. E. 475; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015.

In an action to recover damages for personal injuries the declaration need not allege the plaintiff's ignorance of the danger to which he was exposed. This is in effect an averment that he was not guilty of contributory negligence. Contributory negligence is matter of defense, and need not be negated by the plaintiff in his declaration. *Richmond Granite Co. v. Bailey*, 92 Va. 554, 24 S. E. 232.

**(2) Effect of Averments Showing Contributory Negligence.**

If the facts stated in the declaration

show that the plaintiff was guilty of negligence, which immediately and directly contributed to produce the injury, the declaration is fatally defective. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

Where the declaration alleged that intestate (a track laborer) was being carried from one point on the railroad to another, and was ordered by his superior to ride on top of the car, whereon he was standing when struck by bridge timbers, and that he was ignorant of the dangerous character of the bridge, it was held, that the declaration was not demurrable, the mere fact that he was standing on top of the car not being of itself negligence on his part. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838.

**d. Averments as to Nature and Extent of Injury.**

In an action for damages against a railroad company, a count in the declaration, after setting out that the defendant was working a railroad in the county, with engines and cars for carrying passengers and freight, alleged that on a day named "the defendants conducted themselves so carelessly, negligently and unskillfully in the operation of their said business as to inflict upon W. (plaintiff's intestate), severe bodily injuries, by reason whereof he did, on the 28th of June, die." The count is defective in not stating where the deceased was or how he was injured. *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. 805.

**3. Evidence.**

**a. Presumption and Burden of Proof.**

See the titles NEGLIGENCE; PRESUMPTIONS AND BURDEN OF PROOF.

**(1) Presumption of Negligence.**

The mere fact of injury received raises no presumption of negligence on the part of the master. *Stewart v. Ohio River R. Co.*, 40 W. Va. 188, 20 S. E. 922; *Knight v. Cooper*, 36 W.

Va. 232, 14 S. E. 999; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

The mere fact that an accident happens upon a railroad is not alone sufficient, as between employer and employee, to raise a prima facie case of negligence on the part of the railroad company, though it would be in the case of a passenger injured. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

The negligence of a master can not be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a prima facie presumption that the master has been guilty of negligence, or a breach of duty to his servant. Negligence of the master, in such case, is an affirmative fact to be established by the injured servant. If the injury may have resulted from one of two causes, for one of which the master is responsible, but not the other, the servant can not recover; neither can he recover if it is just as probable that the injury was caused by the one as the other. *Moore Lime Co. v. Johnston*, 103 Va. 84, 48 S. E. 557.

From the mere fact that an injury results to a servant from a latent defect in machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence of negligence connecting him with the injury. The mere fact that machinery proves defective, and that an injury results therefrom, does not fix the master's liability. *Johnson v. Chesapeake, etc.*, R. Co., 36 W. Va. 73, 14 S. E. 432.

## (2) Burden of Proof.

### (a) As to Negligence of Master.

**In General.**—In an action by a servant against the master for personal injuries received in his service, the burden of proving the negligence of the master is upon the plaintiff. *Comer v. Consolidated Coal, etc., Co.*, 34 W. Va. 533, 12 S. E. 476; *Humphreys v.*

*Newport News, etc., R. Co.*, 33 W. Va. 135, 10 S. E. 39; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432; *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444; *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620, 24 S. E. 644; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Norfolk, etc., R. Co. v. Mann*, 99 Va. 180, 37 S. E. 849; *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349; *Bowers v. Bristol Gas, etc., Co.*, 100 Va. 533, 42 S. E. 296; *Moore Lime Co. v. Johnston*, 103 Va. 84, 48 S. E. 557; *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; *Norfolk, etc., R. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 677, 44 S. E. 898; *Chesapeake, etc., R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Sheeler v. Chesapeake, etc., R. Co.*, 81 Va. 188.

Where a declaration alleges that by defendant's negligence the electric current passed through and killed plaintiff's intestate whilst engaged about his special duties in defendant's service, and the plaintiff fails to prove that defendant in any way, by commission or omission, caused the current to pass through and kill the intestate, the inference is inevitable that the intestate's contributory negligence was the proximate cause of his death. *Peidmont, etc., Ill. Co. v. Patteson*, 84 Va. 747, 6 S. E. 4.

**In Providing Servants.**—The burden of proving negligence in selecting and continuing an unfit servant is on the plaintiff. He must prove the specific act of negligence on which the action is founded, and this, of itself, may in some cases prove incompetency, but not notice thereof to the master. *Trigg v. Lindsay*, 101 Va. 193, 43 S. E. 349.

When an action is founded on the incompetency of a fireman temporarily

in change of an engine, the plaintiff must prove that the fireman was so inexperienced in the management of an engine that it was not an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and fit for the employment; that he was guilty of mismanagement of the engine by reason of his inexperience and unskillfulness; that such mismanagement was the proximate cause of the plaintiff's injury. *Core v. Ohio River R. Co.*, 38 W. Va. 436, 18 S. E. 596. See the title FELLOW SERVANTS, vol. 6, p. 5.

**In Providing Machinery and Appliances.**—In an action by the servant against the master for injury from defective machinery or appliances, the burden is on the servant to show that the same was defective. *Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432.

A servant who seeks to recover for an injury which, he claims, resulted from defective machinery or appliances furnished by the master to be used about the business in which such servant was employed, takes upon himself the burden of establishing negligence on the part of the master, and due care on his own part; and, in order to entitle him to recover, he must overcome two presumptions: First, that the master has discharged his duty to him, by providing suitable machinery and appliances for the business and in keeping them in condition; second, that he assumed all of the usual and ordinary hazards of the business. *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432.

**Notice of Defects by Master.**—The servant takes upon himself the burden of showing that the master had notice of the defect complained of, or that, in the exercise of that ordinary care which he is bound to observe, he would have known it, and that the servant was ignorant of such defect, and had not equal means of knowledge. *John-*

*son v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, 14 S. E. 432.

**(b) As to Assumption of Risks by Servant.**

The burden rests upon employer to prove that employee was aware of the increased dangers growing out of employer's negligence, and not out of the dangers incident to his ordinary employment. *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849.

**(c) As to Contributory Negligence of Servant.**

In an action by a servant against the master for negligence, while the burden of proof of the negligence pleaded as the cause of the injury rests on the plaintiff, the burden of proof of contributory negligence of the plaintiff rests on the defendant. *Comer v. Consolidated Coal, etc., Co.*, 34 W. Va. 533, 12 S. E. 476; *Wooddell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386; *Williamson v. Newport News, etc., Co.*, 34 W. Va. 657, 12 S. E. 824; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522; *Southwest Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, 8 S. E. 370.

The plaintiff must be presumed to have been without fault; and if the defendant relies on the defense of contributory negligence, he must prove it. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71.

"If the defendant relied on the contributory negligence of the plaintiff, it is matter of proof for him, either by testimony, adduced by, or as matter of inference, deducible from the evidence of the plaintiff, but it is not the duty of the plaintiff to negative it by proof, and no part of his case to deny it in his declaration. *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71." *Southwest Improvement Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015.

In case of an employee the court will not presume that there was negligence in using a "passing siding" for storing cars. *Norfolk, etc., R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

## **b. Admissibility of Evidence.**

### **(1) In General.**

In an action by an employee against a corporation for a personal injury, it is error to allow other employees to testify what they did after the time of the injury, and their reasons therefor. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Where the gravamen of the charge of negligence on the part of a conductor in making a coupling is that he permitted the engine to approach, with a dangerous speed, the cars to which the coupling was to be made, and that it was his duty to know, not the exact position of those cars, but to have such a reasonable knowledge of their situation as would have enabled him to make the coupling with safety, it is not error to refuse to permit a witness to answer the question, "Would it or not be the duty of the conductor to know the exact spot at which the cars had been left to which he was going back to couple;" as a categorical answer would have been misleading. *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33.

### **(2) As to Negligence.**

#### **(a) In General.**

Negligence may be proved by circumstantial evidence as well as by direct testimony. *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

If the injury alleged in the declaration is not alleged to be due in any way to the absence of a particular person, evidence as to his absence is not admissible. *Norfolk, etc., R. Co. v. Phillips*, 100 Va. 362, 41 S. E. 726.

**Rules of Defendant.**—When a plaintiff offers in evidence to the jury in an action against a railway company certain printed rules of the defendant, to the reading of which it objects, on the

ground that said rules were not the rules in force at the time the cause of action arose; and the plaintiff submits evidence which shows *prima facie*, that said rules were then in force, it is not error for the court to permit said rules, together with such evidence, to go to the jury. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610.

**Evidence to Show That Defendant Used as Much Care as Other Employers.**—In an action by a servant against a railroad company for injuries received through the negligence of the company, evidence tending to show that the defendant conducted its road as well as other railroads are conducted is inadmissible. *Riley v. West Virginia Cent., etc., R. Co.*, 27 W. Va. 145, 146.

### **(b) In Providing Safe Place of Work.**

Evidence which tends to show knowledge by a vice principal of the dangerous condition of premises in which he puts hands to work is admissible. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

In a case in which the boss of a gang of hands engaged in quarrying stone was held to be a vice principal while discharging certain duties, evidence or the refusal of some of the hands to assist in cleaning out a hole that had been loaded but the charge in which had not exploded, was received to show that the boss had knowledge of the condition of the hole when he directed it to be cleaned. *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

### **(c) In Providing Machinery and Appliances.**

#### **aa. Subsequent Repairs.**

In an action by a servant to recover damages for a personal injury resulting from alleged defects of machinery, evidence of repairs to the machinery after the injury is not admissible to show negligent failure to repair before the injury. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

If the defendant offers evidence of

good condition after the injury, the plaintiff may rebut it by evidence to disprove that fact, or may show subsequent repairs. *Virginia, etc., Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

**bb. Evidence to Show Knowledge of Defects.**

Knowledge of the defective condition of the elevator could be shown by proving actual knowledge on the part of the defendants, or by showing that it had been out of condition for such length of time that the law would presume knowledge on their part. *Myers v. Falk*, 99 Va. 385, 388, 38 S. E. 178.

**(d) In Providing Servants.**

Where a declaration avers that one of the acts of negligence of defendant contributing to the injury of the plaintiff was the employment and retention in service of an incompetent foreman, evidence of such incompetency is admissible. *Dingee v. Unrue*, 98 Va. 247, 35 S. E. 794.

Knowledge of the incompetency of the elevator boy could have been brought home to the defendants by showing either that they saw his acts of negligence, or that such acts of negligence occurred so frequently that the law would presume knowledge thereof. *Myers v. Falk*, 99 Va. 385, 388, 38 S. E. 178.

Where the declaration alleges that the plaintiff was one of the "steel gang" and charges that his injuries were inflicted by reason of the negligence, incompetency and want of skill of the defendants, their agents and employees, and that the defendant's foreman was without ordinary competency and skill for the performance of his duties, it is error to refuse to permit the foreman, when examined as a witness on the trial, to answer the question: "Did you assign to the steel gang any but experienced men?" *Lane Bros. v. Bauserman*, 103 Va. 146, 147, 48 S. E. 857.

**(3) As to Contributory Negligence.**

In an action by a servant to recover for injuries alleged to have been inflicted in consequence of being put at an unsafe place to work, the defendant should be permitted to show that the place was originally safe, but was rendered unsafe by the plaintiff's actions and conduct. *Lane Bros. v. Bauserman*, 103 Va. 146, 148, 48 S. E. 857.

In an action by a servant to recover for injuries inflicted while cleaning out a "loaded" hole in a stone, which he alleges he did not know was "loaded," evidence of the absence of any placard or other device to show that the hole was "loaded" is receivable, if not to show negligence of the master, to rebut the idea of contributory negligence on the part of the servant in working in the hole in the face of such danger signal. *Lane Bros. v. Bauserman*, 103 Va. 146, 147, 48 S. E. 857.

**c. Competency of Witnesses.**

A servant is a competent witness to prove that the master exercised a degree of care required of him by law, but the jury, in considering the weight to be given to the evidence of such witnesses may consider the question as to whether they were or were not influenced by the relation which exists between them and the master. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

In an action by a servant for personal injuries, it is error to allow other employees to testify what they did after the time of the injury and their reasons therefor. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

**d. Weight and Sufficiency.**

The evidence must show more than a mere probability of negligence. *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898.

"It is not sufficient that the evidence is consistent equally with the existence or nonexistence of negligence.



There must be affirmative and preponderating proof of the defendant's negligence. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627; *Humphrey v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882; *Norfolk, etc., R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898." *Moore Lime Co. v. Johnston*, 103 Va. 84, 90, 48 S. E. 557.

If the injury may have resulted from one of two causes, for one of which the defendant is responsible but not for the other, the plaintiff can not recover; neither can he recover if it is just as probable that the damage was caused by the one as by the other. *Norfolk, etc., R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627.

Evidence that the "push pole" furnished by defendant railroad for the purpose of pushing cars upon a track running parallel with the engine, while it should have been sound and strong, was in reality cross grained and defective; that the tender lacked the usual socket in which to place the end of the pole for operation; that the pole slipped, broke, and that the deceased involuntarily grasped the pole, and was thrown in front of the advancing tender, and killed, sustains a judgment for plaintiff asking damages for negligence. *Norfolk, etc., R. Co. v. Jackson*, 1 Va. Dec. 680.

#### 4. Province of Court and Jury.

See the titles NEGLIGENCE; QUESTIONS OF LAW AND FACT.

**When Case Must Be Submitted to Jury.**—In all actions founded on negligence, whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of evidence, or whether the facts admitted or not denied are such that fair minded men might draw different inferences from them, it is a case for the jury, and a case should not be withdrawn from the jury unless the inferences from the facts are so plain as to be a legal conclusion—so plain that a verdict for the plaintiff

would have to be set aside as one rendered through prejudice, passion, or caprice. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683.

**When Court May Direct Verdict.**—Though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 46 S. E. 802.

Generally, as to directing verdict, see the title VERDICT.

In actions for negligence, the courts have abrogated the doctrine that a mere scintilla of evidence from which there might be a surmise of negligence is sufficient to carry a case to the jury, and have adopted the more reasonable rule that there is a preliminary question which the judge must decide, if asked, whether, granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved; for, while negligence is usually an inference from facts, it must be proved, and competent and sufficient evidence is as much required to prove it as to prove any other fact. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683, citing *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84, 46 S. E. 802.

**Risks Assumed a Jury Question.**—"Where there is any doubt whether an employee was acquainted, or ought to have been acquainted, with the risk, the determination of the question is necessarily with the jury." *Norfolk, etc., R. Co. v. Ward*, 90 Va. 687, 692, 19 S. E. 849.

**Contributory Negligence.**—Whether a lineman is guilty of contributory neg-

ligence in climbing a telephone pole which has been condemned and is plainly so marked, but the dangerous condition of which is not obvious, is a question of fact to be determined by the jury from all the circumstances of the particular case, under proper instructions from the court. *Southern Bell, etc., Co. v. Clements*, 98 Va. 1, 34 S. E. 951.

**Upon a demurrer to the evidence** where the evidence is conflicting as to whether the servant was drunk and negligent or otherwise, it will be held, that the servant was free from fault. *Richmond, etc., R. Co. v. Moore*, 78 Va. 93.

In *Richmond, etc., R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132, it was held, that from the evidence disclosed by the record, viewed upon the principle of demurrer to evidence, the injury to the plaintiff was the result of the defendant company's negligence, and the company was therefore liable to answer in damages.

**An hypothetical instruction directing a finding in favor of plaintiff**, which omits any reference to the facts tending to establish contributory negligence, and entirely ignores such defense, is erroneous. Nor can such error be cured by other instructions given in behalf of either party. *McCreery v. Ohio River R. Co.*, 43 W. Va. 110, 27 S. E. 327. See the title VERDICT.

## VII. Liability of Master to Third Persons for Acts of Servant.

### A. IN GENERAL.

The liability of a third person, to the person injured, for the negligence of another, proceeds upon the maxim, *qui facit per alium, facit per se*, and presupposes the existence of the relation of master and servant between such third person and the person actually guilty of the negligent act. It is founded upon the right which the

employer has to select his servants and to discharge them if not competent or skillful, and to direct and control them while in his employ. A servant is regarded as an instrument set in motion by the master, and if any injury occurs to another through the negligence or unskillfulness of such servant, while in the course of his employment, it is deemed reasonable that he who has selected the servant should be answerable for such injury. Hence, in cases of this character when it has once been ascertained in whose employ the servant actually is, it is only necessary to ascertain further that the servant was engaged at the time the act of negligence was committed, in the performance of some duty enjoined upon him by his master, within the scope of employment, to fasten upon the master liability for any injury resulting from the negligent act of the servant. *Muse v. Stern*, 82 Va. 33; *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163.

**Servant Does Not Have to Be Following Instructions.**—The test of the liability of the principal or master for the torts of his agent or servant in all cases, is whether the latter was at the time acting within the scope of his authority in the business of the principal or master, and not whether the act was done in accordance with his instructions. For if such act is done within the scope of his authority, and while engaged in his employer's business, the latter is bound for it. *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. 819.

### B. NECESSITY FOR EXISTENCE OF RELATION OF MASTER AND SERVANT.

#### 1. In General.

By the plain import of its terms the rule of respondeat superior belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and serv-

ant, and where that relation does not exist, there can be no ground for the application of the rule. *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 14 S. E. 163.

"The principal's liability for the acts of his agent, within the scope of his authority, depends upon the fact that the relation of principal and agent exists. It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is, therefore, just and proper that he should be responsible for what the agent does while so employed. When, however, the principal has not this right of control, a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no power or right to direct or control the manner." *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711, 723, 14 S. E. 163.

**Between Whom Relation Exists.—**

The relation of master and servant does not exist between a person riding in the carriage of another and the driver who is the employer of the carriage owner, and in such case the person riding in the carriage is not liable for the negligence of the driver. *Muse v. Stern*. 82 Va. 33.

A medical examiner of an insurance company is a servant and the company is a servant for whose negligence the company is liable. *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479, 44 S. E. 439. See ante, "Between Whom Relation Exists," II.

**2. Liability of Railroad Company for Acts of Postal Clerk.**

As a general rule, a railroad company is not responsible for the negligent acts of United States postal clerks or agents upon its trains. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782.

**3. Liability of Employer for Acts of Independent Contractor.**

See the title INDEPENDENT CONTRACTORS, vol. 7, p. 363.

**C. FOR WHAT ACTS MASTER IS LIABLE.**

**1. General Rule.**

That the master is liable for the acts of his servant done within the course of his employment is well settled. It is equally well settled that he is liable for the negligent omissions of the servant, if the omitted duty comes within the scope of the servant's employment. *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757; *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. 819; *Virginia, etc., R. Co. v. White*, 84 Va. 498, 5 S. E. 573; *Harris v. Nicholas*, 5 Munf. 483; *Bess v. Chesapeake, etc., R. Co.*, 35 W. Va. 492, 14 S. E. 234; *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. 724; *Norfolk, etc., R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367.

The principal is liable to third persons in a civil suit for frauds, deceptions, concealments, misrepresentations, torts, negligences, and other misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed, know of, such misconduct, or even if he forbade them, or disapproved of them. In all such cases the rule applies, respondeat superior, and it is founded on public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of the agency. The master is liable for the wrong and negligence of his servant, just as much when it has been done contrary to his orders, and against his intent, as he is when he has co-operated in or known of the wrong. *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. 819.

As to liability of carrier for acts of its servants, see the title CARRIERS, vol. 2, p. 671.

## 2. Negligence.

Where a servant, acting within the course of his employment fails to exercise such care as a reasonably prudent man would exercise under like circumstances, in consequence of which injury results to a third party, the master is liable in damages. *Bowen v. Flanagan*, 84 Va. 313, 4 S. E. 724.

In an action against a railroad company for injury to the plaintiff's horses, if it appears that the road runs through plaintiff's land, and the horses got upon the track of the road without any negligence or default of his, and were killed by the company's engine, the company will be liable for the damages sustained by the plaintiff, if the damage was done by the failure of the engineer to take the proper care to avoid doing the injury. *Trout v. Virginia*, etc., R. Co., 23 Gratt. 619.

Where the injury of the insured is a sprain of the foot, requiring a plaster cast or similar appliance to hold the injured ligaments in place until they heal or regain strength, and the agent, in making the examination, removes, and fails to replace, such appliance, and injury results therefrom, he is guilty of negligence for which his principal must answer in damages. *Tompkins v. Pacific Mut. Life Ins. Co.*, 53 W. Va. 479, 44 S. E. 439.

## 3. Willful and Malicious Acts of Servant.

**Within Scope of Employment.**—The general rule of master and servant is that the master is liable for the acts of the servant, though willful and malicious, if done in the course of his employment within the scope of his authority. *Bess v. Chesapeake*, etc., R. Co., 35 W. Va. 492, 14 S. E. 234, 236.

To charge a railroad company for the willful wrong of an employee in forcing a boy from a freight train

while in motion, whereby he is injured, it must appear that the act was in the course of the employee's business, and within the scope of his authority; the boy being a trespasser, not a passenger. *Bess v. Chesapeake*, etc., R. Co., 35 W. Va. 492, 14 S. E. 234.

## Outside Scope of Employment.

Where a person, to whom a railroad company owes no duty, is injured by one of its servants, the company is not liable to the party injured unless the servant was acting within the scope of his employment at the time the injury was inflicted. Thus, where a servant of the carrier willfully ejected a trespasser from a freight train while in motion, which resulted in injury to the party ejected, it was held that in order to hold the carrier liable it was necessary to show that the act was done in the course of the employee's business, and within the scope of his authority. *Bess v. Chesapeake*, etc., R. Co., 35 W. Va. 492, 14 S. E. 234.

It has been held, that for willful and unauthorized trespasses of the servant not within the scope of his employment, the master is not liable. *Harris v. Nicholas*, 5 Munf. 483.

## 4. Declarations or Admissions of Servant.

See the titles AGENCY, vol. 1, p. 274; DECLARATIONS AND ADMISSIONS, vol. 4, p. 325.

## 5. Notice to Servant as Notice to Master.

Knowledge acquired by a servant whilst performing duties for the master in the scope of his employment is, for all judicial purposes, notice to the master. *Standard Oil Co. v. Wakefield*, 102 Va. 825, 47 S. E. 830. See generally, the title AGENCY, vol. 1, p. 276.

## D. LIABILITY OF MASTER FOR EXEMPLARY DAMAGES.

See the title EXEMPLARY DAMAGES, vol. 5, p. 748.

### **Masters in Chancery.**

See references under COMMISSIONERS IN CHANCERY, vol. 2, p. 856.

### **Masters of Vessels.**

See the title SHIPS AND SHIPPING.

### **Material Alterations.**

See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 307.

### **Materiality of Evidence.**

See generally, the title EVIDENCE, vol. 5, p. 299.

### **Material Facts.**

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 94.

### **Materialmen's Lien.**

See the title MECHANICS' LIENS.

### **Materials.**

See the title FIRE INSURANCE, vol. 6, p. 86.

**MATTER IN VARIANCE.**—See ISSUE (PLEADING), vol. 8, p. 42.

### **Matters in Controversy.**

See the titles APPEAL AND ERROR, vol. 1, p. 479; JURISDICTION, vol. 8, p. 842; JUSTICES OF THE PEACE, ante, p. 68.

**MATTERS OF SUBSISTENCE.**—In *Sledd v. Com.*, 19 Gratt. 813, 822, it is said: "We think that the words 'matters of subsistence for man,' as used in the act, comprehend all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer, or are only consumed after undergoing a process of preparation, which is greater or less according to the character of the article."

### **Maturity.**

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 424.

## **MAXIMS.**

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- A. He Who Seek Equity Must Do Equity, 731.
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### III. Legal Maxims, 737.

#### I. Scope of Treatment.

**In General.**—A maxim is said to be an established principle or proposition. 2 Bouv. L. Dict. 343, "Maxim."

**Equitable Maxims.**—Under the head equitable maxims it is intended to treat in a general way, the well established maxims followed by courts of equity, by setting out the maxims as applied and specifically referring for applications thereof.

**Legal Maxims.**—The following treatment of legal maxims is comprised of the so-called legal maxims and some that are merely legal phrases and terms, which are in reality not maxims, together with specific references to the titles and places in which the principle, maxim, or phrase is applied.

#### II. Equitable Maxims.

##### A. HE WHO SEEKS EQUITY MUST DO EQUITY.

He who seeks equity must do it. *Jones v. Roberts*, 6 Call 187; *Kelly v. Jones*, 6 Call 204; *Lipscomb v. Winston*, 1 Hen. & M. 453; *Haydon v. Goode*, 4 Hen. & M. 460; *Garland v. Rives*, 4 Rand. 282; *Gilliat v. Lynch*, 2 Leigh 493, cited in *Scott v. Scott*, 18 Gratt. 150, 163; *Compton v. Major*, 30 Gratt. 180. See the titles FRAUD AND DECEIT, vol. 6, p. 488; GAMBLING CONTRACTS, vol. 6, p. 689; TENDER; USURY.

This maxim does not impose upon a person the duty of going beyond what his adversary has a right to require. *Compton v. Major*, 30 Gratt. 180.

This principle is not confined to any particular kind of equitable rights and

remedies, but pervades the entire field of equitable jurisdiction, so far as it is concerned with administration of equitable remedies. *Jones v. Roberts*, 6 Call 187; *Lipscomb v. Winston*, 1 Hen. & M. 453; *Massie v. Heiskell*, 80 Va. 789, 803.

If a party comes into a court of chancery for relief, he should be able to show, that he has done all which his adversary has a right to require as the consideration for performance on his part. Otherwise, he is not entitled to the aid of the court; and this argument is a fortiori where he has grossly failed to comply with his engagements to the lasting injury of his adversary; for then the converse of the maxim, takes place, namely, that he who has committed iniquity, shall not have equity. *Jones v. Roberts*, 6 Call 187, 203.

**Adequate Remedy at Law.**—The maxim of courts of equity, that a plaintiff asking equity must do equity to the party against whom he asks it, applies only to cases where the plaintiff is wholly without remedy at law, and is entirely dependent on the court of equity for relief. Per *Green and Cabell, JJ. Gilliat v. Lynch*, 2 Leigh 493. See the title ADEQUATE REMEDY AT LAW, vol. 1, p. 162.

**Vendor and Purchaser.**—Vendee, to whom, under mutual mistake of fact, vendor has conveyed more than was bargained or paid for, can not be regarded, as to such excess, as a purchaser for value without notice. But against vendor's claim for compensation for such excess, vendee may set off any counterclaim he may have for money expended by him in clearing the

property of encumbrances existing thereon when the conveyance was made. Vendee's right to set off such counterclaims, is not founded on the idea of a breach of warranty, and is not affected by the question whether the warranty of the vendor was general or special, but rests on the principle that "he that asks equity must do equity." *Massie v. Heiskell*, 80 Va. 789. See the title **VENDOR AND PURCHASER**.

**Judgment Lienor.**—The maxim that he who asks equity must do equity, has no application to a judgment creditor seeking to enforce his lien on debtor's land. See the title **JUDGMENTS AND DECREES**, vol. 8, p. 460.

**Application to Pledge—Mortgage.**—"The doctrine, that he who asks equity, must do equity, has no application to a mere pledge of personal property. That doctrine is applied, sometimes, to forfeited mortgages, where the mortgagor brings a bill to redeem; and it is applied, then, solely on the ground, that the mortgagee having acquired the legal title by the forfeiture, equity will not take that title from him, until he is paid all that the mortgagor owes him." *Gilliat v. Lynch*, 2 Leigh 493, 511. See the titles **MORTGAGES AND DEEDS OF TRUST; PLEDGE AND COLLATERAL SECURITY**.

**Calling in Outstanding Title.**—Where one invokes the aid of a court of equity to call in the outstanding legal title, relief will not be extended, except upon condition that he shall do what is equitable under the circumstances. *Kerr v. Kerr*, 84 Va. 154, 5 S. E. 89. See the title **QUIETING TITLE**.

**Specific Performance.**—It is a principle in equity, that he who demands the execution of an agreement, ought to show that there has been no default in him, in performing all that was to be done on his part. For, if either he will not, or, through his negligence, can not, perform the whole on his side, he has no title in equity, to the

performance of the other party, since such performance could not be mutual. Nor will equity decree a specific performance in his favor, especially if circumstances are altered. 1 Fonbl. 391, 392. *Jones v. Roberts*, 6 Call 187, 200.

And, therefore, if a person having contracted for a lease upon certain stipulations, enters on the land, and fails to perform the stipulations, he can not compel a lease to be made to him, either by the original lessor, or his assignee. *Jones v. Roberts*, 6 Call 187. See the title **SPECIFIC PERFORMANCE**.

**As to application of maxim where party being both heir and administrator seeks to be relieved as administrator,** see the title **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 516.

## **B. EQUITY AIDS THE VIGILANT, NOT THE SLOTHFUL.**

*Vigilantibus non dormientibus jura subveniunt* is a favorite rule of equity. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447, 454.

A court of equity will not assist one who has slept on his rights. *Beecher v. Foster*, 51 W. Va. 605, 617, 42 S. E. 647.

"Nothing calls it into activity but good conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, especially when rights of third parties may be prejudiced. 1 Bart. Ch. Pr. 90; *Trader v. Jarvis*, 23 W. Va. 100; *Connell v. Connell*, 32 W. Va. 319, 9 S. E. 252. Equity has always refused its aid to stale demands, wholly independent of statutory provision, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence. 1 Pom. Eq. Jur., §§ 418, 419. So strong is this principle that it overcomes that favorite maxim of equity, 'equity will not suffer a wrong without a remedy' (1 Pom. Eq.

Jur. § 424), and under it an equity otherwise superior will be postponed to a subsequent interest acquired by another. (2 Pom. Eq. Jur., § 687.)" *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447, 454. And see *Bill v. Schilling*, 39 W. Va. 108, 19 S. E. 514. See the titles INJUNCTIONS, vol. 7, p. 524; LACHES, ante, p. 93; LIMITATION OF ACTIONS, ante, p. 367.

"And in *Tazewell v. Saunders*, 13 Gratt. 354, it was said that laches will defeat a claim when the delay has been such as to afford a reasonable presumption of the satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. In such a case the maxim, *vigilantibus non dormientibus jura subveniunt* applies with peculiar force. See also, *Harwood v. Railroad Co.*, 17 Wall. 178; *Landsdale v. Smith*, 106 U. S. 391; *Speidel v. Henrici*, 120 Id. 377; *Perkins v. Lane*, 82 Va. 59, and cases cited." *Terry v. Fontaine*, 83 Va. 451, 2 S. E. 743.

"In *Dryden v. Stephens*, 19 W. Va. 1, it was held, that where a purchaser under a deed of trust had sold to an innocent party, the sale could not be set aside because the sale was for a grossly inadequate price, and that where a party waited four years before suing to set it aside for want of advertisement, and an innocent purchaser was involved, it could not be set aside. See *Whittaker v. Southwest Va. Imp. Co.*, 34 W. Va. 217, 12 S. E. 507, and cases cited as to laches. No fraud, concealment, or obstruction is shown to excuse this laches, and such excuse must be shown." *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447, 454.

"It appeared by the affidavit that it was through the efforts and at the cost of the plaintiff a knowledge of the real estate sold was obtained, and it would be a hardship if another creditor, who has made no effort to this end, should enjoy the fruits of this diligence. Both

the judgment creditors were in a position to use diligence. One only encountered the labor and expense. To him should be the reward. *Vigilantibus, non dormientibus, jura subveniunt.*" *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643, citing *Smith v. Lind*, 29 Ill. 24.

Several firms were beaten in the court below, and decreed to pay costs. Three of these parties applied to others to join them in an appeal. None of the others came forward to join in the appeal. These three firms alone applied for the appeal, which was granted, and the decree reversed, and trust deed set aside as fraudulent. "It seems to us this cause, in all its circumstances, is within the maxim, *vigilantibus, non dormientibus, jura subveniunt.* There would be no reward to the vigilant, if these parties were now compelled to step aside, and let those who fought them persistently all through the cause, in both courts, and those who stood by and did nothing, take the fruits of their labor and expense, or to be compelled to divide it with them." *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643.

**Resuscitating Land Entry.**—A court of equity will not give its aid to resuscitate an entry, which has slept for forty years, in order to disturb intervening legal titles, fairly obtained. *Johnson v. Brown*, 3 Call 259, 267. See the title PUBLIC LANDS.

**Relief against Judgment.**—As to application of maxim to application for equitable relief against judgments, see the title JUDGMENTS AND DECREES, vol. 8, p. 537.

### C. HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

He who comes into equity must come with clean hands. *Jones v. Roberts*, 6 Call 187, 200; *Tate v. Vance*, 27 Gratt. 571; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874.

Equity will not decree in favor of



a party whose hands are unclean. *Jones v. Roberts*, 6 Call 187, 200.

"It is a well-established rule of courts of equity not to assist one wrongdoer against another—a doctrine expressed in the maxim that he who comes into equity must come with clean hands." *Helsley v. Fultz*, 76 Va. 671. See the titles COMPOUNDING OFFENSES, vol. 3, p. 37; GAMBLING CONTRACTS, vol. 6, p. 689; SPECIFIC PERFORMANCE.

"The same rule applies \* \* \* to all cases where the party seeking the aid of the courts has been guilty of conduct in violation of the principles of equity jurisprudence with reference to the subject matter of litigation. In all such cases equity leaves the parties in the position in which they have placed themselves, refusing all affirmative aid to either of the participants in the fraud, breach of trust or other misconduct. *Pomeroy*, § 397." *Helsley v. Fultz*, 76 Va. 671.

"This maxim is more frequently invoked in cases upon contracts entered into in fraud of the rights of creditors and other persons. The cases before this court are numerous in which it has been held, that a court of equity will not, at the suit of either party, afford a remedy. It will not, while the agreement is executory, either compel its execution or decree its cancellation, nor, after the agreement has been executed, will it set it aside and restore the plaintiff to the property which has been fraudulently conveyed. 1 *Pomeroy's Equity Jurisprudence*, § 401." *Helsley v. Fultz*, 76 Va. 671. See the title FRAUD AND DECEIT, vol. 6, p. 476.

He who comes into a court of equity must come in with clean hands therefore, when there appears to be an unfortunate quarrel between two women, which involves the families of each, and both are in fault, a court of equity will not interfere to protect one against the other, and enjoin as a nuisance

what one does against the other. *Medford v. Levy*, 31 W. Va. 649, 8 S. E. 302. See the title NUISANCES. And see the title INJUNCTIONS, vol. 7, p. 531.

As applied to subrogation, see the title SUBROGATION.

#### **D. WHERE EQUITIES ARE EQUAL THE LAW WILL PREVAIL.**

Where equities are equal the law will prevail. *Johnson v. Brown*, 3 Call 259; *Garland v. Rives*, 4 Rand. 282, 308. See the titles LIENS, ante, p. 325; MECHANICS' LIENS; MORTGAGES AND DEEDS OF TRUST; VENDOR'S LIEN.

"Between two creditors engaged in a race of diligence, in seeking a prior right to satisfaction out of the debtor's property, there can be no equity. It is the tabula in naufragio; and he who obtains the prior legal right to satisfaction, must prevail, both at law and in equity." *Garland v. Rives*, 4 Rand. 282, 308.

**Conflicting Rights to Title.**—A purchaser of land for a valuable consideration, without notice of a prior equitable right, obtaining the legal title at the time of his purchase, or before he has notice of such prior equity, is, in a court of equity as well as at law, entitled to priority according to the maxim, "where equities are equal the law shall prevail." *Hoult v. Donahue*, 21 W. Va. 294.

As to action of equity in a case where the parties, claimants to public land, stand on equal equities, see the title PUBLIC LANDS.

#### **E. WHERE EQUITIES ARE EQUAL PRIORITY IN TIME SHALL PREVAIL.**

In equity, as between parties having equal equity, the one whose equity is prior in time will prevail. *Briscoe v. Ashby*, 24 Gratt. 454.

As applied to judgments lienors, see the title JUDGMENTS AND DECREES, vol. 8, p. 408.

As applied to assignments of judgments, see the title JUDGMENTS AND DECREES, vol. 8, p. 578.

**Assignments of Choses in Action.**—See the title ASSIGNMENTS, vol. 1, p. 785.

**Vendor's Lien.**—See the title VENDOR'S LIEN.

**Conflicting Equitable Titles.**—"As was decided in *Renick v. Ludington*, 16 W. Va. 378, those who have acquired, not legal titles, but mere equitable titles, by virtue of assignments, must be held subordinate to the lien of the attorney, because, as Judge Green explains, between equities, other things being equal, the first shall prevail. *Qui prior est in tempore, potior est in jure.*" *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447, 454.

"Neither of the parties, therefore, having obtained the legal title but the titles of the plaintiffs and defendants being purely equitable, and emanating from the same source, and each party being equally innocent and equally diligent, it seems to me that the elder equity should prevail, the maxim being *qui prior est in tempore, potior est in jure*; 'for precedency in time will, under many circumstances, give an advantage, or priority in right.' 1 Story's Eq. Jurs., § 64 d. It is true that where the equities are not equal, the junior equity may under certain circumstances prevail against an elder equity, and in that case the holder of the junior equity may have the preferable right to call for the legal estate as was the case in *Williamson v. Gordon*, 5 Munf. 257; *Coleman v. Cocke*, 6 Rand. 618; *Mutual Ass'n Soc. v. Stone*, 3 Leigh 218." *Camden v. Harris*, 15 W. Va. 554.

#### F. HE WHO HATH DONE INEQUITY SHALL NOT HAVE EQUITY.

It is a maxim in equity that he who hath done iniquity shall not have equity. That is, he shall not have the aid of a court of equity when he is

plaintiff. *Austin v. Winston*, 1 Hen. & M. 33; *Dabney v. Green*, 4 Hen. & M. 101; *Harris v. Harris*, 23 Gratt. 737, 769; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874, 877. This maxim is similar to the legal maxim *in pari delicto potior ut conditio defendantis*. For application and illustration, see post, "Legal Maxims," III.

As to loss of right to redeem mortgage, by reason of the maxim that "he who hath done iniquity shall not have equity," see the title MORTGAGES AND DEEDS OF TRUST.

#### G. EQUITY CONSIDERS THAT AS DONE WHICH OUGHT TO BE DONE.

"It is a maxim of universal application that 'equity regards and treats that as done, which, in good conscience, ought to be done.'" *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 9 S. E. 748.

"The principle upon which this doctrine proceeds is that a court of equity looks upon that as done which ought to be done. That court considers all agreements as performed which are made for a valuable consideration in favor of those entitled to insist upon the performance, so that neither party will suffer prejudice or derive any undue advantage from a noncompliance with the contract. A different rule would no doubt apply to the case of a bona fide purchaser for a valuable consideration acquiring title to the property before the execution of the mortgage and in ignorance of the arrangement. But with respect to creditors they stand on no higher ground than the debtor, and must take the estate as he holds it." *Summers v. Darne*, 31 Gratt. 791.

"This maxim is the source of a large part of that division of equity jurisprudence which concerns equitable property, and the doctrines and rules which create and define equitable estates or interests are in great measure derived from its operation. The true meaning

of this maxim is, that equity will treat the subject matter of a contract, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been, not as they might have been executed. 1 Pom. Eq. Jur., § 364, and note." *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 9 S. E. 748.

"Perhaps no better illustration of the universality of the maxim can be found than is afforded in the case of *Frederick v. Frederick*, 1 P. Wms. 710. In that case a person had contracted to become a citizen of London, but died before he had carried this agreement into effect by taking up his freedom. His widow thereupon brought a suit to procure his personal estate to be distributed in accordance with the customs of London, which applied to citizens only, and which prescribed a very different mode of distribution from that which prevailed under the statute in other parts of England. The court, invoking the maxim, held that the deceased should be regarded as though he were actually a citizen at the time of his death. *Ib.*, note 1. So, in the same note, the remark of Lord Chan. Westbury, in *Coventry v. Barclay*, 3 De. G. J. & S. 320-328, is cited: 'It is the rule of a court of equity to consider that as done which ought to be done; and if, therefore, I find that the accounts and valuation of July, 1860, at the making of which Mr. Bevan was not present, were afterwards accepted and agreed to by him, I shall hold that the account was in equity signed by him at the time when it was so accepted.'" *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 9 S. E. 748.

For application of this maxim, see the titles **CONVERSION AND RECONVERSION**, vol. 3, p. 498; **DEEDS**, vol. 4, pp. 414, 415, 419; **FRAUDS, STATUTE OF**, vol. 6, p. 530; **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS**;

## **RESCISSION, CANCELLATION AND REFORMATION; VENDOR AND PURCHASER.**

**Commencement of Lease.**—Equity, considering that as done which ought to have been done, will refer the commencement of the lease to the time when the promise to grant a lease for the two remaining lives was made. *Jones v. Roberts*, 6 Call 187, 199. See the title **LANDLORD AND TENANT**, ante, p. 112.

**As applied to quashing forthcoming bonds in equity**, see the title **FORTHCOMING AND DELIVERY BONDS**, vol. 6, p. 429.

## **H. EQUALITY IS EQUITY.**

Equality is equity. *Morris v. Morris*, 4 Gratt. 293, 331.

By consent decree certain uncollected assets were divided in kind according to a scheme in master's report. Later, certain debts not embraced in that scheme, were collected and distributed by the court, regard being had to losses under first distribution, so as to equalize the shares. Held, proper; equality is equity. *Foley v. Harrison*, 84 Va. 847, 6 S. E. 144.

"The doctrine of marshaling funds has been relied upon as sustaining the rule in bankruptcy. To this principle of equity Chancellor Kent, in *Murray v. Murray*, 5 John. Ch. R. 60, seems to refer the rule. The principle is just, for equality is equity; and the case of joint and several creditors, and joint and separate estates, may present a proper occasion for its application." *Morris v. Morris*, 4 Gratt. 293, 331. See the titles **BANKRUPTCY AND INSOLVENCY**, vol. 2, p. 232; **MARSHALING ASSETS AND SECURITIES**, ante, p. 593.

"In *Hawker v. Moore*, 40 W. Va. 49, 20 S. E. 848, Judge Holt, in speaking of the doctrine of subrogation, says: 'It is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one,

therefore, which is much encouraged and protected. 'Equality is equity,' is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced'; and citations, page 51, 40 W. Va. and page 849, 20 S. E." *Myers v. Miller*, 45 W. Va. 595, 31 S. E. 976. See the titles CONTRIBUTION AND EXONERATION, vol. 3, p. 461; SUBROGATION.

### I. EQUITY ACTS IN PERSONAM.

In *Muller v. Bayly*, 2 Gratt. 521, 532, it is said that equity acts upon the person and as a general rule has jurisdiction whenever the defendant resides or is found within the territorial limits.

### J. EQUITY LOOKS TO THE SUBSTANCE OF THINGS AND NOT TO MERE FORM.

As to application of maxim, where judgment is reversed in part, to the preservation or discharge, of the lien as to part unreversed, see the title JUDGMENTS AND DECREES, vol. 8, p. 445.

**Bill Filed as Cross Bill.**—"It is the disposition of the courts of equity to regard substance rather than mere form; hence in this case a bill filed as a cross bill, which could not be sustained as such, but having all the elements of an original bill, was held to be sufficient as an original bill, and treated as such." *Riggs v. Armstrong*, 23 W. Va. 760." *Skaggs v. Mann*, 46 W. Va. 209, 33 S. E. 110. See the title CROSS BILLS, vol. 4, p. 101.

### K. EQUITY FOLLOWS THE LAW.

Equity follows the law. *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61. See also, *Kellam v. Kellam*, 2 Pat. & H. 357.

"No principle is better established, or more uniformly acted on in courts of equity, than that in respect to the statute of limitations—equity follows the law—that is to say, if a legal de-

mand be asserted in equity, which at law is barred by statute, it is equally barred in a court of equity; and if not barred by statute at law, neither is it barred in equity. *Rowe v. Bentley*, 29 Gratt. 756, 759." *Coles v. Ballard*, 78 Va. 139. See the title LIMITATION OF ACTIONS, ante, p. 367. Equity follows the law in holding that time does not run against one who is in possession in the exercise or assertion of a right, and hence, a vendee who enters upon land and holds the land with the vendor's consent and acquiescence will not be barred by the mere lapse of time, nor until he is put in default by a notice to surrender the promise or pay the price. *Abbott v. L'Hommedieu*, 10 W. Va. 677. See the title VENDOR AND PURCHASER.

In *Garland v. Rives*, 4 Rand. 282, 15 Am. Dec. 756, it was held, that where equity and law have concurrent jurisdiction in cases of fraud that equity will follow the law. See the title FRAUD AND DECEIT, vol. 6, p. 480.

### L. EQUITY WILL SUFFER NO WRONG WITHOUT A REMEDY.

"Judge-made law, in such an unforeseen event, is better than no law. It is at least in accord with, and preservative of, that favorite maxim of the courts of common law, founded on fiction though it be, that 'there is no right without a remedy.' *Charleston, etc., Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 24 S. E. 1002." *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. 165, 168. And see *Fleshman v. McWhorter*, 54 W. Va. 161, 46 S. E. 116, for illustration of maxim. See ante, "Equity Aids the Vigilant, Not the Slothful," II, B.

## III. Legal Maxims.

**Actio Personalis Moritur Cum Persona.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 2, 34.

**As between persons equally innocent of wrongdoing, he whose neglect, default, or conduct was the occasion of loss must bear it; and equity will not relieve him of it, and place the burden on the other innocent party, guiltless of fraud.** *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576; *Lenhart v. Zents*, 50 W. Va. 86, 93, 40 S. E. 444. See the titles **BILLS, NOTES AND CHECKS**, vol. 2, p. 401, 459; **RESCISSION, CANCELLATION AND REFORMATION**.

**"He who, without intentional fraud, has enabled any person to do an act, which must be injurious to himself, or to another innocent party, shall himself suffer the injury rather than the innocent party, who has placed confidence in him. The maxim is founded in the soundest ethics, and is enforced to a large extent by courts of equity. Of course, the maxim fails in its application, when the party dealing with the agent has a full knowledge of the private instructions of the agent, or that he is exceeding his authority. Story on Agency, § 127." *Davis v. Gordon*, 87 Va. 559, 13 S. E. 35; *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755. See the titles **ESTOPPEL**, vol. 5, p. 229; **FRAUD AND DECEIT**, vol. 6, pp. 465, 470.**

**A Divorce Is Never Decreed for Adultery upon Confession of the Parties Alone.**—See the title **DIVORCE**, vol. 4, pp. 734, 744.

**A Testator Can Disinherit His Heir and Next of Kin Only by Leaving His Property to Others.**—See the title **DESCENT AND DISTRIBUTION**, vol. 4, p. 608.

**Causa Causantis Causa Est Causanti.**—"It is a maxim, we believe, of the schoolmen, *causa causantis causa est causanti*. And this makes the chain of causation by successive links endless. And, this, perhaps, in a certain

sense, is true. Perhaps, no event can occur which may be considered as insulated and independent. Every event is the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences more or less immediate or remote. The law, however, looks to a practical rule, adapted to the rights and duties of all persons in society in the common and ordinary concerns of actual and real life; and on account of the difficulty of unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause, the law has adopted the rule, before stated, of regarding the proximate and not the remote cause of the occurrence which is the subject of inquiry." *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, citing *Marble v. City of Worcester*, 4 Gray. 395. See the titles **ANIMALS**, vol. 1, p. 378; **DAMAGES**, vol. 4, p. 172; **NEGLIGENCE**.

**Causa Proxima, Non Remota Spectatur.**—In law the immediate, not the remote, cause of any event is regarded. See the titles **ANIMALS**, vol. 1, p. 378; **DAMAGES**, vol. 4, p. 172; **INSURANCE**, vol. 7, p. 794; **NEGLIGENCE**.

**Caveat Emptor.**—See the titles **JUDICIAL SALES AND RENTINGS**, vol. 8, p. 829; **SALES**; **SHERIFFS' SALES**; **VENDOR AND PURCHASER**.

The rule caveat emptor applies to legal, not to latent, and much less, to willfully concealed, equitable rights. *Southall v. Mayo*, 1 Wash. 336, 339.

"It must be borne in mind that the sale was not a judicial, but a sale in pais, by a trustee. To such a sale the maxim caveat emptor does not apply with the force and emphasis with which it applies to sales made under decrees of court, regularly reported and confirmed. But the application of that maxim is not appropriate even to judicial sales, reported and confirmed though they may be, where the pur-

chaser did not have full knowledge, or at least an opportunity for such knowledge, of all the facts connected with the title, or where he was led to make the purchase by mistake, fraud or surprise. *Watson v. Hoy*, 28 Gratt. 698; *Thomas v. Davidson*, 76 Va. 338; and *Boyce v. Strother*, 76 Va. 862." *Nutt v. Summers*, 78 Va. 164.

**Certum Est Quod Certum Redde Potest.**—See the title *WILLS*. See generally, the titles *COVENANTS*, vol. 3, p. 741; *DEEDS*, vol. 4, p. 364; *INTERPRETATION AND CONSTRUCTION*, vol. 7, p. 856.

**Contemporanea Expositio Est Fortissima in Lege.**—See the titles *CONSTITUTIONAL LAW*, vol. 3, pp. 149, 152; *DEEDS*, vol. 4, p. 425; *STARE DECISIS*; *STATUTES*.

**Damnum Absque Injuria.**—See the title *DAMAGES*, vol. 4, p. 165.

**Delegatus Non Potest Delegare.**—See the titles *AGENCY*, vol. 1, p. 257; *EXECUTORS AND ADMINISTRATORS*, vol. 5, p. 526; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*; *POWERS*; *TRUSTS AND TRUSTEES*. See also, the title *LICENSES*, ante, p. 305.

**De Minimis Non Curat Lex.**—See *Lovett v. Thomas*, 81 Va. 245, 258. See the titles *APPEAL AND ERROR*, vol. 1, p. 586; *PAYMENT*; *SPECIFIC PERFORMANCE*.

The accounts as kept by the agent and approved by the principal properly calculated, show such a small difference either way, as not to justify a new account, but to require the dismissal of the bill. And however it might be, it would be very small, and made up of small mistakes in the details of stating the accounts, not of sufficient importance to warrant the expense of retaking the accounts and to which we may safely apply the maxim, *de minimis non curat lex*. *Rixey v. Moorehead*, 79 Va. 575.

As restricting right to new trial on the ground of excessive damages, see the title *DAMAGES*, vol. 4, p. 202, 203.

**Ex Dolo Malo Non Oritur Actio—Ex Maleficio Non Oritur Contractus—Ex Turpi Causa Non Oritur Actio—Ex Pacto Illicito Non Oritur Actio.**—*Ex*

*dolo malo oritur actio* has been recognized as a maxim of law, wherever organized society has existed. Those who come into a court of justice for redress, must come with clean hands, and must disclose a transaction warranted by law, *ex maleficio non oritur contractus*. And this defense may be made by a defendant who is *pari delicto*. *Harris v. Harris*, 23 Gratt. 737, 766.

"In *Holeman v. Johnson*, Cowp. R. 341, 343, C. J. Mansfield said, 'the principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or a transgression of a positive law of this country, then the court says, he has no right to be assisted.'" *Harris v. Harris*, 23 Gratt. 737, 766.

"Although it is an indisputable proposition, as against an innocent party, that no man shall set up his own iniquity, as a defense, any more than as a cause of action; and that it is what C. J. Mansfield meant in *Montefiori v. Montefiori*, 1 W. Black. R. 363; yet, where a contract or deed is made for an illegal purpose, whatever may be stated in it, a defendant against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff; and a court of justice will not give its aid to enforce a contract springing from such a source." *Harris v. Harris*, 23 Gratt. 737, 766. See the titles *GAMBLING CONTRACTS*, vol. 6, p. 686, 689; *ILLEGAL CONTRACTS*, vol. 7, pp. 244, 245, 281. And see the list of general cross references to the title *ILLEGAL CONTRACTS*, vol. 7, p. 241.

**Expressum Facit Cessare Tacitum.**—"When the agreement contains any

express terms on the subject, evidence of the custom shall be excluded.' *Expressum facit cessare tacitum*. Clark v. Roystone, 13 Mess. & W. 752; Roberts v. Baker, 1 Crompt. & M., 808. Promises in law exist only in the absence of express promises. A party, therefore, can not be bound by an implied contract, when he has made an express contract as to the same subject matter. Chit. on Cont., 85; Selway v. Fogg, 5 Mess. & W., 83; Ferguson v. Carrington, 9 Barn. & C., 39." *Mutual Ins. Soc. v. Scottish Union, etc., Ins. Co.*, 84 Va. 116, 4 S. E. 178. See generally, the titles CONTRACTS, vol. 3, p. 307; IMPLIED CONTRACTS, vol. 7, p. 301; MARRIAGE, ante, p. 570; STATUTES.

**Expressio Unius Est Exclusio Alterius.**—See the titles SEPARATE ESTATE OF MARRIED WOMEN; STATUTES; TAXATION; TRUSTS AND TRUSTEES; RECORDS.

**False Demonstratio Non Nocet Cum De Corpore Constat.**—See the titles BOUNDARIES, vol. 2, p. 600; CONTRACTS, vol. 3, p. 403; DEEDS, vol. 4, pp. 422, 423; WILLS.

**Falsus in Uno Falsus in Omnibus.**—See the title WITNESSES.

**Fraud Must Be Proven and Is Never Presumed.**—See the titles FRAUD AND DECEIT, vol. 6, p. 502; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 659.

**General Expressions in Every Opinion Are to Be Taken in Connection with the Case in Which Those Expressions Are Used.**—See Griffin v. Woolford, 100 Va. 473, 41 S. E. 949. See the title STARE DECISIS for full treatment of obiter dicta.

**He Who Receives the Advantage Ought to Sustain the Burthen.**—See the titles SUBROGATION; TAXATION.

**Hereditas Jacens.**—The possession of a tenant, without a lease, is the possession of the landlord, and the tenant is a mere tenant at will, and if he dies, or leaves the premises, the landlord may enter as owner of the soil, and not

merely as occupant. See the title LANDLORD AND TENANT, ante, p. 112.

**Ignorantia Legis Neminem Excusat.**—See the titles CRIMINAL LAW, vol. 4, p. 19; FRAUD AND DECEIT, vol. 6, pp. 459, 463.

**In Pari Delicto Potior Est Conditiō Defendantis.**—Men of equal capacity must act freely to be subjects of this maxim. Smith v. Elliott, 1 Pat. & H. 307.

It is a maxim at law, that where the parties are equally culpable or criminal, the defendant must prevail. Austin v. Winston, 1 Hen. & M. 33; Owen v. Sharp, 12 Leigh 427, citing James v. Bird, 8 Leigh 510; Terrell v. Imboden, 10 Leigh 321; Harris v. Harris, 23 Gratt. 737, 769.

"It is on all hands admitted as a general, perhaps as an universal proposition, that in *pari delicto potior est conditio defendantis*; but in the application of this rule, some important distinctions have been solemnly and ably settled. It is said in them that the prohibitions enacted by positive law in respect of contracts are of two kinds: 1st. To prevent weak or necessitous men from being overreached, defrauded, or oppressed; and 2d. Those prohibitions which are founded on reasons of policy and public expedience." Wise v. Craig, 1 Hen. & M. 578, citing Austin v. Winston, 1 Hen. & M. 33.

"It is a general rule that '*in pari delicto potior est conditio defendantis*;' and this was the principle of the civil law. '*Porro autem, si et dantis et excipientis turpis causa sit, possessor potiore esse, et ideo repetitionem cessare.*' Dig. Lib. 12, tit. 5, (b), 8." Starke v. Littlepage, 4 Rand. 368, cited in Harris v. Harris, 23 Gratt. 737.

"This rule operates only in cases, where the refusal of the courts to aid either party, frustrates the object of the transaction, and takes away the temptation to engage in contracts contra bonos mores, or violating the pol-

icy of the laws. If it be necessary, in order to discountenance such transaction, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are in *pari delicto*." *Starke v. Littlepage*, 4 Rand. 368, 372, cited in *Harris v. Harris*, 23 Gratt. 737.

**Maxim Applied.**—See the titles COMPOUNDING OFFENSES, vol. 2, p. 37; FRAUD AND DECEIT, vol. 6, p. 492; ILLEGAL CONTRACTS, vol. 7, p. 281; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 622.

The maxim does not apply where one party acts under duress. See the title USURY.

**Interest Rei Publicæ Res Judicatas Non Rescindi.**—"In *Price v. Campbell*, 5 Call 115, it was held, that the law in such a case supposes everything contained in the record to have been decided on, and that a contrary doctrine would violate the wisely-established rule, that interest rei publicæ res judicatas non rescindi." *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744, 3 S. E. 433. See the titles FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 261; STARE DECISIS.

**Ita Lex Scripta—Stare Decisis.**—"When the law is plainly or intelligibly written, or expounded and settled by competent judicial authority, and not repugnant to the fundamental law, I always yield a willing obedience to the maxims, *ita lex scripta*, and *stare decisis*, without the observance of which the law is divested of one of its most important attributes, becomes fluctuating and capricious, and instead of being a steady light to guide, or shield or protect, becomes an ignis fatuus to mislead, or a snare to entrap the citizen." *Perkins v. Clements*, 1 Pat. & H. 141, 153. See the titles STATUTES; STARE DECISIS.

As to estoppel to deny constitutionality of statute, see the titles CON-

STITUTIONAL LAW, vol. 3, p. 186; ESTOPPEL, vol. 5, p. 289.

**Lex Non Cogit Ad Impossibilia.**—

In *Smith v. Lloyd*, 16 Gratt. 295, 360, the maxim is illustrated thus: "In *Read v. Brookman*, 3 T. R. 151, it was held, by the court of King's Bench, that it was a sufficient excuse for not making profert of a deed that it was 'lost and destroyed by time and accident.' This is a leading case on the subject, and placed it on the true ground, which is that the law compels no one to do an impossibility. Indeed Lord Coke had placed it on the same ground in assigning as a reason why a deed remaining in one court may be pleaded in another, without showing forth, *quia lex non cogit ad impossibilia*. Wherever, therefore, a party can not produce a deed, at least unless his inability proceed from his own willful act, he is not bound to give oyer of it. We regard this as a true test, though we do not mean to say it is the only one." See the title PROFERT AND OYER.

**Mala Grammatica Non Vitiat Chartam.**—See the titles CONTRACTS, vol. 3, p. 407; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 864.

**Modus et Conventio Vincunt Legem.**—See the titles INSURANCE, vol. 7, p. 787; PAYMENT. See also, the title DESCENT AND DISTRIBUTION, vol. 4, p. 608.

**Nemo Allegans Suam Turpitudinem.**—See the titles ESTOPPEL, vol. 5, p. 229; FRAUD AND DECEIT, vol. 6, p. 448; ILLEGAL CONTRACTS, vol. 7, p. 293.

A plea setting up defendant's own fraud as grounds for relief is not a good plea at common law, because it is emphatically of the class of cases in which this maxim applies with full force. *Harris v. Harris*, 23 Gratt 737.

*Nemo allegans suam turpitudinem audiendus est*, if it be law, does not apply, where it be the creditors of the parties who assail the deed, and call



on one of them to prove the fraud. *Brown v. Molineaux*, 21 Gratt. 539. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 664.

**Nemo Bis Puni'tur Pro Eodem Delicto—Nemo Debet Bis Vexari Si Constat Quod Sit Pro Uno et Eadem Causa.**—See the titles AUTREFOIS, ACQUIT AND CONVICT; vol. 2, p. 183. See also, the title FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 264.

**No Man Can Be Judge of His Own Cause.**—That maxim has no application where a clerk of the court confesses and enters his own judgment, see the title CONFESSION OF JUDGMENTS, vol. 3, p. 68.

**Nullum Tempus Occurrit Regi.**—See the titles ADVERSE POSSESSION, vol. 1, p. 220; LIMITATION OF ACTIONS, ante, p. 367.

**Omnia Præsumuntur Rite Esse Acta.**—See the titles APPEAL AND ERROR, vol. 1, p. 609; JURISDICTION, vol. 8, p. 842.

**Once a Highway Always a Highway.**—See the title STREETS AND HIGHWAYS.

**Once a Mortgage Always a Mortgage.**—See the title MORTGAGES AND DEEDS OF TRUST.

**Pacta Quæ Contra Leges et Constitutiones Vel Contra Bonos Mores Sunt Nullam Vim Habere in Dubitati Juris Est.**—For application and limitation of this maxim, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 622. See also, the title ILLEGAL CONTRACTS, vol. 7, p. 279, et seq.

**Pendenti Lite Nihil Innovetur.**—See the title LIS PENDENS, ante, p. 453.

**Plaintiff Must Recover on Strength of His Own Title and Not on the Weakness of the Defendants.**—See the title EJECTMENT, vol. 4, p. 876.

**Potior Tempore, Potior Jure.**—See the titles JUDGMENTS AND DE-

CREES, vol. 8, p. 408; MECHANICS' LIENS; MORTGAGES AND DEEDS OF TRUST; VENDOR'S LIEN.

**Qui Facit Per Alium Facit Per Se.**—See the titles AGENCY, vol. 1, p. 272, et seq; FRAUD AND DECEIT, vol. 6, p. 470; MASTER AND SERVANT, ante, p. 657; STATE.

"The insurance business of the world is done through agents almost exclusively, and the maxim qui facit per alium facit per se applies with special force to their acts." *Mutual Fire Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209. See the title INSURANCE, vol. 7, p. 761.

**Qui Non Prohibet Quod Prohibere Potest Assentire Videtur.**—See the title ESTOPPEL, vol. 5, p. 229.

**Qui Tacet Consentire Videtur.**—See the title ESTOPPEL, vol. 5, p. 229.

**Qui Sentit Commodum Sentire Debet et Onus.**—See the title ASSIGNMENTS, vol. 1, p. 770, et seq.

**Quod Non Apparet Non Est.**—What does not appear is as though it did not exist is a maxim in the administration of justice. *Shickel v. Berryville Land, etc., Co.*, 99 Va. 88, 96. See the titles APPEAL AND ERROR, vol. 1, pp. 547, 581; EXCEPTIONS, BILL OF, vol. 5, p. 361. See also, the title RECORDS.

**Seisina Facit Stipitem.**—See the title DESCENT AND DISTRIBUTION, vol. 4, p. 601.

**The Intention of the Lawmaker Constitutes the Law.**—See the titles CONSTITUTIONAL LAW, vol. 3, p. 149; STATUTES.

**The Jury Are the Judges of the Law and Fact.**—It was held, that this maxim has no application. In this country the court is the judge of the law, and the jury is the judge of fact. *Newport News, etc., R. Co. v. Bradford*, 100 Va. 231, 239, 40 S. E. 900, citing *Delaplane v. Crenshaw*, 15 Gratt. 457. See the titles CRIMINAL LAW, vol. 4, p. 71; EVIDENCE, vol. 5, p. 295.

**It is a maxim of the law that there**

should be an end to litigation, and jurors should always agree if possible. *Buntin v. Danville*, 93 Va. 200, 212. See also, the title **FORMER ADJUDICATA OR RES ADJUDICATA**, vol. 6, p. 266.

**Utile Per Inutile Non Vitiatur.**—"In *Newman v. Newman*, 4 Malue & S. 70, Lord Ellenborough said, 'Admitting the condition of this bond to be ill as to one part, it seems that it may be well as to other parts, for you may separate at the common law the bad from the good.' The old maxim, 'utile per inutile non vitiatur,' solves the question. It was unanimously agreed in *Pigot's Case*, 11 Cooke 27 that in case certain conditions of a bond are against law, some good and lawful, 'the conditions which are against law are void, the others stand good.' 'Though the condition of a statutory bond contains more than is required, it will not invalidate the bond, if the good can be eliminated from the bad.' 4 Myers, Fed. Dec., § 234; *Farrar v. U. S.*, 5 Pet. 373." *State v. McGuire*, 46 W. Va. 328, 23 S. E. 313. See the titles **PLEADING; SHERIFFS AND CONSTABLES**.

As to irregularity in summoning jury by using the words "Who reside remote," etc., in tales, see the title **JURY**, ante, p. 30.

**Ut Res Magis Valeat Quam Pereat.**—See the titles **COVENANTS**, vol. 3, p. 747; **DEEDS**, vol. 4, p. 421; **INTERPRETATION AND CONSTRUCTION**, vol. 7, p. 859; **STATUTES; WILLS**.

**Res Inter Alios Acta.**—See the titles **EVIDENCE**, vol. 5, p. 302; **RES GESTÆ**.

**Res Ipsa Loquitur.**—See the titles **CARRIERS**, vol. 2, p. 671, 704; **MASTER AND SERVANT**, ante, p. 657; **NEGLIGENCE**.

**Respondeat Surprior.**—See the titles **AGENCY**, vol. 1, p. 272; **MASTER AND SERVANT**, ante, p. 657.

**Salus Populi Suprema Est Lex.**—See the titles **CONSTITUTIONAL LAW**, vol. 4, p. 226; **NEGLIGENCE; NUISANCES**.

**Sic Utere tuo ut Alienum Non Lædas.**—"So use your own property and rights as not to injure those of another, or those of others collectively constituting the state, is a rule of law of universal application. The legislative power to enforce this maxim is called the 'police power.'" *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. 1000. See the titles **EXPLOSIONS AND EXPLOSIVES**, vol. 5, p. 800; **MARSHALING ASSETS AND SECURITIES**, ante, p. 593; **NEGLIGENCE; NUISANCES**. See also, the title **ANIMALS**, vol. 1, p. 383.

**Volenti Non Fit Injuria.**—This maxim is quoted in *Starke v. Littlepage*, 4 Rand. 368, 378. It is frequently misapplied, as is shown in the above case. See the titles **DAMAGES**, vol. 4, p. 162; **ESTOPPEL**, vol. 5, p. 229; **NEGLIGENCE; USURY**.

**Volenti Stat Pro Ratione.**—See the title **WILLS**.

**MAY.**—See the titles **SHALL; STATUTES**.

As to construction of the word **may** in statutes regulating the license and sale of intoxicating liquors, see the title **INTOXICATING LIQUORS**, vol. 8, p. 1. As to construction of word **may** in wills, see the title **WILLS**.

**May Construed as Must or Shall.**—The court in *Pearson v. Supervisors*, 91 Va. 322, 333, 21 S. E. 483, says: "Without doubt the primary meaning of 'may' is permissive or directory, while the primary meaning of 'shall' is mandatory or imperative; yet courts in order to accomplish what to them appears to be the leading purpose of the legislature, have never hesitated in a proper case to hold 'may' to be mandatory and 'shall' to be merely directory. These rules

of construction are too elementary and well established to need any citation of authority in support of them."

Where to give "**may**" a permissive sense would render an act a dead letter, it will be construed as imperative. *Hyers v. Wood*, 2 Call 574, 591.

The word "**may**" when used in a statute means "must" or "shall" only in cases where the public rights are concerned, or where the public or third persons have a claim de jure, that the power shall be exercised. *Bolling v. Mayor*, 3 Rand. 563, 580; *Bean v. Simmons*, 9 Gratt. 389, 391; *Turner v. Smith*, 18 Gratt. 830, 838; *Pearson v. Supervisors*, 91 Va. 322, 334, 21 S. E. 483; *Elliott v. Hutchinson*, 8 W. Va. 452, 459; *Exchange Bank v. Lewis County*, 28 W. Va. 273, 292.

**Illustrations.**—Thus, an act saying that commissioners "shall be authorized" to bid off lands, etc., was construed to be mandatory, and not merely permissive, as it was a power conferred for the benefit of the public. *Turner v. Smith*, 18 Gratt. 830, 838.

In the act of the 7th of March, 1826, providing that at any time, before final decree, a defendant "**may**" be allowed to file his answer, the term "**may**" is imperative and means "must" or "shall." *Bean v. Simmons*, 9 Gratt. 389, 391; *Bowles v. Woodson*, 6 Gratt. 78, 81; *Preston v. Heiskell*, 32 Gratt. 48; *Radford v. Fowlkes*, 85 Va. 820, 828, 8 S. E. 817; *Welsh v. Solenberger*, 85 Va. 441, 444, 8 S. E. 91; *Buford v. North Roanoke, etc., Co.*, 90 Va. 418, 433, 18 S. E. 914.

In § 66, ch. 50, W. Va. Code, 1887, which provides, "Saving the right of a defendant, who has filed a set-off or counterclaim, to proceed to trial though the plaintiff fail to appear or dismiss his action, judgment may be rendered against the plaintiff, dismissing his action, with cost, but without prejudice to a new action for the same cause, etc.," the word "**may**" is to be read as if it were "shall;" in other words, the justice must enter an order of dismissal if the defendant demand it. *Buena Vista, etc., Co. v. Parrish*, 34 W. Va. 652, 12 S. E. 817, 818.

The word "**may**" in the act of February 26th, 1896 (acts, 1895-96, p. 453), which provides that whenever it shall appear in any action at law or suit in equity, by the pleadings or otherwise, that there has been a misjoinder of parties, the court **may** order the action or suit to abate as to any party improperly joined, and to proceed by or against the others as if such misjoinder had not been made, means "shall." *Lee v. Mutual, etc., Ass'n*, 97 Va. 160, 162, 33 S. E. 556.

The word "**may**" as used in the fifteenth section of the act of March 6th, 1894, relating to the duties of special constables, is mandatory and not merely permissive and directory. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 483.

In *Johnson v. Com.*, 2 Gratt. 581, 586, it is said: "The expression 'who **may** be witnesses,' I regard as tantamount to 'who shall be witnesses,' that is, who shall be competent witnesses."

**May Not Construed as Must or Shall.**—In construing acts of assembly, the words used should receive their ordinary meaning, unless it can be seen that the legislature intended that they should receive a broader or narrower signification. The word "**may**" should not be construed to mean "must," unless the clear policy and intention of the legislature demands it. *Harrison v. Wissler*, 98 Va. 597, 36 S. E. 982.

**Illustrations.**—In construing "an act for reforming the method of proceeding in writs of right," it was held, that the words "**may** plead," etc., does not mean "shall." *Bolling v. Mayor*, 3 Rand. 563, 579.

The statute, 1 Rev. Code, ch. 75, § 13, that "Juries de medietate linguæ **may** be directed by the court respectively," is not imperative that the courts shall direct such a jury in cases, even of a criminal nature, in which aliens are parties, but confers a discretionary power on the courts to direct such jury, if to them it appear proper. *Richards v. Com.*, 11 Leigh 690; *Brown v. Com.*, 11 Leigh 711.

Where the language of a statute is that suits on insurance policies **may** be brought in the county where the property is situated, it was held, that within the limitations of the statute the word "**may**" must be construed to be permissive, and not imperative. *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 23 S. E. 552.

Section 2 of chapter 10, Code of West Virginia, provides that suits on official bonds **may** be prosecuted in the name of the state. This is not mandatory, in suits in equity, but optional. *Brooks v. Miller*, 29 W. Va. 499, 2 S. E. 219.

In *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 648, 652, it was held, that the words "all railroads that are now constructing their works, **may** acquire title to lands necessary for that purpose under the provisions of this act," in § 37, ch. 88, act, 1872-73, make it optional with railroads whether they will acquire, or not, title to the land. But if they chose to acquire the title, they could do so only in the manner prescribed by § 18, ch. 88.

The provision in § 3312 of the Code, that the court making an order of dismissal under the five years' rule "**may** direct it to be published in a newspaper," is not mandatory. The public has no interest in such publication, and no party has a claim, as of right, to such a publication. *Echols v. Brennan*, 99 Va. 150, 37 S. E. 786.

The word "**may**" in clause seven of § 3214 of the Virginia Code is permissive only; and, although a circuit judge **may** sue in any county or corporation in an adjoining circuit, he is not precluded from suing in the circuit court of any county or corporation in his own circuit in which any of the defendants reside. *Harrison v. Wissler*, 98 Va. 597, 36 S. E. 982.

The language of § 3158 of the Virginia Code of 1887, that "any court, in a case where a jury is required, **may** allow a special jury, was held, in *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 132, 12 S. E. 348, 349, to leave the matter to the discretion of the court—a discretion not arbitrary, but a sound judicial discretion, to be governed by settled principles, and reviewable by the appellate court.

In construing an act concerning the powers of a court to remove a sheriff as administrator, and appoint another, it was held, that the word "**may** revoke—and allow any other persons to qualify as executor or administrator," did not mean "must" but vested a sound discretion in the court. *Hutcheson v. Priddy*, 12 Gratt. 85. But see dissenting opinion of Moncure, J.

In *Verlander v. Harvey*, 36 W. Va. 374, 15 S. E. 54, 56, it is said: "Upon a careful examination of our own act, and the act of Virginia, it is to my mind quite apparent that our legislature did not intend, by changing the phraseology in this respect, to change the principle of the Virginia act, which declared that the alienee might seek relief through a court of equity from a recovery of dower in kind. It is quite apparent that the alienee need not resort to a court of equity under that act, unless he elects so to do, and in our act the substituted expression, '**may** pay the widow,' was intended to leave the matter optional with the alienee, just as it was before."

**MAY BE.**—In *Norris v. Crummey*, 2 Rand. 323, 339, it is said: "The 34th section of the act of 1819, provides that, 'when any deputy sheriff now in office, or who may hereafter come into office, hath been, or shall be, found in arrears for any money, tobacco, or other thing received, or which ought to be received, by such deputy, by virtue of his office, and for which the principal, etc., is or **may be chargeable**, and shall not immediately pay or deliver the same to the person, etc., entitled thereto, the sheriff may obtain such judgment, on motion, against the deputy, and his securities, as the principal, etc., might, by motion, be liable to, on account of such arrears, etc., and have execution for the same; unless the person entitled had already recovered against the deputy, or might thereafter, and before the motion of the high sheriff, recover a judgment against the deputy.' I have not used the precise words, but have stated the substance of the statute. For, the words **may be** do not refer to the possibility or right of the party to recover judgment on motion, against the deputy, before the motion of the high sheriff, but to an actual judgment thereafter obtained, before the motion of the high sheriff."

## **MAYHEM.**

### **I. Nature and Elements of Offense, 746.**

- A. In General, 746.
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### **CROSS REFERENCES.**

See the titles ASSAULT AND BATTERY, vol. 1, p. 729; COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1; CRIMINAL LAW, vol. 4, p. 1; HOMICIDE, vol. 7, p. 105; INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 371; SENTENCE AND PUNISHMENT; VERDICT.

### **I. Nature and Elements of Offense.**

#### **A. IN GENERAL.**

**Code Provision.**—The Codes of Virginia and West Virginia are practically the same as to what constitutes the crime of mayhem. Section 3671 of the Virginia Code, reads as follows: "If any person maliciously shoot, stab, cut, or wound any person, or by any

means cause him bodily injury, with intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be punished by confinement in the penitentiary not less than one nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, in the discretion of the jury, be confined in the penitentiary not less than one nor more

than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars." See also, § 9, ch. 144, W. Va. Code.

**The act of 1803** provided that "who-soever shall willfully, maliciously and of purpose stab, or shoot another," with intent, etc., such offender shall be sentenced to a confinement in the penitentiary, etc. The same language is used in the act of 1819. *Com. v. Carver*, 5 Rand. 660; *Com. v. Chapple*, 1 Va. Cas. 184.

**Stabbing of Slave.**—An indictment for the malicious stabbing of a slave could be supported under the act of January 28th, 1803, which gave three-fourths of the fine to the use of the party aggrieved, although the slave could not take the fine. *Com. v. Chapple*, 1 Va. Cas. 184. See also, the title SLAVES.

#### B. DEGREE OF CRIME.

Whether a prisoner on trial is guilty of malicious shooting with intent to kill, depends upon the question, whether if he had killed the person at whom he shot, instead of only wounding him, with intent to kill him, the offense would have been murder. *Read v. Com.*, 22 Gratt. 924. See *Com. v. Chapple*, 1 Va. Cas. 184; *Price v. Com.*, 77 Va. 393, 396.

**Not a Felony at Common Law.**—If a prisoner be charged with feloniously breaking the jaw bone of another, contra formam statui, the indictment can not be sustained as one for mayhem at common law, because a mayhem at common law, with one exception only, is not a felony. *Com. v. Lester*, 2 Va. Cas. 198.

**Felony under West Virginia Code.**—Section 9, ch. 144, of the Code of West Virginia, provides for two offenses, both felonies, which must be so charged in the indictment and tried as such on the trial: (1) Malicious shooting, etc., with intent to maim, disfigure, disable, or kill, which, having the

essential element of malice, corresponds to murder; (2) unlawful, but not malicious, shooting, etc., with the intent aforesaid, but wanting the element of malice corresponding to manslaughter. The discretion given the court to ascertain and fix in the second class a less degree of punishment does not reduce the grade of the crime. *State v. Harr*, 38 W. Va. 58, 17 S. E. 794.

#### C. ON WHOM OFFENSE MAY BE COMMITTED.

**A negro slave** is a person on whom a free person may commit the offense of malicious or unlawful shooting, stabbing, etc., under the act against those offenses, passed 9th of February, 1819. *Com. v. Carver*, 5 Rand. 660.

#### D. INTENT.

**Presumption as to Intent.**—A man is taken to intend that which he does, or which is the natural and necessary consequence of his own act. Therefore, if the prisoner wounded the prosecutor, by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of the law is that he intended the consequences that resulted from said use of said deadly instrument. *Murphy v. Com.*, 23 Gratt. 960. See also, *Price v. Com.*, 77 Va. 393.

**Instruction as to Intent.**—On the trial of an indictment for maliciously or unlawfully shooting a person "with intent to disfigure, disable and kill" him, it is error to instruct the jury that if they believe the shooting was done "with intent to maim, disfigure, disable or kill him, or to cause him bodily injury," they must find a verdict of guilty. It is not error for the court to instruct the jury on such an indictment, that under § 22, ch. 159, of the Code, they can acquit of the felony and find the prisoner guilty of the attempt to commit such felony. *State v. Meadows*, 18 W. Va. 658. See also, *State v. Banks*, 55 W. Va. 388, 47 S. E. 742.

So it is error to instruct the jury that

if they have any reasonable doubt, whether the prisoner under the circumstances was excusable for the use of the deadly weapon, they must acquit him. *State v. Jones*, 20 W. Va. 764.

But it is not error upon the trial of an indictment for shooting with intent to kill to charge the jury in general terms, "that if all the evidence and circumstances of the case warrant the finding, they may find the prisoner guilty of the offense charged in the indictment; or if all the facts and circumstances of the case warrant such finding, the jury may find the prisoner guilty of a part of the offense charged in said indictment whether such part be a felony or misdemeanor." If the prisoner had desired the court to give the jury more specific instructions as to what they might find, if warranted by the evidence, he should have asked the court to so instruct the jury. *State v. Donohoo*, 22 W. Va. 761.

Upon the trial of indictment for unlawful and malicious shooting with intent to maim, disfigure, disable and kill, it is error to instruct the jury that if they believe there was a quarrel between the accused and F and that both were in fault, and that a combat as the result of the quarrel took place and the accused shot and wounded F "In order to reduce the offense from malicious to unlawful shooting, two things must appear from the evidence and circumstances of the case; first, that before the shot was fired and the wound inflicted, the accused declined further combat and retreated as far as he could with safety; and, secondly, that he necessarily shot F in order to preserve his own life, or to protect himself from great bodily harm." *State v. Banks*, 55 W. Va. 388, 47 S. E. 742.

**Assault with Intent to Kill or Injure a Party Other Than the One in Fact Injured.**—If A is indicted for shooting C with intent to maim, disfigure, disable and kill him, and the proof is, that

he shot at B and missed him and accidentally hit C, he can be convicted on such indictment for shooting C with intent to maim, disfigure, disable and kill him. But being indicted for an attempt to shoot C with intent to maim, disfigure, disable and kill him, and C is not in fact shot, and the proof is, that the attempt was to shoot B and not C, he can not be convicted of an attempt to shoot C. *State v. Meadows*, 18 W. Va. 658.

**Finding as to Intent.**—Where on an indictment the verdict finds the prisoner guilty of malicious assault, without saying with what intent the assault was committed, the verdict should be set aside on motion, as irresponsible to the issue. *Jones v. Com.*, 87 Va. 63, 12 S. E. 226.

J was indicted for the malicious stabbing, etc., of W, with intent to maim, etc. The jury found J "guilty of unlawful cutting, as charged in the within indictment," etc. The language, "as charged in the within indictment," has reference both to the cutting and the intent, and is a sufficient finding of the intent with which the unlawful act was done, to meet the requirement of the statute. *Jones v. Com.*, 31 Gratt. 830.

**Statement of Prisoner.**—While M. and B. were fighting, and while B. was on top of M., the latter's son struck B. with an iron weight, and ran, and while running he was shot by defendant, who remarked, that he shot at the son of a b—h to kill him. It was held, that a verdict of guilty of assault with intent to kill was justified. *Miller v. Com.*, 2 Va. Dec. 47.

## II. Prosecutions.

### A. INDICTMENT.

**Should Charge Conjunctively.**—Although the statute against unlawful shooting, etc., affixes a penalty when the act is done with intent to maim, disfigure, disable or kill (in the disjunctive), yet the indictment should charge the intents conjunctively. *Angel v. Com.*, 2 Va. Cas. 231.

**Distinction between Words.**—The words "malicious stabbing" used in the record of the finding of the indictment much more nearly indicate the character of the offense charged in the indictment than the word "felony" would, so that the court did not err in refusing to quash the indictment for the supposed defect in the record. *Crookham v. State*, 5 W. Va. 510, 512.

**Fracturing Skull.**—In an indictment in the district court of M. county, a count for beating, etc., A. B. with a hickory club, etc., thereby maiming and disabling him by fracturing his skull, etc., it was held, not to be a good count for mayhem, but good as a count for assault and battery of an aggrieved nature. *Com. v. Somerville*, 1 Va. Cas. 164.

**Breaking of Jaw Bone.**—An indictment which charges that a prisoner feloniously did break the jaw bone of another with intent to maim, disfigure, disable or kill, and concludes against the form of the statute, is yet not a good indictment under the statute, because it does not aver that he did disable any limb or member, but only that he did break a bone with intent to disable, etc. *Com. v. Lester*, 2 Va. Cas. 198.

**Mixed Charge of Felony and Misdemeanor.**—If an indictment charge that one feloniously did strike, cut, and stab another, with intent to kill, etc., although the words strike and cut are not in the statute, yet the indictment ought not to be quashed "because of the commixture of felony and misdemeanor" contained therein. Those words may be rejected as surplusage. *Derieux v. Com.*, 2 Va. Cas. 379.

**Sufficiency.**—An indictment charging that prisoner, "at the county and within the jurisdiction of the court, feloniously and maliciously did stab one P. T. with intention to maim, etc., and kill him," will not be quashed, upon objection that it does not allege any assault, striking or wounding, nor that P. T. was within the county or jurisdiction,

nor that the intent was felonious or malicious. *Com. v. Woodson*, 9 Leigh 669.

The record of the finding of an indictment under the statute for maliciously shooting, stabbing, cutting, etc., is as follows: "An indictment against Charles L. Crookham, malicious stabbing, a true bill," and is held to be sufficient. *Crookham v. State*, 5 W. Va. 510.

Indictment charging that accused made an assault with a stone, and did feloniously, maliciously and unlawfully beat, wound, ill treat and cause bodily injury, etc., sufficiently conforms to Va. Code, § 3671. *Jones v. Com.*, 87 Va. 63, 12 S. E. 226.

**An indictment for malicious assault with intent to kill** does not involve a charge of more than one offense, because it alleges a felonious assault by defendant, this being an ingredient to the other crime charged. *Miller v. Com.*, 2 Va. Dec. 47.

**Should Allege Act.**—An indictment for an attempt to commit an offense ought to allege some act done by the defendant, of such a nature as to constitute an attempt to commit the offense mentioned in the indictment. *Com. v. Clark*, 6 Gratt. 675.

**Done Feloniously.**—An indictment for malicious shooting ought to charge that it was done feloniously, and this under the act of 1817, which does not in terms declare it a felony, but makes it punishable with penitentiary confinement. *Trimble v. Com.*, 2 Va. Cas. 143.

**Statement as to Weapon.**—In an indictment for malicious assault with intent to kill it is unnecessary to state the weapon with which the assault was made. *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452, citing *Canada v. Com.*, 22 Gratt. 899.

**Pistol or Revolver.**—Upon an indictment under the act concerning malicious and unlawful shooting, etc. (Code, 1869, ch. 144, § 9), which charges, that the prisoner, "with a certain pistol or revolver, etc., feloniously and with his



malice aforethought, did shoot one Lewis Dempsey, Jr., with intent," etc., the jury found the prisoner "guilty of unlawful shooting, with intent," etc., without saying whom he shot, and fixed the term of his imprisonment in the penitentiary at one year. It was held, the court did not err in overruling the motion to quash, and in overruling the demurrer to the indictment, because, although it alleged the weapon in the alternative, as a "pistol or revolver," the expression "or revolver" was mere surplusage, and could be rejected, and therefore need not be proved. *State v. Newsom*, 13 W. Va. 859.

### B. PRELIMINARY EXAMINATION.

See also, the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 9.

Upon an indictment being found against the prisoner for maiming, a capias, returnable immediately, was issued, upon which the prisoner was brought into court (September, 1800), and pleaded not guilty. Seven days after, upon a continuance to that day, at the same term of the court, the prisoner was allowed to withdraw the plea, and thereupon pleaded a right to a preliminary inquiry by a court of examination. It was held, the new plea must be overruled, and the court must proceed upon the indictment. *Com. v. Blakeley*, 1 Va. Cas. 129.

### C. EVIDENCE.

**Burden of Proof.**—If upon a trial for shooting with intent to kill, the use of a deadly weapon is proved, and the prisoner relies upon self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner, and to avail him he must prove such defense by a preponderance of the evidence. He may show it by his own evidence—the evidence adduced by the prosecution, the circumstances arising out of the case, or by all of these modes. *State v. Jones*, 20 W. Va. 764.

**Evidence of Motive.**—On the trial of W. for procuring certain persons to cut, shoot, stab, wound, etc., with intent, etc., one S., it is held not to be error in the court below to admit as evidence a statement that on the evening of the day the offense was committed, W. and S. had an altercation, and W. struck at S. with a knife, whereupon S. threw a stone at W., to show the existence of a motive likely to instigate the defendant to the commission of the offense charged. *Watts v. State*, 5 W. Va. 532.

**Evidence of Another Offense.**—On an indictment for procuring persons to shoot, cut, stab, wound, etc., with intent to maim, etc., a certain other person, it is error to admit testimony of a rape committed by such persons after they had broken into a dwelling, where such other person was lodging; because the rape was a distinct, substantive offense from that charged in the indictment, and had no connection whatever with the offense charged, and because it was a total and substantial departure from that instructed, and the defendant could not be held responsible as accessory thereto. *Watts v. State*, 5 W. Va. 532.

**Question as to Intent.**—A person is indicted for shooting another with intent to maim, disfigure, disable and kill him, and under § 1, ch. 29, acts, 1881, takes the stand as a witness in her own behalf. It is competent to ask her, with what intent she shot at the person she tried to shoot. *State v. Meadows*, 18 W. Va. 658.

**Irrelevant Evidence.**—On the trial of an employee of a water company for malicious assault upon a consumer, while cutting off his water for failure to pay his water tax, it is improper to allow the consumer to testify that the employee who was directed to collect the tax was indebted to him in a larger amount than the tax due by the consumer. Such evidence is irrelevant. *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452.

**Confidential Communication.**—On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made was asked if he did not tell his wife that the prisoner acted only in his own defense. The answer to the question may tend to criminate himself, and the testimony is inadmissible. It required him to state a communication supposed to have been made by him to his wife; which, if made, was a confidential communication, and which he was not bound to disclose. *Murphy v. Com.*, 23 Gratt. 960.

## D. DEFENSES.

If a person be indicted for shooting S. W. and acquitted thereof, and then indicted for shooting J. W., her plea of autrefois acquit will not be supported, although the same act of shooting is charged in each indictment; for, the jury who tried the first indictment might have acquitted the prisoner on several grounds, which would not affect the second trial, as that the shot did not strike and wound S. W. or that she did not shoot S. W. with intent to maim, disfigure, disable or kill the said S. W. *Vaughan v. Com.*, 2 Va. Cas. 273. See also, the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, pp. 188, 190, 194.

**Necessity of Party Assailed Retreating.**—In cases of assault, not made with intent to kill or do great bodily harm, or when the person assaulted is not in his dwelling house, he can not justifiably kill his assailant without first having retreated "to the wall." *State v. Clark*, 51 W. Va. 457, 4 S. E. 204. See also, *Jackson v. Com.*, 96 Va. 107, 109, 30 S. E. 452.

Where an attack is made with murderous intent and with a deadly weapon, there being a sufficient overt act, the person attacked being himself without fault, is under no duty to fly or retreat; he may stand his ground and if need be kill his adversary. *State v. Clark*, 51 W. Va. 457, 4 S. E. 204.

See also, *State v. Banks*, 55 W. Va. 388, 47 S. E. 742.

**Right of Self-Defense.**—As to the right of a person assailed to defend himself, see the titles ASSAULT AND BATTERY, vol. 1, p. 744; HOMICIDE, vol. 7, p. 133.

## E. QUESTION FOR JURY.

**Right to Go Armed.**—One who has been threatened with such an attack and has reasonable ground to believe it will be made, may arm himself for defense, and in such case no inference of malice can be drawn from the fact of preparation. But it is for the jury to determine, from all the evidence in the case, whether there was reasonable ground for such belief, and the purpose for which the deadly weapon was procured. *State v. Clark*, 51 W. Va. 457, 4 S. E. 204.

## F. VERDICT.

See generally, the title VERDICT.

**Sufficiency.**—On an indictment for maliciously shooting with intent to kill, etc., one S., the jury return their verdict: "We, the jury, find the prisoner guilty of unlawful shooting with intent to kill, as charged in the indictment, and fix the term of imprisonment at three years in the penitentiary." The verdict is to be read in connection with the indictment, and therefore sufficiently indicates the person shot. *Price v. Com.*, 77 Va. 393.

A prisoner was tried upon an indictment containing two counts, the first charged that he unlawfully, feloniously, willfully, voluntarily, maliciously, etc., stabbed a person with intent to maim, disfigure and kill said person. Second count charged that the person unlawfully, feloniously, voluntarily and with purpose stabbed the said person with intent to maim, disable, disfigure and kill said person. The jury returned a verdict finding "the person not guilty under the first count of the indictment, but guilty of unlawful stabbing." It was held, the verdict is insufficient and will not authorize a judgment, but the

court should direct a new trial. *Marshall v. Com.*, 5 Gratt. 663.

**Name of Person Shot.**—Upon an indictment under the act concerning malicious and unlawful shooting, stabbing, etc. (Code, 1860, ch. 171, § 9), which charges that the prisoner did unlawfully shoot, etc., with set purpose and malice aforethought to kill and murder, etc., the jury find the prisoner guilty of malicious shooting, without saying who he shot, and fix the term of his imprisonment in the penitentiary at five years. No judgment can be entered on the verdict. *Randall v. Com.*, 24 Gratt. 644. See also, *State v. Newsum*, 13 W. Va. 859.

**Read in Connection with Indictment.**—On an indictment, under ch. 202, § 29, of the Virginia Code of 1873, of H, for that he maliciously and of his malice aforethought did shoot one S, the jury returned their verdict: "We, the jury, find the defendant H not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting with the intent to maim, disfigure and kill, and fix his term of confinement in the penitentiary at two years." The verdict is to be read in connection with the indictment, and therefore sufficiently indicates the person shot. *Hoback v. Com.*, 28 Gratt. 922.

**Conviction of Misdemeanor.**—Under an indictment with only one count, for malicious shooting, stabbing or cutting, with the intent to kill, the accused may be convicted of the offense charged, or of unlawfully doing such acts, or indeed, of any other offense—felony or misdemeanor—which is substantially charged in the indictment. *Stuart v. Com.*, 28 Gratt. 951; *Montgomery v. Com.*, 98 Va. 840, 36 S. E. 371; *Canada v. Com.*, 22 Gratt. 899.

C is indicted for feloniously and maliciously cutting, striking, wounding, etc., H, with intent to maim, disfigure, disable and kill. The indictment charges that C made an assault upon H, and feloniously and maliciously, etc.

The jury find "the prisoner not guilty of the malicious cutting and wounding as charged in the within indictment; but guilty of an assault and battery as charged in the within indictment, and assess his fine at \$500." It was held, this is an acquittal of the prisoner of the felony charged, whether of the "malicious" or "unlawful" cutting, etc., with intent to maim, etc.; and it is a conviction for the misdemeanor of assault and battery. *Canada v. Com.*, 22 Gratt. 899.

## G. SENTENCE AND PUNISHMENT.

See generally, the title SENTENCE AND PUNISHMENT.

"If any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury, with intent to maim, disfigure, disable or kill, he shall, except when it is otherwise provided, be punished by confinement in the penitentiary not less than two nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall, at the discretion of the court, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months, and fined not exceeding five hundred dollars." Section 9, ch. 115, acts, 1882. *Ex parte Mooney*, 26 W. Va. 37, 53 Am. Rep. 59.

As to punishment under present statutes, see Va. Code, § 3671, W. Va. Code, ch. 144, § 9.

**Unlawfully but Not Maliciously.**—Where a verdict has been rendered on an indictment for an injury done with intent to maim, etc., under § 9, ch. 118, of the acts of 1882, finding the defendant not guilty of doing the acts maliciously, but guilty of unlawfully doing the act charged, the court can not under the statute sentence the prisoner to confinement in the penitentiary and also impose a fine. *State v. Mooney*, 27 W. Va. 546.

**Release by Habeas Corpus.**—Under the provisions of section nine of chapter one hundred and eighteen of acts of 1882 the court sentenced a party, found guilty of unlawfully wounding with intent to maim, disfigure, disable and kill, to confinement in the penitentiary for one year and to pay a fine of one hundred dollars, it was held, such a party is not entitled to be discharged on habeas corpus. *Ex parte Mooney*, 26 W. Va. 37, 53 Am. Rep. 59. See also, the title **HABEAS CORPUS**, vol. 7, p. 4.

**Erroneous Punishment.**—B is indicted for the unlawful and felonious attempt to feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder. The jury found

B guilty of an attempt to commit murder in the second degree as charged in the indictment. The facts and circumstances prove that, if the pistol shot, alleged in the indictment, and fired by B at K, but which did not strike him, had resulted fatally to K, B would not have been guilty of either murder of the first degree, murder of the second degree, or voluntary manslaughter. Held, that the verdict of the jury and judgment of the court thereon, fixing the fine of defendant at fifty dollars, and imposing upon him imprisonment in the county jail for the period of six months, are erroneous. *State v. Ballard*, 55 W. Va. 379, 47 S. E. 148.

## Mayor.

See the title **MUNICIPAL CORPORATIONS**.

## Measure of Damages.

See generally, the title **DAMAGES**, vol. 4, p. 182. See also, the various particular titles.

## Measure of Proof.

See the title **EVIDENCE**, vol. 5, p. 322.

## Measures.

See the title **WEIGHTS AND MEASURES**.

**MEATHOUSE.**—In *Benton v. Com.*, 91 Va. 782, 21 S. E. 493, 498, it is said: "A meathouse, as popularly understood, is a building in which meat is stored and kept. It is by its very definition a storehouse, and synonymous with it."

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### **CROSS REFERENCES.**

See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; LIENS, ante, p. 325.

### **I. Definition.**

A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge. *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926. It is the ligament or tie which binds certain property to a particular debt for its payment or satisfaction. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

### **II. Object, Origin and Nature.**

#### **A. OBJECT.**

The statute was designed to give security to those who, by their labor, skill, and materials, add value to property by a pledge of the interest of their employer for their payment; and for that purpose it subordinates all other interests acquired subsequent to the commencement of their work. *Merchants', etc., Savings Bank v. Dashiell*, 25 Gratt. 616; *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259, 264.

"The object of the law in creating liens in favor of mechanics was to secure to a deserving class of men the fruits of their labor." *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110.

#### **B. ORIGIN.**

What is known as the "mechanic's lien" on real estate and buildings is the creation of statute. It was unknown at common law, but the right given by statute to enforce it in a court of equity carries with it all the rights

incident to that court's principles and rules and its methods of procedure. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769; *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241; *Shackleford v. Beck*, 80 Va. 573; *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821, 826; *Stout v. Golden*, 9 W. Va. 231; *Mayes v. Ruffners*, 8 W. Va. 384; *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431; *McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36; *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926; *Savings Bank v. Powhatan Clay Mfg. Co.*, 102 Va. 274, 46 S. E. 294; *Lawyer v. Barker*, 45 W. Va. 468, 31 S. E. 964; *Kahle v. Oil Co.*, 51 W. Va. 313, 41 S. E. 233. See also, post, "Methods of Enforcing Lien," XVIII, A.

#### **C. NATURE.**

**Specific Lien.**—The lien is specific; that is, it is confined to the particular building or structure upon which the labor was done or the materials were furnished; thus, a single lien for materials furnished for repairing a house and the fence. The claimant may have a lien upon the house for the materials furnished for the repairs upon the house, and he may have another lien for materials used for the construction of the fence; but he has no lien upon the house for materials used in building the fence, and he has no lien upon the fence for materials used upon the house. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241, quoting *Jones on Liens*, vol. 2, § 1310.

**Lien Not Created by Contract, but by Furnishing Material or Doing Work.**

—It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialmen and laborers their liens under the statute. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241. Nor does the statute give the mechanic the right to his debt, but merely furnishes a remedy for its collection. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241.

### III. Constitutionality of Laws.

**Special or Class Legislation.**—Code, § 2486, giving liens to persons furnishing supplies to a manufacturing corporation on all its property, superior to deeds of trust, etc., executed since March 21, 1877, is not contrary to amendment fourteen to the constitution of the United States as being special and class legislation. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806. *Millhiser, etc., Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

**Vested Rights.**—Section 2485 giving prior liens upon the property of manufacturing corporations for supplies is not invalid as impairing the charter right of such corporation to issue its bonds and secure them, as the charter was taken subject to the general law of the state, and such changes as might be made in that law. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

### IV. Construction of Statutes.

#### A. GENERAL RULE.

**Substantial Compliance.**—A mechanic's lien is of statutory creation, and can be maintained by a substantial observance of, and compliance with, the requirements of the statute. *Stout v. Golden*, 9 W. Va. 231; *McGugin v.*

*Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36; *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926; *Shackleford v. Beck*, 80 Va. 573; *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821, 825; *Mayes v. Rufners*, 8 W. Va. 384; *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241; *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769; *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

#### B. STRICT OR LIBERAL CONSTRUCTION.

##### 1. In General.

While it seems to be a universal rule that there must be a "substantial" compliance with the provisions of the statute, yet there is confusion as to whether the statutes are to be strictly construed, as in derogation of the common law, or liberally construed, as being remedial in their nature. In late Virginia and West Virginia cases there seems to be a tendency toward a liberal construction of the statutes.

"There seems to be conflict in the decisions as to what should be the policy of the law applicable to these liens. As is said in *Phillips on Mechanics' Liens*, § 16: 'Adjudications will be found declaring it to be against the genius of government to make distinctions between its citizens, or to prefer one class by granting them special privileges in derogation of the rules of common law, and consequently these laws should be construed strictly; there are others equally numerous to the effect that correct policy dictates the fostering of this remedy for purposes of improvement of the country, and the protection of often unlettered men, and that a free interpretation should be given them in favor of the mechanic. It will be found, however, on a comparative examination, that courts have, with scarcely an exception, adopted either one or the other line of decisions, according as the statutes of



the particular state were themselves equitable and just. If they bore with unnecessary severity upon others in favor of the mechanic, and palpable injustice resulted, they have uniformly declared they should not be aided by construction, and a strict interpretation should be placed upon the laws. If, on the other hand, they have secured the laborer the result of his toil and capital, with a due regard to the rights of all, constant expressions are to be found in the reported cases, declaring they should be favored." *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110.

### 2. Liberal Construction.

**Remedial Nature of Statutes.**—The statute giving a lien to "all persons furnishing \* \* \* fuel and all other supplies necessary to the operation of any manufacturing company, etc.," is remedial in its nature, and, therefore, to be construed liberally, as has been held in regard to statutes giving liens to mechanics and laborers. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

"The statute upon the subject is remedial in its nature, and while courts require a strict compliance with all that the statute prescribes for the completion or perfecting of the lien, and can by construction supply no failure or omission upon the part of the claimant, and to this extent may be said to place a strict construction upon the statute, as being an innovation upon the common law, yet when the mechanic has done all which it is necessary for him to do, has performed the work or supplied the material, and perfected his lien therefor in the prescribed mode, the duty of the courts is to see that those whom the law intended to protect shall enjoy the advantages which it confers." *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110.

"Our law as it now stands can not be justly criticised as unduly favoring those for whose benefit it was enacted.

It merely serves to secure to the mechanic and laborer the result of his toil and capital, and, while doing justice to them, inflicts no injustice upon any, and should therefore be fairly, if not liberally, interpreted." *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110. See ante, "Object," II, A.

In *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769, it is said that while a substantial observance of and compliance with the statute is necessary, yet the statute is given a fair and liberal construction as to the creation of the lien and its enforcement.

### 3. Strict Construction.

Mechanic's lien laws are opposed to common right, and confer special privileges upon one class of the community not enjoyed by others, and should receive a strict construction, and parties claiming its benefits must bring themselves clearly within its provisions. *McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36.

The remedy by lien under Code, 1873, ch. 115, §§ 2, 3, 4, is a creature of statute unknown to the common law; and in order to entitle a contractor to its benefit, he must strictly pursue the statute. *Shackleford v. Beck*, 80 Va. 573.

"The statute now under consideration extends to certain classes of operatives and others of the people embraced in its provisions, a security for their claims, that no other class enjoys; and it is no hardship, in consideration of this, to require them to comply with the terms upon which the benefaction is offered to them." *Shackleford v. Beck*, 80 Va. 573.

### C. PROSPECTIVE OPERATION.

The Code of 1860, ch. 119, § 2, p. 567, provided for mechanic's liens only where land on which the house was to be built or repaired was in a city or town, and an agreement in writing, for the erection of a house in the country, entered into the 1st day of March, 1866,

which agreement was duly recorded, is not a lien on the property, nor is it a lien under the act of the 13th of April, 1867, it having only a prospective operation. *Hendricks v. Fields*, 26 Gratt. 447.

## V. Property Subject to Lien.

### A. PUBLIC PROPERTY.

Property which is exempt from seizure and sale under an execution upon grounds of public necessity must for the same reason be equally exempt from the operation of the mechanic's lien law, unless it appears by law itself that property of this description was meant to be included; and to warrant this inference something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property enforceable as judgment rendered in other civil actions. *Hall's Safe & Lock Co. v. Scites*, 38 W. Va. 691, 18 S. E. 895, 896; *Phillips v. University of Va.*, 97 Va. 472, 34 S. E. 66; *Hicks v. Roanoke Bridge Co.*, 94 Va. 741, 27 S. E. 596; *Manly Mfg. Co. v. Broadus*, 94 Va. 547, 27 S. E. 438.

And in *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596, it was said: "It is contrary to public policy to allow a lien to be acquired on public property, and the mechanic's lien laws do not apply to public buildings erected by states, cities and counties for public uses, unless the statute authorizing the lien expressly so provides." *Phillips v. University of Va.*, 97 Va. 472, 34 S. E. 66.

**University of Virginia.**—The University of Virginia is public property created and used for public purposes, and its buildings and grounds are the property of the state and can not be subjected to a mechanic's lien. *Phillips v. University of Va.*, 97 Va. 472, 34 S. E. 66.

**Furnishing Materials.**—Furnishing materials to be used by a contractor in the erection of public improvements for a city, which materials are so used,

does not give any lien on the fund due by the city to the contractor. *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596.

**Authority to Issue Bonds Does Not Authorize Lien.**—The act of January 23, 1896, authorizing the rector and visitors of the University of Virginia to issue bonds and borrow money thereon does not give a mechanic a right to a mechanic's lien thereon. *Phillips v. University of Va.*, 97 Va. 472, 34 S. E. 66.

**Power of Supervisors.**—A board of supervisors can not give a lien upon a public building, nor does the contractor, nor do those who furnish materials, nor the artisans employed in its construction, acquire a lien of any kind upon it. Those who contract with the board of supervisors to do work for the county, or furnish materials to it, do so not upon expectation of securing their compensation by a lien, but solely upon the faith and credit of the county. *Manly Mfg. Co. v. Broadus*, 94 Va. 547, 27 S. E. 438. See also, *Phillips v. University of Va.*, 97 Va. 472, 34 S. E. 66.

### B. PRIVATE PROPERTY.

#### 1. In General.

**Entire Lot in Town Considered Necessary.**—The statute gives a lien not only on the building, but also on "so much land therewith as shall be necessary for the convenient use and enjoyment of the premises." In the absence of proof to the contrary, a lot in a town, such as is described in this case, is necessary to the convenient and reasonable enjoyment of the building put upon it. *Pairo v. Bethell*, 75 Va. 825, 826.

And where material is furnished and work done under the second section, ch. 139, of acts, 1872-73, p. 460, must, in the language of the statute, be furnished and done "by virtue of a contract with the owner or his agents;" and the lien attaches to the lot or lots on which the building is erected, as

well as to the mere building itself. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586, 591.

**Material Incorporated in Building.—**

If material is used in the building, and the owner gets the benefit thereof, the lien attaches without regard to the contract, unless it has been recorded, under § 5, ch. 75, W. Va. Code. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

**Object.**—And the object of this provision is to secure materialmen when the material furnished by them has become a part of the building beyond reclaimer, and also to prevent collusion between the contractor and the owner to defraud the materialmen, and not to destroy the owner's security under his contract. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

**2. Building for Joint Purposes.**

A stack erected in a building used as pork house, for the joint purposes of pork house and generating steam and running machinery in a distillery attached thereto, and which can be used as a distillery only in connection with the pork house, must be regarded as a structure necessary to both establishments and as a part thereof, although the pork house may be used independently of the distillery; and a mechanic has a lien on both establishments for the construction of the stack by virtue of the act of the general assembly passed February 2, 1853, for the benefit of the mechanics of Wheeling. *Bodley v. Denmead*, 1 W. Va. 249.

**3. Buildings on Separate Lots.**

**Under entire contract**, Mrs. S. bargained with general contractors, D. & W., to build two houses on two distinct lots, for an entire price, and the latter bargained with a subcontractor, D., to furnish materials for the entire work, and the work was done and the materials furnished accordingly. Held, the lien of the general contractors and of the subcontractor is joint on both

houses, under Code, 1873, ch. 115, § 3. *Sergeant v. Denby*, 87 Va. 206, 12 S. E. 402.

**Under Separate Contracts.**—And where separate buildings, though in one block, are erected under separate and independent contracts, no lien can attach under such contracts to all the buildings. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241; *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

Where there is a separate estimate for each building, a single lien is not valid. *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

**4. Material Not Used.**

Materialmen who furnish material to contractors do so at their own risk, unless such material is incorporated in the building for which it is furnished, or they notify the owner of the building in advance that they will look to him for payment therefor, and he acquiesces therein, and receives the material with such condition attached. In the latter case, he, and not the contractors, becomes the purchaser of the material. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

**Estimates to Be on Labor and Material Used.**—In a written contract, it is provided that certain contractors will erect a building on a certain lot for the owner thereof, for a fixed sum, payable in installments on estimates and certificates of the architects as the work progresses. Estimates must be on the labor and material actually used in the building, and can not be extended to include material not so used, although in course of preparation for such use. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

**Default of Contractor.**—A materialman who furnishes material to the contractors can have no lien on such building if the material is not incorporated therein by reason of the default of the contractors. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

**5. Surplus after Paying Prior Lien.**

Where A agrees to convey land to B, a married woman, who takes possession and builds thereon, and the mechanic who does the work takes the proper steps and secures his lien upon it after which time the vendor conveys the land to B, reserving a lien thereon for the purchase money, which he enforces, any surplus remaining after satisfying his lien can not be subjected to the mechanic's lien, it having become the separate personal estate of B. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

**6. Rents and Profits.**

There may be a mechanic's lien on the rents and profits of the separate real estate of a married woman, when she or her agents have made the contract with the mechanic for building. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586, 587.

**7. Real Estate of Feme Covert.**

There can be no mechanic's lien on the real estate of a married woman, when she has not a separate estate therein. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

**8. Machinery.**

All machinery and apparatus of a permanent character, and essential to the purposes for which a building is erected, although the connection between them is such that it may be severed without physical or lasting injury to either, may be subjected to a valid mechanic's lien. *Haskin Wood, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 439, 26 S. E. 878.

**Tank or Reservoir.**—In *Haskin Wood, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 439, 26 S. E. 878, it was held, that a lien might exist for the construction of a tank or reservoir.

But an apparatus for kiln drying lumber is not a part of the "supplies necessary to the operation" of a sawmill, and therefore no lien is given therefor by § 2485 of the Code. *Boston, etc.,*

*Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. 390.

**May Be Subjected Separate from Building.**—Machinery of a permanent character may be subjected to a mechanic's lien without subjecting the buildings in which it is located and for the object for which the building is constructed and the machinery is essential. *Haskin Wood, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 439, 26 S. E. 878.

**9. Several Buildings on Same Lot.**

When labor is performed or materials furnished, under one contract, upon several buildings, all situate upon one lot of land, belonging to the contracting owner, the lien attaches to all the land for the whole value of the labor performed, and it is immaterial whether the contract specifies one sum for all the work or separate amounts for each building. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241.

**10. Goods Represented by Warehouse Receipts.**

After a manufacturing company has issued and negotiated to a bona fide holder for value, warehouse receipts for its products, the goods represented by such receipts are not "personal property of such company" within the meaning of § 2485 of the Code so as to be liable for supplies furnished the company. *Millhiser, etc., Co. v. Gallego Mill's Co.*, 101 Va. 579, 44 S. E. 760. And see generally, the title WAREHOUSES AND WAREHOUSEMEN.

**VI. Estate or Interest Subject to Lien.****A. IN GENERAL.**

The owner of land, with whom or with whose agent the contract must be made under our statute, is not simply the legal owner, but it includes also an equitable owner; nor need he be the owner in fee, he may own any interest in the land, but the mechanic's lien will,

of course, be confined to a lien on his interest in the land. But unless the statute so provides, the consent of the holder of the legal title that the person, who has agreed to purchase the land of him, shall or may erect a building upon it, will not make the interest of the legal owner of the land liable to the mechanic's lien arising from the contract by the mechanic with the party who has agreed to purchase the land. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

### **B. SEPARATE ESTATE OF FEME COVERT.**

By a contract with a mechanic to build a house on her separate real estate or by a contract with anyone to furnish materials for such building, she may create a lien, under our law, which will render the rents and profits of the building so erected, so long as the marriage continues, liable to the payment of said lien, in preference to any lien which she and her husband could subsequently create by uniting in a deed. But such lien could only be enforced, as other debts of a married woman are enforced, by renting out the property from year to year during the continuance of the marriage. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

## **VII. Who May Subject Property to Lien.**

### **A. VENDEE.**

**Power to Bind Interest of Vendor.**—The lien of a mechanic is subordinate to that of a vendor of land, on which a building is erected, for the unpaid purchase money, and the court can not, in the absence of any statutory provision, undertake to give to a mechanic a lien against the previous vendor's lien on any part of the purchase money for which the lot and building might sell because of its enhanced value by reason of the erection of the building. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586. And see post, "Vendor's Lien," XIII, G.

### **B. MARRIED WOMAN.**

By a contract with a mechanic to build a house on her separate real estate, or by a contract with one to furnish materials for such a building, she may create a lien, under our law, which will render the rents and profits of the building to be erected, so long as the marriage continues, liable to the payment of said lien, in preference to any lien which she and her husband could subsequently create by uniting in a deed. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

**Enforcement.**—But such lien could only be enforced, as other debts of a married woman are enforced, by renting out the property from year to year during the continuance of the marriage. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

### **C. GENERAL CONTRACTORS.**

The term "general contractor," as used in the act of July 11, 1870, entitled "an act in relation to mechanics' liens," includes all persons furnishing materials for doing work upon a building, under a contract made by such persons directly with the owner of the building. *Merchant's, etc., Savings Bank v. Dashiell*, 25 Gratt. 616; *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926.

And where lumber is furnished to a railroad company to be used in the construction of tunnels, buildings, etc., the person furnishing it is a general contractor within the meaning of the mechanic's lien law. Va. Code, 1873, ch. 115. *Boston v. Chesapeake, etc., R. Co.*, 76 Va. 180.

### **How Perfected.**

**Incipient Lien.**—Furnishing materials creates an incipient lien, but to perfect it the general contractor must, in conformity with Va. Code, 1873, ch. 115, § 3 to § 11 inclusive, within the prescribed time, file in the county or corporation court of the county or corporation in which is situated the property on which lien is sought to be

secured, and in the clerk's office of the chancery court of Richmond city, where the property is in said city, a true account of the work done, or materials furnished, sworn to by the claimant or his agent, with a statement attached, signifying his intention to claim the benefit of the lien, which is to be recorded by the clerk. *Boston v. Chesapeake, etc., R. Co.*, 76 Va. 180.

#### D. SUBCONTRACTOR.

**Two-Fold Remedy.**—Section 8, ch. 115, Va. Code, 1873, secures to the subcontractor the benefit of lien given general contractor by § 4, provided notice is given by former before lien is discharged. This remedy is additional to that conferred by § 5, which gives to subcontractor, upon compliance with its requirements, the right to charge owner personally. Under § 8, regard is had to state of accounts between owner and general contractor; under § 5, none is had. *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821.

**Subcontractor of Subcontractor.**—A subcontractor in the second degree, who shows no privity of contract with the owner of the land on which a building is erected, or with his duly authorized agents, who furnishes material or labor in the erection or construction of the building, can acquire no lien on the lot or building by giving the notice provided for in § 5, ch. 75, W. Va. Code, within thirty days after the labor was performed or material furnished. *McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36; *Richardson v. Norfolk, etc., R. Co.*, 37 W. Va. 641, 17 S. E. 195.

#### E. EMPLOYEES OF MANUFACTURING COMPANY.

Employees of manufacturing companies, under Va. Code, § 2486, as amended by act, February 15, 1892, are entitled to a mechanic's lien for services on the property of the company. *Overholt v. Old Dom. Mfg. Co.*, 98 Va. 654, 37 S. E. 307.

And § 7, ch. 64, acts, 1882 (Warth's

Code, 1887, ch. 75), gives a lien on all the real estate and personal property of an incorporated company doing business in this state to every workman, laborer, or other person who does any work or performs any labor for such company by virtue of any contract, written, verbal, express or implied, with such company. *Richardson v. Norfolk, etc., R. Co.*, 37 W. Va. 641, 17 S. E. 195.

#### F. ASSIGNEES.

Suits to enforce mechanics' liens may be maintained by assignees of the original contractors. *Iaeger v. Bossieux*, 15 Gratt. 83; *Pairo v. Bethell*, 75 Va. 825; *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110. See also, post, "Assignment of Lien," XII.

### VIII. Supplies for Which Lien May Exist.

Pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, is "a supply" within the meaning of § 2485, giving a lien to all persons furnishing fuel and other supplies necessary to the operation of any manufacturing company. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

### IX. Contract under Which Lien Acquired.

#### A. IN GENERAL.

A mechanic's lien is a creature of statute, and must have its foundation in a contract, with which it must correspond. *Sergeant v. Denby*, 87 Va. 206, 12 S. E. 402.

But it is immaterial whether the contract be written or oral, to create such lien. *West Virginia Bldg. Co. v. Sauer*, 45 W. Va. 483, 31 S. E. 965.

**Must Be by Contract of Owner or Agent.**—The material furnished and work done under § 2, ch. 139, acts, 1872, p. 460, must, in the language of the statute, be furnished and done "by virtue of a contract with the owner or his agents;" and the lien attaches to the

lot or lots on which the building is erected, as well as to the mere building itself. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586, 591.

**Persons Having No Privity Not Embraced.**—While § 7, ch. 64, acts, 1882 (*Warth's Code*, 1887, ch. 75), gives a lien on all the real estate and personal property of an incorporated company doing business in this state to every workman, laborer, or other person who does any work or performs any labor for such company by virtue of any contract, written, verbal, express or implied, with such company, for the value of the work so done or labor so performed, yet the meaning of this section can not be extended to embrace persons who have no privity of contract with the company, but must be confined to those who have such contract, and who, by virtue thereof, do the work and perform the labor for which the lien is claimed. *Richardson v. Norfolk, etc., R. Co.*, 37 W. Va. 641, 17 S. E. 195.

## B. ORAL CONTRACT.

The mechanic's lien exists, and may be enforced, where the work is done under a verbal contract with the owner. *Merchants', etc., Savings Bank v. Dashiell*, 25 Gratt. 616; *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965.

## C. WRITTEN CONTRACT.

Under Va. Code, 1860, ch. 119, p. 567, it was held, that in order to a compliance with the statute, there must be a contract in writing for the lien, and that it must be recorded, and the right to give such a lien is confined only to the interest of the person who contracts with another to pay him money for erecting or repairing any building, and does not authorize a lien to be given on the interest of others in the land though they may be much more interested therein than the party who has the building erected or repaired. *Graeme v. Cullen*, 23 Gratt. 266.

But the statute holding that the con-

tract must be in writing has been changed, and now any contract, oral or written, express or implied, is sufficient. See below.

Where the contract is in writing, a lien may be acquired under § 2, ch. 115, Va. Code, 1873, by the claimant having the contract recorded, in which case the remedy would be by a bill in equity, or it may be acquired or secured by the claimant under the act of 1870, by filing in the proper clerk's office and having recorded a true account of the work done or materials furnished, sworn to by the claimant or his agent, with a statement attached signifying his intention to claim the benefit of the lien, and setting forth a brief description of the property, and this lien may be enforced by bill or motion. *Pairo v. Bethell*, 75 Va. 825. And see post, "Methods of Enforcing Lien," XVIII, A.

And ch. 115 of the Virginia Code, 1873, is much more comprehensive than ch. 117, which is not repealed nor amended; it extends to a larger class of persons, and prescribes a different mode of acquiring the lien; it applies to contracts written as well as oral, and the remedy is by motion as well as by bill in equity. *Pairo v. Bethell*, 75 Va. 825.

## D. RATIFICATION OF CONTRACT.

Where a subcontractor has knowledge of the insolvency of the contractor, and calls on the owner to assist in the collection of his debt, and files a mechanic's lien, such acts amount to a ratification of the contract. *University of Va. v. Snyder*, 100 Va. 567, 42 S. E. 337.

# X. Requisites of Lien.

## A. IN GENERAL.

**Necessity of Compliance with Statutes.**—Where a party seeks to create a mechanic's lien for material furnished to a contractor, to be used on the construction of a house, he must comply

substantially with the requirements of the statute, in order to create a lien on the property on which such house is erected. *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926.

A mechanics' lien can be obtained only in the manner provided by statute. *Lawyer v. Barker*, 45 W. Va. 468, 31 S. E. 964.

And if the time limited by the statute is suffered to elapse before the steps prescribed are taken, more especially if intervening rights in favor of a third party have attached, the lien can not be successfully asserted. *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965.

### B. OATH.

Chapter 75 of the West Virginia Code creates the mechanic's lien in certain cases, on certain conditions; and § 4 of such chapter, among other things, provides that such account, to be effectually filed for record as a lien, must be sworn to by the person claiming the lien or by some person on his behalf. Such oath is an element essential to the creation of the lien, and, to be effectual, must be in writing, as a part, in some way, of the paper writing filed for record. *Lockhead v. Berkeley Springs, etc., Co.*, 40 W. Va. 553, 21 S. E. 1031.

### C. NOTICE TO OWNER.

#### 1. Object of Notice.

The object of the notice is to impart information to the owner of the amount and character of the claim intended to be fixed as a lien upon the property, so that he may protect himself in his future dealings with the contractor. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241; *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821, 826. And to warn and protect all subsequent purchasers or incumbrancers. *Boston v. Chesapeake, etc., R. Co.*, 76 Va. 180, 182; *Shackleford v. Beck*, 80 Va. 573, 577.

"Philips in his *Mechanics' Liens*, §

349, p. 576, says: 'Many reasons for such explicitness in the notice as to the character of the work, and the amount and character of the materials contributed to the building are apparent. It prevents fraud on the part of the subcontractor, and collusion by the contractor; enables the owner to ascertain the correctness and reasonableness of the demands; and gives the most definite information to purchasers and incumbrancers.' " *Shackleford v. Beck*, 80 Va. 573.

#### 2. By Subcontractor.

**When to Be Served.**—Notice may be furnished owner by subcontractor at any time between doing the labor or furnishing the materials, and twenty days after building is completed or work otherwise terminated. But affidavit must be furnished within said period of twenty days. *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821, 826; *Norfolk, etc., R. Co. v. Howison*, 81 Va. 125; *Roanoke Land, etc., Co. v. Karn*, 80 Va. 589.

#### 3. By Materialman.

**After Payment of Contractor by Owner.**—Under the provision of the second and fifth sections of ch. 75, W. Va. Code, 1886, where the owner pays the contractor for the erection of a building pursuant to and in accordance with the obligations of his original contract with the contractor, after its completion, a party who furnished materials to the contractor acquires no lien by giving notice in writing to the owner after such payment of the amount of his demand, and that he claims the benefit of the lien created by said chapter, although the notice was given within thirty days after the material was furnished. In such case, no lien in favor of the materialman ever attached. *McKnight v. Washington*, 8 W. Va. 666.

**Materialman Must Take Notice of Contract between Contractor and Owner.**—Under a proper construction of the second and fifth sections of ch.



75, W. Va. Code, 1886, the materialman is bound to take notice of the contract between the "owner" and the "contractor," not only as to the material but as to the price to be paid by the owner for the construction of the house or building and the time or times the same is to be paid by the owner. *McKnight v. Washington*, 8 W. Va. 666, 671.

#### 4. Sufficiency of Notice.

Under Code, 1873, ch. 115, as amended by acts, 1883-84, pp. 636, 637, in an action against the owner by the subcontractor, whose account is disputed by the general contractor, it is not sufficient for the subcontractor to show that he has served his notice and filed his account as provided by § 5, but he must also aver and prove that he has complied with his contract with the general contractor under which the materials were furnished. *Kirn v. Champion Iron Fence Co.*, 86 Va. 608, 10 S. E. 885.

**Account and Statement.**—Where the account is sufficient, and a copy thereof, together with a statement of the intention to claim the lien, is served on the owner within the time prescribed by the statute, this is a sufficient notice to the owner, under § 2477 of the Virginia Code. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

**Claim and Motion—Continuance.**—Where a verified account of the number and price of materials furnished is filed with claim for lien on a certain building, "with so much land therewith as shall be necessary for convenient use of the premises," and notice is served of claim for lien and of motion to enforce the same at first day of next term, and the motion was on that day docketed and continued until the sixth day of the term, when it is heard, the proceedings conform to the statute and are regular. *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703.

**Account and Affidavit Need Not Show Notice.**—When the account is

filed with the clerk of the county court, as provided in § 4, ch. 75, it is not essential, and not required by that section, that the account and affidavit so filed shall show on its face the fact of service of the account and notice on the owner. Such fact may be proved under proper allegations in the bill. *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

#### D. FILING AND RECORDATION OF CLAIM.

##### 1. In General.

The filing of the account is the initial and one of the most important steps in the establishment of a mechanic's lien. A substantial compliance with this provision of the statute has always been regarded as essential to the creation of the lien, and as necessary for the protection of owners, purchasers, and other lien creditors. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888; *Gilman v. Ryan*, 95 Va. 494, 497, 28 S. E. 875.

And the intention is that the mere inspection of a record, to be found at a particular place, shall disclose all the information necessary in order to enable those interested therein to determine as to the existence of liens on the property. The record should be sufficient to give in itself the information intended by the recordation, and should not be made to depend upon verbal explanations of its meaning, and the record can not be supplemented by parol evidence after suit brought to enforce the lien. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241; *Niswander v. Black*, 50 W. Va. 188, 196, 40 S. E. 431.

**Modes of Securing Liens.**—"Sections 2, 3, 4, ch. 115, Va. Code, 1873, provide the machinery by which a mechanic or general contractor may avail himself of the lien there given. There have been several amendments of these sections, but they relate only to the time within which the account must be filed in the clerk's office. Two modes of

securing a lien are provided; one, under the second section, by recording the written contract, when there is one; and the other, under section four, by filing in the clerk's office a true account of the work done or material furnished, sworn to by the claimant, with a statement attached, declaring his intention to claim the benefit of the lien, and setting forth a brief description of the property. A mechanic may proceed under either the one or the other of these modes; and this whether there be a written contract or not. *Merchants', etc., Savings Bank v. Dashiell*, 25 Gratt. 616, 621." *Shackleford v. Beck*, 80 Va. 573.

**What to Be Filed.**—Under ch. 115, Code, 1873, a mechanic may either file for recordation his written contract if there be one, and if not, he may file a true account of the work done or material furnished under his affidavit, with a statement declaring his intention to claim the benefit of the lien, and setting forth a brief description of the property, and he may proceed under either mode, whether the contract be in writing or not. *Merchants', etc., Savings Bank v. Dashiell*, 25 Gratt. 616, 621; *Shackleford v. Beck*, 80 Va. 573.

"The only things the act upon its face requires to appear by the recorded memorandum are that it shall show: (1) The amount of the claim. (2) The consideration of it (i. e. whether for supplies or for labor). (3) That it shall be verified by affidavit. All else, however essential to the existence of a valid lien, would seem to have been intentionally left by the legislature to be supplied by proof aliunde." *Overholt v. Old Dom. Mfg. Co.*, 98 Va. 654, 37 S. E. 307, citing 3 Va. Law Reg. 95.

**Reason for Simplicity of Memorandum.**—"It is not difficult to conjecture a reason which, whether adequate or not, in point of public policy, may have induced the lawmakers to reduce what the memorandum shall contain to its simplest terms. Very often, especially

in the case of laborers, the sums due will be small, and the parties unable to understand and act upon a complex law. The amount would often be too inconsiderable to justify the employment of a lawyer to prepare the memorandum. If the act means what it appears to say, this could be done by any fairly well-informed lay friend, without charge, or for a trifling one." *Overholt v. Old Dom. Mfg. Co.*, 98 Va. 654, 37 S. E. 307.

#### **Effect of Failure to Record Contract.**

—Failure of the owner to record his contract with the principal contractor does not render his property liable to the claims of any laborer, mechanic or materialman, except such as have so complied with the provisions of the statute as to entitle them to their liens. *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

**On Purchaser with Notice.**—And the contractor, having failed to secure a lien on the house by his omission to fulfill the requirements of the statute, a purchaser of the house from the owner is not affected with liability for the contractor's claim by reason even of actual notice of the account thereof. *Shackleford v. Beck*, 80 Va. 573.

## **2. Time of Filing.**

**Time Runs from Last Item.**—Where a general contractor furnished lumber to a railroad company, the last item being dated September 8, 1873, and he files his claim December 27, 1873, it was held, that the lien was invalid, not being filed within the time prescribed by statute. Code, 1873, ch. 115. *Boston v. Chesapeake, etc., R. Co.*, 76 Va. 180; *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

**Where Considered Completed before Finishing Touches Are Put on.**—A contract for erecting a building provides that it shall be considered completed before "the finishing touches" are put on it. Held, that ninety days, within which the statute allows a mechanic's lien to be filed, commence from the

time of practical completion and not from the actual completion. *Acts*, 1883-84, p. 636. *Trustees v. Davis*, 85 Va. 193, 7 S. E. 245.

**When Work Stopped by Default of Owner.**—That provision of the mechanic's lien act of July 11, 1870, which requires the contractor, etc., to file, within thirty days after the completion of the work, an account and statement, is construed to mean actual completion, and does not apply when the work has been stopped by default of the owner of the property. *Merchants', etc., Savings Bank v. Dashiell*, 25 Gratt. 616.

**Filing after Suit Instituted to Wind Up Company.**—A laborer's lien against an insolvent corporation is not invalid because sworn to and filed in the county clerk's office after a suit to wind up its affairs and apply its property to creditors' debts has been instituted. *Kahle v. Oil Co.*, 51 W. Va. 313, 41 S. E. 233.

"We find it laid down in *Phillips on Mechanics' Liens*, § 257, that: 'The equitable doctrine of marshaling of securities applies to mechanics' liens. It has been objected that the lien is only statutory, and can not, therefore, be enforced in any other way or to any greater extent than is given by the act creating it. But this objection is not well founded. The lien must, beyond question, be perfected in strict conformity with the law; but when so perfected, it may be governed by other rules than those especially designated in it.'" *Kahle v. Oil Co.*, 51 W. Va. 313, 41 S. E. 233.

### 3. Where to Be Recorded.

Where lumber was furnished by a general contractor to a railroad company, to be used in the construction of their buildings, tunnels, etc., and which was used in several different counties and cities of the state, it was held that, in order to be a valid mechanic's lien on the property of the company, the papers must be recorded in every county and city in which the railroad

owned property. *Boston v. Chesapeake, etc., R. Co.*, 76 Va. 180. *Quære*, are railroad companies embraced in the provisions of Va. Code, 1873, ch. 115, § 3, to § 11 inclusive.

But by an amendment of 1895-96 (*acts*, 1895-96, pp. 71, 903, *Pollard's Code*, § 2475) a lien is given upon such railroad and franchise.

Where lumber is furnished by a general contractor to a railroad company, which uses it in the construction of a tunnel in the city of Richmond and a wharf one mile below the city, the wharf is not within the jurisdiction of the city, for the purpose of filing, recording and enforcing mechanic's liens. *Boston v. Chesapeake, etc., R. Co.*, 76 Va. 180.

### 4. Proof of Recordation.

On a motion, proof of the recordation of the account and statement, under the statute, is proper, if such evidence is afforded not to contradict or vary the written contract, but merely to prove the signing of the contract by the parties and the performance of it on the part of the builder. *Pairo v. Bethell*, 75 Va. 825, 826.

### 5. Filing Contrary to Law—Effect.

A subcontractor files a mechanic's lien before completion of the work, contrary to Va. Code, § 2476. Held, that he is liable to an action for damage for injury thereby done the contractor. In such action, the declaration should charge some special damage to plaintiff, as the language of the alleged lien does not necessarily import injurious defamation; but it is not necessary to give the name of any whose custom has been lost to the plaintiff, nor to state that the alleged lien has been ended by limitation or degree. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520.

### 6. Burden of Proof to Show Compliance.

The provisions of the statute are indispensable to the creation of the lien, and hence, if any one be not complied

with, no lien is acquired. It is therefore incumbent upon the party asserting a lien under the statute to show that he has complied with every essential requirement of the statute; and unless such compliance is shown, his claim must be rejected. *Shackleford v. Beck*, 80 Va. 573; *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821; *Trustees v. Davis*, 85 Va. 193, 7 S. E. 245.

## 7. Account and Statement of Claim.

### a. In General.

Statutes which require the filing of a true account of the work done or materials furnished necessarily imply an itemized or detailed statement of the transactions which are the foundation of the lien, and the particulars of the lien serve for the protection of the contractor, and of purchasers and others who may become interested in the property subject to the lien. The chief purpose, however, which the account serves, is to give the owner notice of the amount and character of the claim, so that he may protect himself in his future dealings with the contractor. *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

**Statement of "Balance Due."**—"To serve this purpose, the claim should show what it is for—whether work or materials—and a notice which does not show this is defective. Stating a balance due is not sufficient." *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431. And when an account extends through a considerable period, the time begins to run from the last item. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 30 S. E. 446.

**Statement of "Balance of Account."**—The statute, Va. Code, 1873, ch. 115, §§ 2, 3, 4, requires that a contractor seeking to secure the benefit of its provisions, shall file in the clerk's office an account (which is an itemized or detailed statement of the transactions to which it relates) of work done and materials furnished; and, therefore, a paper in the following words, viz.: "To

balance of account rendered for work and labor done and material furnished for your house," is not sufficient to create the lien provided by the statute. *Shackleford v. Beck*, 80 Va. 573.

**"Work and Labor" and "Materials Furnished" Distinct Items.**—"It is manifest that the act contemplates work and labor done, and materials furnished, as distinct and separate items, which, to be sure, may enter into and make part of the same claim, but not necessarily so, and, when so, not properly to be confounded or treated as one." *Shackleford v. Beck*, 80 Va. 573, citing *Noll v. Swineford*, 6 Penn. 187.

### b. What May Be Considered in Determining Sufficiency.

In ascertaining whether the account which is required to be filed and recorded to create the lien is a substantial compliance with the statute in respect to designating the name of the owner of the property, the account proper, and the sworn statement annexed thereto may be read together. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

### c. Name of Owner.

The statute contemplates a positive designation of the name of the owner, if known to the person seeking the lien. *Mayer v. Ruffners*, 8 W. Va. 384.

### d. Description of Property.

Upon a bill filed to enforce a mechanic's lien, the quantity of land necessary for the convenient use of the building is sufficiently described by reference to an exhibit filed with the bill, which gives an adequate description of the land, and seeking to enforce the lien against the land thus described. *Richlands, etc., Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806.

**Object.**—The object of requiring a description is to inform the owner upon which of his property the lien is claimed, and to give notice thereof to purchasers and creditors, so that they may identify the property and protect themselves against the lien. If the

property can be reasonably identified by the description given, it is all that the law requires. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

**e. Subscribing Account.**

An account claimed as a lien must be subscribed to by the person claiming the lien, or someone in his behalf, under the provisions of § 3, ch. 139, acts, 1872-73. *Stout v. Golden*, 9 W. Va. 231. But subscribing the affidavit to the account is not the subscribing of the account contemplated by the statute; the account itself must be subscribed. *Mayes v. Ruffners*, 8 W. Va. 384.

**f. Verification.**

A claim for a mechanic's lien, when filed, should be verified; and it should appear upon its face to have been verified, before it can be made the basis of the proceeding to enforce the claim based upon it. *Lockhead v. Berkeley Springs, etc., Co.*, 40 W. Va. 553, 21 S. E. 1031, 1035.

**No Particular Form Prescribed.**—No particular form of verification is prescribed, and the certificate of a notary at the foot of the account filed that the contractor personally appeared before him, in his county or city, and made oath to the correctness of the account, is a sufficient verification under the statute. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

**Method of Foreign Verification.**—If an affidavit be made before any officer of another state or county, such as the District of Columbia, it is not duly authenticated for record until it is subscribed by such officer, and there be annexed thereto a certificate of the clerk or other officer of a court of record of such state or county, under an official seal, verify the genuineness of the signature of the first-mentioned officer, and his authority to administer an oath. Code, § 31, ch. 130. *Lockhead v. Berkeley Springs, etc., Co.*, 40 W. Va. 553, 21 S. E. 1031.

**g. Miscellaneous Instances of Account. Entire Contract—Extra Work.**

Where the work is contracted for as an entirety for a specific amount, if this is so set out in the account filed all the information is given that is needed, or can reasonably be required. If extra work is done, it is sufficient to set out each item of the extra work and the price thereof. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

**Buildings on Distinct Lots.**—Where a contract has been made which estimates or fixes the price of materials furnished and work done upon each of two or more buildings, on disconnected lots, an account which claims the aggregate price as a lien upon all of the lots is not a substantial compliance with the statute. *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

**Sand and Brick.**—And in the absence of an entire contract, an account for furnishing and hauling sand, and hauling bricks, as a basis of a mechanic's lien, should show the amount of sand furnished and hauled and the prices charged therefor, and the quantity or number of bricks hauled and the prices charged therefor. *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

**Several Houses.**—An account which simply charges "for materials furnished and work done" in plastering certain enumerated houses, or in granolithic work at those houses, or for furnishing and hauling sand and hauling bricks for the construction of those houses, is not sufficient. *Gilman v. Ryan*, 95 Va. 494, 28 S. E. 875.

**Building Must Be Specified.**—A three-story building on a corner, at the intersection of an avenue and street, and another building, two stories high, built at a different time, but adjoining the first mentioned, constitute a block called the "Harvey Building," in the city of Huntington. P contracted with H, the executor of the deceased owner of the property, to alter and repair each of said buildings, but by separate

agreement in writing respectively relating to each of said houses, executed on different dates, and for different sums, to be paid to the contractor. The contracts were duly recorded before any labor was performed or materials furnished for either of the buildings. The defendants performed labor upon and furnished materials, under contracts with P for the alteration and repair of the buildings, provided for in the contracts between P and H. The subcontractors assert in this suit their demand against P for the labor and materials as a lien upon the property; but their accounts filed therefore do not specify upon which of the buildings or parts of the "Harvey Building," or block, the labor was performed, or for which the materials were furnished. Held, the said accounts are insufficient, and can not be enforced as liens on the property. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241.

**Balance of Account.**—The statute requires that a contractor seeking to secure the benefit of its provisions shall file in the clerk's office an account (which is an itemized or detailed statement of the transactions to which it relates) of work done and materials furnished; and, therefore, a paper in the following words, "To balance of account rendered for work and labor done and materials furnished for your house," is not sufficient to create the lien provided by the statute. *Shackleford v. Beck*, 80 Va. 573.

**Gross Sum for Repairs.**—Where a gross sum has been agreed for repairs to, or improvements on a building, an account which states the agreed sum, but omits credits which are known to the owner, but of which the contractor has not accurate information, is a sufficient compliance with the statute which requires "a true account" to be filed as the basis of a mechanic's lien, especially where no injury is done to the owner. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

**Estimates Furnished.**—When an ac-

count purporting to be an itemized account of materials furnished to a principal contractor for building a house, amounting in the aggregate to the sum of \$886.75, is filed with the clerk of a county court, and served with notice, upon the owner, under the provision of ch. 75, Code, which account contains one item, "Estimate furnished, \$485," such account and notice are not sufficient, under that chapter, to entitle the material man to his lien for the item of \$485. *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

**Term "Due" Construed.**—Section 4 of ch. 75 of the West Virginia Code, which requires a just and true account of the amount due, after allowing all credits, to be sworn to and filed for record, uses the term "due" in the sense of an existing liability, without reference to whether it be then matured and enforceable by suit or not matured and not then enforceable by suit. *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

#### 8. Who May Perfect Lien.

**Assignee.**—The right to perfect an inchoate mechanics' lien, existing in a contractor under § 2475 of the Code, passes by his general assignment for the benefit of his creditors to his assignee, and the assignee, on completion of the work, may take the necessary steps to perfect the lien, although the statute is silent on the subject. *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110.

#### E. EFFECT OF FAILURE TO FULFILL REQUIREMENTS OF STATUTE ON PURCHASER WITH NOTICE.

The contractor, having failed to secure a lien on the house by his omission to fulfill the requirements of the statute, a purchaser of the house from the owner is not affected with liability for the contractor's claim, by reason even of actual notice of the account thereof. *Shackleford v. Beck*, 80 Va. 573.

## **XI. Amount Secured by Lien.**

### **A. WHEN OWNER FAILS TO RECORD CONTRACT.**

Where an account has been properly filed by a laborer, mechanic or materialman, and the owner has failed to limit his liability by so recording his contract, then his property becomes liable for the whole of such lien, without regard to the amount that was to be paid by the owner to the contractor. *Niswander v. Black*, 50 W. Va. 188, 40 S. E. 431.

### **B. TO A SUBCONTRACTOR.**

**Amount Limited by Original Contract.**—A subcontractor's remedy is limited in its extent by the terms of the original contract between the owner and contractor, and the amount which can be secured by a subcontractor is limited to that due from the owner to the contractor. *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192, 44 S. E. 241.

And the fact of the general contractor's failure and the owner's necessity to complete the work does not affect the owner's liability for the amount due the subcontractor for labor or materials. *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821.

But where notice and affidavit have been furnished, as required by law, by subcontractor to owner, the latter is liable to the former for the amount named in the affidavit, regardless of the state of accounts between the owner and general contractor. *Acts*, 1874-75, § 5, p. 437; *Roanoke Land, etc., Co. v. Karn*, 80 Va. 589; *Norfolk, etc., R. R. Co. v. Howison*, 81 Va. 125.

**Where Owner Must Protect Subcontractor—Personal Liability.**—The owner of a building in course of construction is under no obligation to protect the interest of a subcontractor unless the latter has complied with the provisions of the statute (*Code*, § 2474 as amended by acts, 1893-94, p. 523), rendering the owner personally liable to the subcontractor to the extent that

such owner is indebted to the general contractor. Where, however, such personal liability has been duly created, it becomes a preferred claim, and is to be paid in full in preference to the claims of other subcontractors who have not obtained a like advantage, but have subsequently perfected their liens under § 2477 of the Code. *Schrieber v. Citizens' Nat. Bank*, 99 Va. 257, 38 S. E. 134.

### **C. RESERVATION BY OWNER NOT FOR BENEFIT OF SUBCONTRACTOR.**

The reservation by the owner of a percentage of the cost of construction of a building until its completion, with the right to supply any deficiency and deduct the cost from any money due or to become due under the contract, is for the benefit of the owner alone, and not of the subcontractor who may be thereafter employed. *Schrieber v. Citizens' Nat. Bank*, 99 Va. 257, 38 S. E. 134.

### **D. FOR EXTRA WORK.**

**To Be Considered in Separate Controversy.**—Extra work not covered or contemplated by the original contract, and which has been paid for by the owner, is to be considered a separate and distinct transaction in a controversy between the owner and the subcontractor. *Schrieber v. Citizens' Nat. Bank*, 99 Va. 257, 38 S. E. 134.

### **E. WHERE AMOUNT DUE BY INSTALLMENTS.**

Where the contract price agreed on by the owner and the mechanic is payable by installments, one of which becomes due before the completion of the work and a lien is filed accordingly, it is valid not only as to prior installments, but future ones also. *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965. And the court will make provision for those to become due. *Iaeger v. Bossieux*, 15 Gratt. 83.

### **F. RECOUPMENT.**

**Substantial Completion.**—If there be a substantially completed though not

perfectly completed contract, the claim may be filed, and the defendant may recoup or abate from the contract the value of the failure. *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965, 967.

And, in a suit in equity to enforce a mechanic's lien, where the contractor has not completed his work, the owner is entitled to set off against the contractor's claim the sum which it would take to complete the contract and any damages sustained by the owner by reason of the delay in the completion of the contract, and these damages will not be confined to a penalty or forfeiture stipulated for in the contract. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

But, under § 2476, Code, 1887, a subcontractor can not perfect his lien until the work for which he engages is done; that is, before his contract is completed. *Moore v. Rolin*, 89 Va. 107, 15 S. E. 520.

**Owner May Set Off Damages against Assignee.**—In a suit by the assignee of a mechanic and builder to enforce the assigned lien for the price for building the house, the owner will be required to pay only the value of the building, being entitled to set off the damages for defective workmanship and material against the assignee. *Iaeger v. Bossieux*, 15 Gratt. 83.

**Owner May Set Off Discounted Notes against Subcontractor.**—It is not error to allow the owner credit for notes discounted by him which were given by the contractor to other subcontractors for work done or material furnished, nor for similar notes held by banks and taken up by owner, nor for orders drawn on the owner by the general contractor in favor of subcontractor. *Schrieber v. Citizens' Nat. Bank*, 99 Va. 257, 38 S. E. 134.

## XII. Assignment of Lien.

**Rights and Remedies Follow Assignment.**—Where a mechanic assigns his contract to build a house, he assigns

therewith his right to a mechanic's lien, and the assignee has the same rights and remedies as the assignor. *Iaeger v. Bossieux*, 15 Gratt. 83.

The mechanic's lien when perfected follows the assignment of the debt which it secures. *Iaeger v. Bossieux*, 15 Gratt. 83; *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396, 25 S. E. 110. See ante, "Assignees," VII, F.

## XIII. Priorities.

### A. IN GENERAL.

Under our statute, the vested rights of third persons, neither parties nor privies to the contract for building or furnishing materials, can not be prejudiced by the mechanic's lien, and mechanics, like other persons, are bound to ascertain for themselves the nature of the interest of their employer. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586, 591.

**Where Owner Stops Work.**—And if, after contracts are made by the owner with the parties who are to furnish materials for or do the work upon the building, and they have commenced to perform their contracts, the erection of the building is stopped by the owner, so that it is not completed, the lien in favor of the workmen and the parties furnishing the materials for compensation, for work done and materials furnished, is existing and valid, without their filing their claims in the clerk's office within thirty days from the time the work stopped, or though they do not file them. And these liens will have priority over any liens upon the building created after the work was commenced under the contracts. *Merchants', etc., Savings Bank v. Dashiell*, 25 Gratt. 616.

**Priorities Inter Se of Materialman's Liens.**—Liens given by § 2485 for material are entitled to precedence as among themselves according to the times at which they are severally filed under § 2486, that first filed taking preference. *Virginia Development Co.*



*v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

The court in this case says: "In the silence of the statute on the subject, the rule of the common law applies, which establishes liens in the order of their acquisition, the first in order of time standing first in order of rank. This is not so in regard to mechanics' liens, because the statute itself forbids priorities in those cases; and the failure of the legislature to so provide in regard to supply liens indicates its intention to leave the common-law rule on the subject unaltered, so far as liens of the latter class are concerned." *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

## B. TIME OF COMMENCEMENT OF LIEN.

### 1. In General.

A mechanic may go on to work, and he has his lien from its commencement, or when he began furnishing material; and the statute gives him a lien over any creditor whose liens arise after his lien commences, without any recordation, because the law gives notice to the world that the mechanic's lien attached to the building, which lien he may enforce by filing a bill in equity within the prescribed time. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259; *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586, 491; *Merchants' etc., Savings Bank v. Dashiell*, 25 Gratt. 616.

And the lien starts from the first moment when the work or delivery of material commences, even as to creditors, and certainly as to the owner. *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965.

But Dent, J., in a dissenting opinion, said: "The lien attaches and the right to enforce it accrues at the completion of the contract, and when the labor has been fully performed." *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259, 266.

### 2. Proof of Time.

Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and this rule requires them to prove when the work was commenced, and the character of the work, and when it was completed. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259, 264.

## C. PRIOR DEEDS OF TRUST.

If a mechanic's lien is recorded on property upon which there is a deed of trust, recorded before work began on the building or structure placed thereon, the deed of trust creditor is entitled to priority of satisfaction to the extent of the estimated value of the property without the improvements for which the lien is claimed. The value is to be estimated as of the date of sale, and may be fixed either directly by the court upon the testimony of witnesses, or by reference to a commissioner, subject to exceptions to his report. *Fidelity Loan, etc., Co. v. Dennis*, 93 Va. 504, 25 S. E. 546; *Hudson v. Barham*, 101 Va. 63, 43 S. E. 189.

**Deed to Secure Money for Building—Notice.**—A building contract provided that part of the price should be paid in cash when the roof was erected, part in cash when the building was finished, and the balance in notes secured by deed of trust on the premises. The owner had previously obtained a loan on deed of trust on the premises, and out of it the cash payments were made to the contractor, he having actual knowledge of the facts, as well as constructive notice, the deed being on file when the contract was made. On completion of the work, the contractor accepted the notes, but he never called for his deed of trust, which, however, was nevertheless executed, and held subject to his order. Held,

that a mechanic's lien afterwards filed by the contractor was subordinate to the lender's deed of trust. *Wright v. Vaughan*, 2 Va. Dec. 662. See also, *Wroten v. Armat*, 31 Gratt. 228.

The house on the lot in a city conveyed in trust is burned down, and the grantor in the deed employs workmen to build another house, upon an agreement to give them a lien upon the lot and house for the cost of the building. The workmen are not informed of the first lien, until they have nearly completed the work, though it was duly recorded. The whole property is subject to satisfy the first lien. *Graeme v. Cullen*, 23 Gratt. 266.

#### D. SUBSEQUENT DEEDS OF TRUST.

Where work has been commenced and material furnished under a contract, for constructing buildings, with the owner of the land on which buildings are to be erected, the mechanic's lien attaches from the time the performance of the work and furnishing materials begin, and such mechanic's lien is entitled to priority over a deed of trust subsequently executed on the same property. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259.

Liens for supplies given, by § 2485, Va. Code, 1887, priority over deeds of trust, etc., executed since March 21, 1877, are not restricted to deeds of trust, etc., executed between that date and the date of the taking effect of that act, but have precedence over deeds of trust, etc., executed after the latter date. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806.

#### E. DOWER.

The dower interest of a married woman is paramount to a mechanic's lien. *Iaeger v. Boissieux*, 15 Gratt. 83.

#### F. LIEN FOR MONEY ADVANCED FOR BUILDING.

A building fund company agrees to

advance to one of its members money to build a house on a lot owned by him, and advance a part of the money and take a lien upon the lot and the buildings which may be erected upon it, to secure the advances made and to be made. The members then make a contract for the building of a house on the lot, with a mechanic who, to raise money faster than it can be obtained from the company, assigns the contract to a person who undertakes to advance the money; and the contract is recorded, so as to create the mechanic's lien. After the contract is recorded, the company advances money from time to time, as it had agreed to do, which is paid to the assignee in part satisfaction on his advances to the mechanic, with a knowledge on his part, that it comes from the company, and that the company claims priority of lien upon the property. The company is entitled to priority over the mechanic's lien, for its advances made after the contract was recorded, as well as for its advances made before. *Iaeger v. Boissieux*, 15 Gratt. 83, 84.

#### G. VENDOR'S LIEN.

The vendor's lien is, in this state, superior to the mechanic's lien. If A agrees to convey land to B and puts himself in possession thereof under an agreement that he will build a house thereon, and that then A will convey it to him reserving a lien on the property, and B contracts with a mechanic to build the house, and it is built, and a mechanic's lien claimed on the property and recorded under ch. 139, acts, 1872-73, p. 460, and afterwards the deed is made to the purchaser reserving such vendor's lien for the unpaid purchase money, such lien will have priority over the mechanic's lien. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586, 587. See ante, "Vendee," VII. A.

#### H. LIEN OF FIERI FACIAS.

The fifth section of ch. 139, acts,

1872-73, does not create a lien in favor of the furnisher of materials upon the property of the owner, but only a demand against him for what may, at the time of notice, etc., be due or unpaid to the contractor. But if prior to the furnisher of materials, proceeding under and according to said fifth section, a creditor of the contractor acquires an execution lien upon what is due, or in arrear, from the owner to the contractor, and has proceeded to enforce his execution lien against the owner, by suggestion, and summons issued thereon, and served on the owner according to law, such execution creditor, by virtue of his said lien, and proceedings by suggestion, etc., to enforce the same, is entitled, by operation of law, to be first paid his execution debt out of the money or debt due from the owner to the contractor. *Stout v. Golden*, 9 W. Va. 231.

#### **I. LIENS AGAINST LEGAL AND EQUITABLE TITLE.**

If the owner of the full equitable estate in land causes building to be erected thereon, for the cost of which a mechanic records a lien, such lien, by the terms of § 2483 of the Virginia Code, takes priority, as to both land and buildings, over all liens thereafter acquired on the lands of such owner, and also over all judgments thereafter recovered against the grantor of such owner holding the mere legal title to the land. *Pace v. Moorman*, 99 Va. 246, 37 S. E. 911.

#### **J. LIEN OF JUDGMENTS AGAINST GRANTOR IN UNRECORDED DEED.**

The effect of § 2483 of the Virginia Code is to modify the registry law as contained in § 2465 so far as to give priority to a mechanic's lien on the lands of the grantee who has failed to record his deed over judgment subsequently obtained against his grantor. *Pace v. Moorman*, 99 Va. 246, 37 S. E. 911.

#### **K. LIEN OF WAREHOUSE AND STORAGE RECEIPTS.**

Warehouse and storage receipts, whether issued by a warehouseman who has complied with chapter 82 of the Code or one who has not, have the nature and effect given them at common law, and the bona fide holder for value of such receipt has priority over a claimant asserting a lien for supplies furnished after the transfer and delivery of such receipt. *Mill-hiser, etc., Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760. And see generally, the title **WAREHOUSES AND WAREHOUSEMEN**.

#### **XIV. Waiver and Loss.**

**Accepting Note Not Waiver of Lien.**—Where a materialman, workman, laborer, mechanic, or other person, performs any labor or furnishes any material or machinery for constructing any house, mill, manufactory, or other building or structure, by virtue of a contract with the owner or his authorized agent, he shall have a lien, to secure the payment of the same, upon such house or other structure, and upon the interest of the owner of the lot of land on which the same may stand; and such lien will not be affected by the party claiming the same accepting negotiable notes for the amount of his account, which notes are not made payable after the time fixed for bringing a suit to enforce the mechanic's lien. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259.

And while a bill of exchange or other security, which is not maturable until more than three months from the completion of the work, whether paid or not at its maturity, might be regarded as a waiver of the lien because the party after that period would have no right under the statute to assert it, yet the acceptance of such bill of security, which matures and is protested before the expiration of three

months from the completion of the work, the time, under an act of February 2, 1853, within which it must be enforced, is no waiver of such lien. *Bodley v. Demmead*, 1 W. Va. 249.

**Payable before Expiration of Time for Filing.**—Though a note is payable after the expiration of the time limited by law in which a lien must be filed, it is not waived if it be payable before the time in which action must be brought for its enforcement, for a mechanic is allowed to file the lien before his note is due. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259.

**Payable after Expiration of Time for Filing—Offer to Surrender.**—The acceptance of the notes of the debtor, payable after the time granted by the statute for filing a mechanic's lien, and maturing before the expiration of the time limited for bringing suit, will not bar a suit and recovery upon the lien if the notes are produced to be surrendered at the trial. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259, 260.

**Loss by Delay.**—The mechanic's lien created by the Code, § 2, ch. 75, is discharged unless the person desiring to avail himself thereof, within thirty days from the time he ceases to labor on or furnish material for such building and appurtenances, file with the recorder of the county, in which the house or other building is situated, a just and true account of the amount due him, after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which accounts shall be subscribed and sworn to by the person claiming the lien, or someone in his behalf. *Mayes v. Ruffners*, 8 W. Va. 384.

But a laborer's lien on the property of an insolvent corporation does not lapse and become lost by failure to

sue upon it within six months after filing the account, if within that time he files his petition to enforce it in a suit brought by one creditor for himself and others to wind up the affairs of the corporation and apply its property for payment of its creditors. *Kahle v. Oil Co.*, 51 W. Va. 313, 41 S. E. 233.

**Substantial Completion Sufficient.**—If a builder has completed his work according to contract in all material, substantial features, his mechanic's lien is not lost merely because there are minor, unsubstantial, unimportant omissions or defects. *West Virginia Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965.

**Loss by Accepting Confession of Judgment.**—The relinquishment by a contractor of a mechanic's lien on a house on land belonging to a married woman, on condition that the husband and wife confess judgment, will operate as a loss of his remedy, if the judgment is for any reason declared void as to the married woman. *Marks v. Spencer*, 81 Va. 751.

## XV. Merger.

Where a mechanic secures his lien on property by filing his account, etc., in the clerk's office of the court of the county in which the property is located, and subsequently accepts a deed of trust for the amount on the property subject to his lien, the mechanic's lien is merged in the trust deed. *Wroten v. Armat*, 31 Gratt. 228. And see generally, the title MERGER.

## XVI. Sale under Lien.

**When for Cash.**—It is proper to decree sale for cash enough to pay the amount of lien, when that amount is but a small proportion of the value of the whole property. *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703.

**When on Credit.**—Real property of value should be sold on a reasonable credit, unless under peculiar circum-

stances, which should appear by the record. *Pairo v. Bethell*, 75 Va. 825.

**Sale of Machinery and Other Property May Be Separate.**—Where machinery of a permanent character, and which is a part of the realty, is subject to a mechanic's lien, and there is a deed of trust on the buildings and land, all of which is to be sold under one decree, the machinery and the remaining property may be sold in different parcels. *Haskin Wood, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 439, 26 S. E. 878.

## **XVII. Substitute for Mechanic's Lien.**

A deed of trust can not be made a substitute for a mechanics' lien. *Lawyer v. Barker*, 45 W. Va. 468, 31 S. E. 964.

## **XVIII. Pleading and Practice.**

### **A. METHOD OF ENFORCING LIEN.**

#### **1. By Bill in Equity.**

Where the object of the suit is to enforce an alleged mechanic's lien, the suit is one of equitable jurisdiction. Section 2484, Va. Code. *Bailey Cons. Co. v. Purcell*, 88 Va. 300, 13 S. E. 456; *Pairo v. Bethell*, 75 Va. 825; *Iaeger v. Bossieux*, 15 Gratt. 83; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

And a court of equity, having taken jurisdiction of a suit to enforce a mechanic's lien, and having the parties before it, should proceed to the determination of all the questions between them. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

#### **2. By Motion.**

**Nature and Method of Proceeding.**—The proceeding by motion, under ch. 115, Code, 1873, is a summary remedy in equity, assimilated in some of its features to a proceeding at law; the motion may be heard without formal pleadings; the testimony is given viva voce before the court, and if objections

are made to the rulings of the court, they may, it seems, be put into the record by bill of exceptions. All this is anomalous in a court of equity, but it results necessarily from the proceeding authorized, and a party has no absolute right to a trial by jury of an issue joined in such a motion, it being in the nature of an equitable remedy, and the statute (ch. 163, § 8, Code, 1873) not applying to motions which partake of the nature of an equitable proceeding to enforce a charge on real estate. *Pairo v. Bethell*, 75 Va. 825.

### **B. PARTIES.**

**In General.**—In a suit in chancery by a lien creditor to subject real estate, it is the duty of the plaintiff to make all lien creditors, known to him, and all who are disclosed by the judgment lien docket or the records of the courts of the counties in which the land to be sold is situated, parties to the suit. *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413.

**Trustee and Cestui Que Trust.**—A trustee and the cestui que trust must be made parties. *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413.

**Assignors of Contractor Proper, if Not Necessary.**—As the statute requires all parties in interest to be before the court, the assignors of the contract are proper, if not necessary, and may be made such on their motion. *Pairo v. Bethell*, 75 Va. 825, 826.

#### **Failure to Make Necessary Parties**

**Effect.**—If a lien creditor, in filing a bill to enforce his lien against real estate, neglects to make necessary parties thereto in accordance with the former decision of this court, all decrees entered will be reversed, and the proceedings thereunder annulled, and the bill will be remanded to be properly amended. *Farmers' Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413.

**Vendor Reserving Lien.**—If A agrees to convey land to B and puts him in possession thereof, under an agreement that he will build a house thereon, and

that then A will convey it to him, reserving a lien on the property, and B contracts with a mechanic to build the house and it is built, and a mechanic's lien claimed on the property and recorded under ch. 139, acts, 1872, § 3, p. 460, and afterwards the deed is made to the purchaser reserving the vendor's lien for the unpaid purchase money, the vendor's lien will have priority over the mechanic's lien. And if B is a married woman, the mechanic, in seeking to enforce his lien on her separate estate, ought not to make the vendor a party defendant, for the land can be sold only by a separate suit by the vendor to subject the corpus of the property to his lien. *Charleston Lumber, etc., Co. v. Brockmyer*, 18 W. Va. 586.

## C. THE BILL.

### 1. In General.

A bill to enforce a mechanic's lien does not require very great particularity, because the account filed with the clerk, claiming the lien, itself has great effect. *W. Va. Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965, 966.

### 2. Sufficiency.

**Property.**—A bill brought to enforce mechanic's lien on certain property which distinctly specifies the lots, and states the legal title to be in certain individuals as trustees, sufficiently states the ownership of the property. *Heffernan v. Harvey*, 41 W. Va. 766, 24 S. E. 592.

**Trustees.**—A bill brought to enforce mechanics' lien against certain individuals, with the words: "Trustees of, etc.," immediately following their name, in apposition, is sufficient to show that the suit is against them as trustees, without the insertion of the word "as" before "trustees." *Heffernan v. Harvey*, 41 W. Va. 766, 24 S. E. 592.

### 3. Time to Be Filed.

**Where Money Due by Installments.**—Under the Virginia Code, ch. 119, p. 510, a bill in equity is the proper pro-

ceeding to enforce a mechanic's lien, and the suit must be commenced within six months from the time the money or last installment was due. *Iaeger v. Bossieux*, 15 Gratt. 83.

**Demurrable if Not Filed within Statutory Period.**—In a suit to enforce a mechanic's lien claimed under an act of March 8, 1879, if it appears upon the face of the bill that the suit was not brought within six months from the time the plaintiff filed his account with the clerk, as required by the statute, the bill should be dismissed upon demurrer. *Phillips v. Roberts*, 26 W. Va. 783.

A bill to enforce a mechanic's lien which does not show on its face that the suit was brought within the time prescribed by statute is bad on demurrer. *Savings Bank v. Powhatan Clay Co.*, 102 Va. 274, 46 S. E. 294.

### 4. Allegations.

**Alleging Perfection of Lien.**—A bill filed to enforce a mechanic's lien sufficiently alleges that the lien was perfected before the expiration of thirty days from the termination of the work, when it alleges that the lien was filed as provided for in the Code, §§ 2475, 2476, and the copy of the record of the lien exhibited with the bill shows that a part of the work charged for was done within thirty days of the recordation of the lien. *Richlands, etc., Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806.

**Alleging Failure to Pay Estimate.**—If contractors are compelled, by reason of their own insolvency, to abandon their contract, they can not sue for the work and labor performed, unless they allege and prove that either the owner, as a dependent condition to the continuance of the work, failed to pay the estimate of the architects when properly made, or collusively induced such architects in bad faith not to make such payment thereof and defeating such precedent condition. *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436.

**Unnecessary to Allege Approval of Contract by Contractor.**—In a declaration against the owner under the mechanic's lien law, it is unnecessary to aver that the account, alleged to have been furnished the defendant, was approved by the general contractor, or that the latter, after ten days' notice thereof, had failed to object to it. *Va. Code, 1873, ch. 115; Acts, 1874-75, ch. 351, p. 137. Norfolk, etc., R. Co. v. Howison, 81 Va. 125.*

**Allegation of Ascertainment of Account Due.**—And under the above facts, it is not necessary to allege that the account alleged had been ascertained to be due from the contractor to the subcontractor. *Norfolk, etc., R. Co. v. Howison, 81 Va. 125.*

**Allegation of Time of Notice to Defendant.**—And it is not necessary to aver the time when the alleged notice was given defendant. *Norfolk, etc., R. Co. v. Howison, 81 Va. 125.*

**Allegation That Subcontractor Owes General Contractor.**—Nor that, when notice was given, the subcontractor owed anything to the general contractor. *Norfolk, etc., R. Co. v. Howison, 81 Va. 125.*

**Unnecessary to Allege any Part Due.**—In a suit of a subcontractor against an owner for materials furnished the general contractor, it is unnecessary to allege that any part of the price agreed to be paid remained due to the latter from the owner when notice was given. *Acts, 1874-75, § 5, p. 437. Roanoke Land, etc., Co. v. Karn, 80 Va. 589.*

**Allegation That Service Rendered within Statutory Period.**—It is not necessary under *Va. Code, § 2486*, as amended by act of February 15, 1892, giving employees of manufacturing companies a lien for services on the property of the company, and providing that no one shall be entitled to a lien unless within ninety days after such services are rendered he shall file in the office of the clerk of the county

in which the company has its chief office in the state a memorandum of the amount and consideration of his claim, that the memorandum should state that the services were rendered within ninety days. *Overholt v. Old Dom. Mfg. Co., 98 Va. 654, 37 S. E. 307.*

**When Allegations Denied Must Be Proved.**—When the party who claims to have furnished material for the construction of a house proceeds by a bill in equity to enforce his lien against the property, and the owner of the property, in answer to the bill, denies that the lien has been properly obtained by pursuing the statutory requirements, denies that the material was furnished by the plaintiff, the allegations of the bill must be sustained by proof, in order to obtain a decree for the sale of the property. *Cent. City Brick Co. v. Norfolk, etc., R. Co., 44 W. Va. 286, 28 S. E. 926.*

#### D. NEW OR SUPPLEMENTAL BILL.

**Where Not Required.**—Where a mechanic asserts his lien as to installments due and there are others to become due, it is not necessary to file a new or supplemental bill for such future installments. *Iaeger v. Bossieux, 15 Gratt. 83.*

#### E. CROSS BILL.

**Proceeding When Filed.**—Where the chancery court takes cognizance of a suit, the object whereof is to enforce an alleged mechanic's lien, and a cross bill is filed, and all the evidence appears in the record, this court will review the action of the court below and decree according to equity and the right of the case. *Bailey Cons. Co. v. Purcell, 88 Va. 300, 13 S. E. 456.*

**Special Replication.**—In proceedings to enforce a mechanic's lien, an answer claiming recoupment is not one for affirmative relief, and no special reply is necessary under *ch. 125, § 35, W. Va. Code*; but is merely for defense,

and is met by a general replication. *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096.

#### F. DIRECTING AN ISSUE.

The court might, perhaps, in the exercise of a sound discretion, direct an issue or issues under circumstances which would warrant such direction in a regular chancery suit; and so, if the case required it, there seems to be no good reason why there might not be a reference to a commissioner to make inquiries and to take and state accounts. *Pairo v. Bethell*, 75 Va. 825.

#### G. DECREE OR JUDGMENT.

**May Be Personal.**—Although a bill is filed to enforce the lien of a subcontractor against real estate of the owner, yet, if the account is established and the owner admits funds in hand sufficient to pay it and his readiness to pay, it would be a vain and useless act to subject the property to the payment of the lien, and it is not error to give a personal decree against the owner and general contractor for the amount due. *Taylor v. Netherwood*, 91 Va. 88, 20 S. E. 888.

**Decree for Sale Not Final.**—A decree entered, on a bill taken for confessed, for the sale of property to satisfy a supposed mechanic's lien is not final, and an appeal therefrom is not bound by the limitation prescribed by the Virginia Code, ch. 178, § 3, p. 1136, which is applicable to final decrees. *Hendricks v. Fields*, 26 Gratt. 447.

#### H. WHEN JUDGMENT WILL NOT BE REVERSED.

Judgment will not be reversed for defect, imperfection or omission in the pleadings unless in the court below there was a demurrer. Va. Code, 1873, ch. 177, § 3.

**But a failure** to state any cause of action at all is not cured by the statute. *Roanoke Land, etc., Co. v. Karn*, 80 Va. 589.

#### I. APPEAL.

**What May Be Considered on.**—Noth-

ing not made part of the record by bill of exceptions, or by order of the court, can be regarded as such by the appellate court. The clerk can add nothing to the record, and his certificate that a deposition, or other paper copied by him, was the evidence whereon the judgment was founded, is no part of the record. *Roanoke Land, etc., Co. v. Karn*, 80 Va. 589.

**Defect in Notice—When Objected to.**—Defects in notice, or in service of notice, by subcontractor to owner, under the mechanic's lien law, can not be objected to for the first time in the appellate court; nor can refusal of the court below to award new trial be reviewed unless all the evidence is in some proper mode certified to the appellate court. *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821.

#### J. EFFECT OF SUIT BY SUBCONTRACTOR ON RIGHTS OF GENERAL CONTRACTOR.

A suit by a subcontractor to enforce a mechanic's lien which has been duly recorded, to which the general contractor is made a party defendant, and his recorded lien properly set forth in the bill, stops the act of limitations from running not only on the complainant's lien, but also on the lien of the general contractor, and all claiming as contractors under him, and operates to suspend any further suit by any one or more of them during the pendency of a suit instituted by the subcontractor. *Spiller v. Wells*, 96 Va. 598, 32 S. E. 46.

#### K. LIMITATION OF ACTIONS.

**Issuance of Summons on Beginning of Suit.**—An action at law or suit in equity dates from the date of the summons, not from its service; and therefore a suit to enforce a mechanic's lien, in which the summons issued, but was not served, within six months from recordation of the lien, is not barred by that limitation. *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.



**Lapse of Time within Which Suit May Be Brought as Limitation of Right of Lien.**—In *McCartney v. Tyrer*, 94 Va. 198, 26 S. E. 419, it is questioned by the court, whether the time, beyond which no suit can be brought to enforce the lien, is not a limitation of the right to the lien, and not of the remedy alone.

### **XIX. Evidence.**

**In General.**—The first and most important general rule, applicable almost universally, is that the plaintiff should make proof of every material allegation of his complaint or declaration, and the defendant of every new affirmative fact contained in his plea. *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926.

**Production and Competency.**—And the mechanic's lien laws do not alter the rules governing the production and competency of testimony, unless specially provided for by statute. *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926.

**Sufficiency of the Account as Evidence.**—It is not sufficient to file with the bill the account filed with the clerk of the county court for the purpose of creating such lien, but the fact that the material was furnished to the contractor, to be used in the construction of the house, in pursuance of a contract with such contractor, must be alleged and proved before such lien will be enforced against the property; and especially is this the case when the contract is denied in the answer. *Central City Brick Co. v. Norfolk, etc., R. Co.*, 44 W. Va. 286, 28 S. E. 926.

**Receipt.**—Receipts of payment, whether embodied in written instruments or not, are deemed to be of the imperfect sort, which, though prima facie evidence of what they declare, may be explained or contradicted orally. They are so, even when expressed to be in full of all demands. *Cushwa v. Improvement, etc., Bldg. Ass'n*, 45 W. Va. 490, 32 S. E. 259, 262.

### **Medical Attendance.**

As to liability for, see the titles APPRENTICES, vol. 1, p. 684; MASTER AND SERVANT, ante, p. 657.

### **Medical Boards.**

See the title PHYSICIANS AND SURGEONS.

### **Medical College of Virginia.**

See the title COLLEGES AND UNIVERSITIES, vol. 2, p. 849.

### **Medical Experts.**

See the title EXPERT AND OPINION EVIDENCE, vol. 5, p. 780.

### **Medical Jurisprudence.**

See the title PHYSICIANS AND SURGEONS, and references given.

### **Medical Societies.**

See the title PHYSICIANS AND SURGEONS.

### **Medicine.**

See the title DRUGGISTS, vol. 4, p. 830.

## Medium of Payment.

See generally, the title PAYMENT. See also, the particular titles, such as **BILLS, NOTES AND CHECKS**, vol. 2, p. 475; **BONDS**, vol. 2, p. 538; **JUDGMENTS AND DECREES**, vol. 8, p. 583, et seq.

## Meetings.

See the titles **DISTURBING MEETINGS**, vol. 4, p. 733; **SCHOOLS; STOCK AND STOCKHOLDERS**.

**MELANCHOLIA**.—See *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 984. And see the title **INSANITY**, vol. 7, p. 672.

**MEMBER**.—See the titles **ASSOCIATIONS**, vol. 1, p. 843; **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 2, p. 344; **BUILDING AND LOAN ASSOCIATIONS**, vol. 2, p. 645; **MUTUAL INSURANCE; STOCK AND STOCKHOLDERS**.

In *Childrey v. Rady*, 77 Va. 518, 532, it is said: "On the contrary, that section expressly requires a city board to be composed of trustees then in office by appointment of the board of education and **members** (mark the language) of any city board of education created by the municipal authorities thereof, so far as the number and locality of same shall meet the condition prescribed in said act. Now, the '**members** created by the municipal authorities' could only be such persons as had been appointed by the city authorities, by concession of the board of education, to fill vacancies in the board of trustees originally appointed by the board of education." See also, the title **SCHOOLS**.

**MEMBER OF THE FAMILY**.—See **FAMILY**, vol. 5, p. 834. And see the title **SERVICE OF PROCESS**.

By § 3207, Va. Code, 1887, providing that notices may be served by delivering copy to "a **member of the family**" of the person to be notified; held, delivery to "a mere boarder, a stranger to his blood," is not sufficient; and appearing and contesting validity of service is no waiver of defect of notice. *Quære*, whether delivery to a servant of person to be notified is sufficient service. *Fowler v. Mosher*, 85 Va. 421, 7 S. E. 542.

**MEMBERS ELECTED**.—It is not clear beyond a "reasonable doubt," that the words "**members elected**," in the constitution of this state, in the section providing that "no bill shall be passed by either branch (of the legislature) without an affirmative vote of a majority of the **members elected** thereto," can only refer to persons elected at the last preceding elections, although they may have ceased to be **members** at the time the vote is taken on the passage of the bill; and a reasonable doubt as to this, is sufficient to sustain the validity of the act under consideration. The court said: "The words appear to mean that a person must be a '**member**', as well as '**elected**'; and if a senator resigns his seat, and his resignation is accepted, is he still a '**member**'? It is certainly not clear beyond a reasonable doubt, that the words '**members elected**'; can only refer to persons elected at the last preceding elections, although they may have ceased to be **members** at the time the vote is taken on the passage of a bill; and a reasonable doubt as to this is sufficient to sustain the validity of the act in question." *Osburn v. Staley*, 5 W. Va. 85. See the title **STATUTES**.

## **Memorandum.**

See the titles DOCUMENTARY EVIDENCE, vol. 4, p. 775; FRAUDS STATUTE OF, vol. 6, p. 534. As to memorandum to refresh memory, see the title WITNESSES.

## **Memory.**

See the titles EVIDENCE, vol. 5, p. 344; TESTAMENTARY CAPACITY.

## **Mensa et Thoro.**

See the title DIVORCE, vol. 4, p. 734.

## **Mental Anguish and Suffering.**

See the title DAMAGES, vol. 4, p. 196.

**MENTAL DEPRAVITY.**—See *Stewart v. Lyons*, 54 W. Va. 565, 670, 47 S. E. 442.

## **Mercantile Law.**

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

## **Mercantile Partnership.**

See the title PARTNERSHIP.

**MERCHANT.**—See the title LICENSES, ante, p. 305.

A merchant is a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery. *White v. Com.*, 78 Va. 484, 485.

**MERCHANTABLE.**—In *Riggs v. Armstrong*, 23 W. Va. 760, 773, it is said: "If, however, we assume that the evidence does not prove that the term 'merchantable' has a technical designation in the stove trade, then, we must resort to the general definition of it. Webster's definition of the word 'merchantable' is, 'Fit for the market, such as is usually sold in market, or such as will bring the ordinary price, as merchantable wheat or timber.' It, therefore, seems to me, whether we take the evidence or the dictionary as our guide the term 'merchantable' includes both first and second class oil-barrel staves and that all such were embraced by the terms used in the said trust deed."

## **MERGER.**

### **I. Definition, 785.**

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**V. Of Civil by Criminal Liability, 794.****VI. Merger in Criminal Law, 794.****VII. Merger by Nonsuit, 794.****CROSS REFERENCES.**

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; ACCORD AND SATISFACTION, vol. 1, p. 81; ACTIONS, vol. 1, p. 122; ARBITRATION AND AWARD, vol. 1, p. 687; AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181; CONTRACTS, vol. 3, p. 307; CRIMINAL LAW, vol. 4, p. 1; DOWER, vol. 4, p. 782; ESTATES, vol. 5, p. 160; FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 261; JUDGMENTS AND DECREES, vol. 8, p. 161; MORTGAGES AND DEEDS OF TRUST; NOVATION.

As to merger of corporations, see the titles CORPORATIONS, vol. 3, p. 510; RAILROADS. As to merger of decree of divorce, a mensa in decree a vinculo, see the title DIVORCE, vol. 4, p. 734.

**I. Definition.**

The doctrine of merger is a technical doctrine founded upon the presumed intention of the parties. *Bowles v. Elmore*, 7 Gratt. 385, 390.

**II. Contracts.****A. GENERAL RULE.**

**At Law.**—In common-law courts the acceptance of a higher security for the debt is regarded as an extinguishment of a lower security for that debt. A bond extinguishes the simple contract, the latter being merged in the former. *Meade v. Grigsby*, 26 Gratt. 612.

**In Equity.**—With courts of equity a different rule prevails. Those courts, not regarding the form so much as the substance, treat the debt as still subsisting, unless the parties clearly intended a satisfaction. It must be made to appear that the creditor intended by accepting the higher security to abandon all recourse upon his original demand. *Niday v. Harvey*, 9 Gratt. 454, 466; *Meade v. Grigsby*, 26 Gratt. 612. See also, *Bowles v. Elmore*, 7 Gratt. 385, 390.

Whether in a court of equity the tak-

ing of a higher security operates a destruction of the simple contract, is a question to be decided by proof of the intention of the parties. *Niday v. Harvey*, 9 Gratt. 454. And see generally, the title PARTNERSHIP.

**Doctrine Not Favored in Equity.**

The doctrine of merger is not favored in equity, and is never allowed, it is said, unless for special reasons, and to promote the intention of the party. *Garland v. Pamplin*, 32 Gratt. 305.

**No Merger in Equity if Justice Requires Otherwise.**—M. and D., as his surety, execute a bond to G., upon a settlement of an account for articles furnished by G. to M. Though at law the account is merged in the bond, in equity the debt on the account will be held as still subsisting if necessary to do justice between the parties. *Meade v. Grigsby*, 26 Gratt. 612.

After articles were furnished by G. to M. on account, but before the execution of bond by M. with D. as surety, to settle the same, M. conveys all his property in trust for M.'s wife and children, subject to his then-existing debts. G. sues M. and D. on the bond, recovers judgment, and sues

out execution, which is levied on the property of D. The debt of M. to G., for the articles furnished him, was a subsisting debt at the date of the deed, and the trust property is liable for it. *Meade v. Grigsby*, 26 Gratt. 612.

**Parol Evidence to Show Intention.**—

If the higher security does not show on its face that it was given for the same debt as the simple contract, and the party relying upon the merger or extinguishment of the simple contract is compelled to resort to evidence other than the higher security, in order to show the purpose for which it was executed and accepted, then the party claiming that it was given as collateral security, and not in satisfaction of the simple contract, should have the right to introduce parol evidence also to sustain his contention. This violates no rule of law, but is only an explanation of the purpose for which the higher security was given. *Witz v. Fite*, 91 Va. 446, 22 S. E. 171. See the title PAROL EVIDENCE.

In the absence of fraud, accident, or mistake, the terms of a deed can not be varied by parol evidence of what occurred between the parties either before or during its execution, all prior contracts, written or oral, between them, being merged in the subsequent deed. *Shenandoah Valley R. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239. And see generally, the title PAROL EVIDENCE.

**Remedy on Specialty Must Be Co-extensive with That on Simple Contract.**—In general, a simple contract is extinguished by a specialty security for the same debt, if the remedy upon the latter is coextensive with that which the creditor has on the former. *Witz v. Fite*, 91 Va. 446, 22 S. E. 171.

**Merger of Simple Contract in Specialty.**—Taking an obligation under seal for a simple contract debt merges it in the obligation, and thus extinguishes it, as the taking of a security of higher dignity extinguishes inferior securities

for the same debt. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

"A simple contract debt is merged in a bond or covenant taken for or to secure the claim, because in legal contemplation the specialty is an instrument of a higher nature, and affords a higher security and a better remedy than the original demand presented." *Bowles v. Elmore*, 7 Gratt. 383, 390; *Meade v. Grigsby*, 26 Gratt. 612.

In a court of law the taking of a higher security operates per se a destruction of the simple contract. *Niday v. Harvey*, 9 Gratt. 454.

**Simple Contract for Sale of Goods in Specialty.**—

Mercantile business being carried on in a single name, the merchant in whose name the business is conducted buys goods, and executes a specialty for the price thereof. The party who sells the goods and takes the specialty is ignorant at the time that the merchant has a dormant partner. Discovering this fact after the death of the merchant who gave the specialty, he then brings an action of assumpsit for the price of the goods against the dormant partner. Held, the creditor has no legal remedy on the simple contract, the same being extinguished by the specialty. *Dissentiente Baldwin, J. Ward v. Motter*, 2 Rob. 536. And see the title PARTNERSHIP.

**Sealed Instrument by One of Several Joint Contractors.**—Although it is the rule that a sealed instrument given by one of several joint contractors, which purports to bind all, if accepted as a satisfaction, merges a prior simple contract made by all so that no action can afterwards be maintained on the simple contract or on the specialty against those who did not sign it, it appears that a different rule prevails when the contract is joint and several. *Sale v. Dishman*, 3 Leigh 548.

**Higher Contract Must Be by Same Obligor.**—A parol contract is made for the sale of a slave, at a price below the

market value; but with a condition that if the vendee wishes to sell the slave, the vendor shall have him at the price he received for him. The vendor then executes a bill of sale under seal for the slave, to the vendee, in which only the price given is stated; but there is no mention of the condition for repurchase. The vendee afterwards sells the slave, at a price even above the market value at the time of the first sale; and the vendor brings an action for a breach of the parol contract. It was held, that the parol contract was not merged, because the contract of the vendee could not be merged by the deed of the vendor. *Brent v. Richards*, 2 Gratt. 539. See the title **VENDOR AND PURCHASER**.

### B. SECURITIES OF EQUAL DEGREE.

The general rule is that merger is only of a lower security by one higher in legal dignity. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Bowles v. Elmore*, 7 Gratt. 385; *McGuire v. Gadsby*, 3 Call 234; *Bank v. Allen*, 76 Va. 200, 204.

"The general principle governing in cases of this kind, and which applies to all securities," says Chief Justice Savage in *Andrews v. Smith*, 9 Wendell 53, "is, that a security of a higher nature extinguishes inferior securities, but not securities of an equal degree;" and judgments are, of course, of "equal degree." *Bank v. Allen*, 76 Va. 200, 204.

In *McGuire v. Gadsby*, 3 Call 234, the court, per Roane, J., said: "On this subject we take the law to be settled, that, in order to make one instrument an extinguishment of another, the latter must be of a higher dignity than the former, or must put the plaintiff in a better condition."

### C. COLLATERAL SECURITY.

See the title **PLEDGE AND COLLATERAL SECURITY**.

The rule that a simple contract debt is merged in a bond or covenant be-

cause in legal contemplation the specialty is an instrument of a higher nature does not hold, where it appears on the face of the subsequent deed or specialty that it was intended only as an additional or collateral security, and there is nothing in the deed itself expressly inconsistent with such intention. *Bowles v. Elmore*, 7 Gratt. 385.

If the higher security shows on its face that it was executed for the same debt as the simple contract, and shows further that it was not taken in satisfaction of the simple contract, but in addition and collateral to it, there is no merger. But if the higher security simply shows that it was given for the simple contract, and nothing more appears, the presumption, at least of fact, is that it was in satisfaction of the simple contract, and the latter is merged into the former. *Witz v. Fite*, 91 Va. 446, 22 S. E. 171.

#### Note in Bond Given as Security.—

Thus, in September, 1837, the administratrix of E. sued the executor of B. in debt on a promissory note dated June, 1817. The executor pleaded the statute of limitations; and the administratrix replied that after making the note, B. having become the bail of E., they in October, 1818, entered into a covenant, by which it was agreed that E. should deliver to B. the note of B., who was to hold it until the liability of B. as bail was ended, and then he was to redeliver it to E. That pending the suit, E. died in February, 1832, and there was no administration on his estate until August, 1836. There was a demurrer to the replication, which was sustained, because there was no proffer of the covenant. The plaintiff was then allowed to amend the replication by adding the proffer of the covenant, and the defendant again demurred. Held, the note was not merged in the covenant so that an action could not be maintained upon it, the covenant being collateral security. *Bowles v. Elmore*, 7 Gratt. 385.

**By Endorser.**—A. makes a promis-

sory note to B. who indorses it to a bank, which discounts it for accommodation of the maker; the note not being duly paid, the indorser B. gives bond with surety to the bank for the debt. Held, this bond, not being yet paid, does not extinguish A.'s simple contract debt to the bank. *Taylor v. Bank*, 5 Leigh 471.

**Several Small Notes Given for a Larger One.**—Where several small notes are given for a larger one, this does not constitute a merger, and extinguish the former. *McGuire v. Gadsby*, 3 Call 234.

### III. Estates.

#### A. IN GENERAL.

Where a greater and less estate unite in the same person, without intermediate estate, the less at once merges into the greater. *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234; *Little v. Bowen*, 76 Va. 724.

Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, whereby the less is immediately merged—that is, sunk or drowned in the greater. To this result, it is necessary (1) that the two estates should be in one and the same person, (2) at one and the same time, (3) in one and the same right. 2 Bouv. Institutes, 375, No. 1989; 2 Minor's Inst. (2d Ed.), 368, et seq. *Garland v. Pamplin*, 32 Gratt. 305, 315; *Little v. Bowen*, 76 Va. 724.

**One Estate Must Be Greater than the Other.**—Merger can never happen except where a greater estate and a less coincide and meet in the same person without any intermediate estate. In that case the less estate is immediately annihilated, or in law phrase is said to be sunk or drowned in the greater. *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768.

**Estates Must Unite in Same Person.**—In a case where the legal title, the

larger estate, was vested in a trustee, and the equity of redemption, the less estate, in another, the two estates never united in him (the latter), and there could not be otherwise a merger of title. *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768.

**Interest or Intention — Equitable Doctrine.**—"Where 'the owner of an estate becomes also the owner of an incumbrance on it, such incumbrance shall thereby become extinguished,' says the law; provided, however, says equity, 'that it is not his interest or intention to keep such incumbrance alive.'" *Allen v. Patrick*, 97 Va. 521, 34 S. E. 451.

In *Garland v. Pamplin*, 32 Gratt. 305, 315, *Brockenbrough v. Brockenbrough* 31 Gratt. 580, was cited to support the proposition that while the rule at law may be inflexible, in equity it depends upon circumstances, and is governed by the intention, either expressed or implied (if it be a fair and just intention), of the person in whom the estates unite, and the purposes of justice, whether the equitable estate shall merge or be kept in existence. 4 Kent's Comm. 102. See also, *Rhea v. Preston*, 75 Va. 757, 776.

"It is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united." *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, 598, citing *Forbes v. Moffat*, 18 Ves. R. 384, 390.

**Substantial Justice.**—"Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented and a mort-

gage or other security to be kept alive, when this result would aid in carrying a wrong or other unconscientious fraud into effect, under color of legal forms. Equity alone interposes to prevent a merger, in order thereby to work substantial justice." 2 Pom. Eq. Juris., § 734. *Allen v. Patrick*, 97 Va. 521, 525, 34 S. E. 451.

**Innocent Purpose.**—"A merger is prevented and a mortgage upheld where there is a strong equity in favor of it; but never, where it is not for an innocent purpose." *Allen v. Patrick*, 97 Va. 521, 525, 34 S. E. 451.

## B. ILLUSTRATIONS.

**Wife's Separate Estate by Fee—Two Estates Not the Same.**—M., the wife of P., was entitled to real estate by descent from her father and by devise from W., but her husband had not reduced any part of it into possession when he made a deed, by which he conveyed to C. and L. all his interest and right in said estate in trust for the sole and separate use of his wife, M., free from all claim by him, with full power in her to control and dispose of the same as if she was not a married woman. The real estate was afterwards divided, and M. came into actual possession of it, and she sold a part of it to McD., retaining the title, who improved it, and sold it again to her; and she executed her bond to S., by direction of McD., for a part of the purchase money. She also executed to B. a bond as security for G. Upon a creditor's bill by S. to subject the land of M. to pay his debt, held, by this deed M. acquired in equity a separate estate in her husband's estate and interest in her lands conveyed to the said trustees, distinct from her legal estate in fee in said lands, and which did not merge in said legal estate. *Garland v. Pamplin*, 32 Gratt. 305.

**Quitclaim Deed to Beneficiary of Deed of Trust.**—Pending a suit by judgment creditors to set aside a deed of trust as fraudulent, the grantor

makes a deed of quitclaim to his creditor of all the property conveyed in the deed; but the notes evidencing the debt for which the deed of trust is given are not given up, nor is the deed of trust released. It was held, that at law, upon the principle of merger, the rights of the cestui que trust were extinguished by the deed of quitclaim, but that in equity, it was a question of intention. *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

**Mechanic's Lien by Lien of Trust Deed.**—A mechanic's lien will merge in a trust deed given to secure the indebtedness. *Wroten v. Armat*, 31 Gratt. 228.

**Equitable Estate in Legal Title.**—In 1855, H. bought of K. a lot of land for \$433.33, and paid one-third cash, but took neither deed nor other writing nor possession. Sometime prior to 14th of July, 1856, T., as trustee of B., verbally purchased the lot of H. for same price, and paid him what he had paid, and assumed the remaining two-thirds due to K. And by writing, under seal of that date, B. directed her trustee to obtain a conveyance of said lot from K., reserving vendor's lien for the two-thirds still due on the purchase money, and to employ her trust fund in building a house upon it. This T. did, after having first got a written order from H., directing K. to convey the lot as aforesaid. The deed is dated August 1st, 1856, but it was not recorded until 1859. Afterwards, in May, 1857, S. got a judgment against H., and sued to subject the lot to the judgment. Held, the valid, equitable title of T. in the lot was not so merged in the legal title acquired by the subsequent deed of K. to him as to subject the lot to the lien of said judgment. *Powell v. Bell*, 81 Va. 222.

In 1856, L. sells land to T. by parol contract, receives all the purchase money and puts T. into possession. In January, 1867, L. executes a deed to T., by which he released all his



claims to the land to T., and warrants the title. T. then sells the land to W., and W. conveys to F. In March, 1866, B. recovers a judgment against L., which is docketed within the year. In a suit against F. to subject the land to satisfy the judgment against L.; held, the valid equitable title of T. is not so merged in the legal title acquired by the deed of L. to him, as to subject the land to the lien of the judgment against L. *Floyd v. Harding*, 28 Gratt. 401.

"No deed of conveyance is necessary to confirm its validity (of an executory agreement for the sale of land) and how an abortive attempt to obtain a valid conveyance can destroy the pre-existing equitable title is beyond my comprehension. Nor can I conceive what merger there can be in regard to creditors of the equitable estate in the legal title by force of a deed which as to creditors is a blank piece of paper." *Withers v. Carter*, 4 Gratt. 407, cited, with approval, in *Floyd v. Harding*, 28 Gratt. 401; *Long v. Hagerstown Agricultural, etc., Co.*, 30 Gratt. 665.

**Money Charged on Real Estate by Fee Simple.**—"All inferior estates are derived out of the fee simple, so that whenever a particular estate, or limited interest in land, vests in the person who has the fee simple in land, such particular estate or interest is immediately drowned or merged in it, upon the principle that *omne majus continet in se minus*. Where a sum of money is charged on real estate, which comes to the person entitled to the money in fee, the charge is merged." 1 Lomax, Dig. 13." *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234.

"The same result follows where the right to money charged on the land comes to the owner in fee of the land." *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234.

**Purchased Estate by Deed of Trust.**—G., B. and K. were principal obligors in a bond. B. and K. put money in the hands of G. to pay the bond; and he

bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B. paid it. After the judgment G. conveyed land to S. to secure a debt due to him and another debt due to C. Upon a bill by B. and K. against S. and C. to subject the land conveyed in the deed to S. to satisfy the debt B. had paid, S. stated in his answer that prior to the judgment he held the bond of G., B. and K. and that he had delivered it up upon receiving the bond of G. with the deed to secure it; but there was no proof of this. C., in his answer, stated that he had before the judgment bought one-half the land from G., and made payments upon it; and had afterwards given it up and taken the bond of G. for the amount, and taken the deed of trust to secure it. Held, that the equity set up by S. was not proved; and that the equity of C., if he had any, was merged in the deed of trust. *Buchanan v. Clark*, 10 Gratt. 164.

**Judgment Lien by Fee.**—"The union of title to property, and the ownership of a judgment which is a specific lien on the particular property, in the same person, will merge and extinguish the judgment." 15 Am. & Eng. Ency. Law, 321, 334." *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234. See also, post, "Judgments," IV.

**Lien of Trust Deed in Fee.**—A grantor conveyed real estate to a trustee to secure notes, and afterwards conveyed it by general warranty to a grantee, who assumed payment of the indebtedness. The trustee then conveyed to the same grantee, who became the owner of the debts secured by the deed of trust. Held, that the lien created by the deed in trust was not, by such conveyances, merged or impaired, since equity would keep it in force for the protection of grantee's title. *Rorer v. Ferguson*, 96 Va. 411, 31 S. E. 817. See generally, the title MORTGAGES AND DEEDS OF TRUST.

**Estates for Years.**—The general rule

is that an estate for years may be merged in any estate of freehold or inheritance, where there is no intermediate estate to act as a barrier between the term and the greater estate. *Wade v. South Penn Oil Co.*, 45 W. Va. 380, 32 S. E. 169; *Campbell v. Fetterman*, 20 W. Va. 398.

**Life Estate.**—A husband's life estate is merged with the fee, by a devise by the wife in her will of all. *Browne v. Bockover*, 84 Va. 424, 433, 4 S. E. 745. And see the title *CURTESY*, vol. 4, p. 149.

E. owns an estate for her life in property, both real and personal, including slaves; and S. owns the remainder in fee therein; and E. and her trustee enter into a contract called by the parties a lease, by which they convey to S. the life estate of E. in the whole of the property, and S., in consideration thereof, undertakes to pay E. annually for her life seven hundred dollars as rent, and to pay all taxes and legal charges on the estate; and the usual remedies for the recovery of these annual sums were reserved. S. was put into possession of the property, and held and treated it as his own. Held, though the instrument was called a lease, and the sum reserved was called a rent, the contract was a surrender, and the life estate of E. was merged in the estate of S. *Scott v. Scott*, 18 Gratt. 150.

**Dower.**—Land descends on seven heirs and dowerer. S. sells his seventh to M., who conveyed it and his own seventh to secure debt to F., S. & Co. L., whose wife owned one-seventh, acquired five-sevenths, embracing M.'s two subject to the debt of F., S. & Co. C.'s heirs owned the remaining seventh. It was all subject to widow's dower, which was unassigned. L. purchased the dower right for an annuity for widow's life, and L. and wife conveyed four-sevenths, including wife's, to secure payment of the annuity. Subject to these trusts, L.'s entire interest was

conveyed to separate use of L.'s wife. F., S. & Co. sued to enforce their trust on two-sevenths. C.'s heirs sued to sell their one-seventh. Widow sued to enforce her trust on four-sevenths. The suits being heard together, held, there was no merger of the dower purchased by L. in the two-sevenths conveyed to secure F., S. & Co., and bought by L. subject to that trust; nor in the one-seventh, the reversion whereof was owned by C.'s heirs. But as to three of the four shares conveyed to secure the widow's annuity, merger took place before the conveyance. *Little v. Bowen*, 76 Va. 724.

**Contingent Right of Dower.**—If a husband purchase his wife's contingent right of dower in his real estate, and secures the purchase price along with other debts by a deed of trust on his real estate, on the death of the wife intestate, the debt secured to her becomes extinguished, as the husband is her sole distributee, and the deed of trust stands as a security for the other creditors secured. *Allen v. Patrick*, 97 Va. 521, 34 S. E. 451. See the title *DOWER*, vol. 4, p. 782.

**Remainder.**—The alienation of a particular estate on which a remainder depends, or the union of such estate with the inheritance by purchase or descent, shall not operate, by merger or otherwise, to defeat, impair, or otherwise affect such remainder. W. Va. Code, 1906, § 3032; Warth's Code, ch. 71, § 13; Va. Code, § 2425.

## C. MORTGAGES.

See the title *MORTGAGES AND DEEDS OF TRUST*.

## IV. Judgments.

### A. IN GENERAL.

**Not Inflexibly Applied in Equity.**—The doctrine of merger is not inflexibly applied in courts of equity. It will not be there applied to destroy the security of a decree as a lien to the defeat of justice. *Turner v. Stewart*, 5 W. Va. 493, 41 S. E. 924.

**B. OF JUDGMENT.**

**By Forthcoming Bond.**—Judgment against T. and another docketed April, 1872. Fi. fa. levied and forthcoming bond taken with E. as surety. Bond forfeited and returned May, 1873, but not docketed. Judgment on the bond against all the obligors January 19th, 1874, and docketed. E. claims that he paid the judgment as surety and asks to be substituted to the lien of the judgment on the land of T. conveyed by trust deed to secure F., recorded January 4, 1874. Fi. fa. on last judgment levied on principal obligor's property, but, with consent of surety, held up by plaintiff's order. The debt was then paid without sale. On the last fi. fa. is an endorsement purporting to be signed by W. and S., the judgment creditor's attorneys, to the effect that the fi. fa. was satisfied by E., and one of the attorneys deposed that he was induced to hold up the fi. fa. by the promise of one of the principals or the surety, E., or both, to see the money paid at an early day, whilst the testimony of the sheriff tends to show that if payment was made by either, that principal or E., it was probably by the former. *Quære*, whether the original judgment was merged in the forfeited forthcoming bond, or in the subsequent judgment on the bond, it never having been quashed, or liable to be quashed, so far as appears. *Barksdale v. Fitzgerald*, 76 Va. 892. See *Rhea v. Preston*, 75 Va. 757; *Bank v. Allen*, 76 Va. 200.

**By Award.**—A judgment or decree will not be merged by an award upon the same original cause of action not made the judgment or decree of a court; but, where the first judgment is the very subject of the arbitrament, it is merged and ended by an award, whether carried into judgment or not. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924. See the title **ARBITRATION AND AWARD**, vol. 1, p. 706.

An award which is for any reason void does not merge or conclude a

matter to which it relates. *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

**C. OF CAUSE OF ACTION INTO JUDGMENT.**

**In General.**—"We may now consider, briefly speaking, generally what is the effect in an original cause of action of maturing the same to judgment. The judgment establishes in the most conclusive manner, and reduces to the most authentic form, that which had hitherto been unsettled. The cause of action thus established, and permanently attested, is said to merge into the judgment establishing it upon the same principle that a simple contract merges into a specialty. The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and to enforce liabilities has terminated in the judgment. It is drowned in the judgment and must henceforth be regarded as *functus officio*." *Beazley v. Sims*, 81 Va. 644, 648. And see generally, the title **JUDGMENTS AND DECREES**, vol. 8, p. 161.

**Confessing Judgment by One on Joint Action.**—In joint action against partners, judgment is confessed by one, and later, during the same term, is rendered against the other. Held, cause of action was not merged by the confession, and the judgment rendered is valid, though the rule is, that a judgment against one of a firm on a joint liability, merges the original cause of action, and bars another suit against the remaining partners; the action in this case being joint, and not separate. *Pitts v. Spotts*, 86 Va. 71, 9 S. E. 501. And see generally, the title **PARTNERSHIP**.

**Under § 3212, Code, 1887.**—In a proceeding by motion against an ex-treasurer and his sureties, to recover a balance of county levies left in his hands,

a confession of judgment by the principal does not merge the cause of action against the sureties, and judgment may be rendered against the latter at a succeeding term of the court. *Ca-hoon v. McCulloch*, 92 Va. 177, 23 S. E. 225. This decision was based on § 3212, Va. Code, 1887, which to this extent abrogates the rule of the common law, that a judgment against one of several joint obligors merges the cause of action. See also, *Pitts v. Spotts*, 80 Va. 71, 9 S. E. 501. And see generally, the title **SHERIFFS AND CONSTABLES**.

In a joint action against A. J. W. S. and J. S. on a joint obligation and process served on each of them, A. J. W. S. confessed judgment which, as to him, a separate judgment was entered. J. S. plead to the action and had a trial before a jury, and on verdict found against him at a subsequent term of the court, a separate judgment was entered against him on the verdict, from which he appealed. It was held, that the judgment entered on the *cognovit actionem* of A. J. W. S. did not merge the plaintiff's cause of action, so as to exonerate the said J. S. *Snyder v. Snyder*, 9 W. Va. 415.

In 1866, S. sues M. and B. on their joint bonds. M. confesses judgment that day. Suit is suffered to abate as to B., who had never been summoned. S. having died, his administrator in 1879 brings a second suit on the bond against both obligors. They plead the former judgment in bar. This plea the court below rejects as to B., but admits as to M., and causes the action to proceed as a separate one against B., and renders judgment against him. Upon error, it was held, the bond is merged in the judgment against M., and the second action is barred by the recovery in the first. *Beazley v. Sims*, 81 Va. 644.

#### **Against Absent Debtor.**

**How Far Original Cause of Action Merged.**—A decree against an absent

debtor merges the original cause of action, so far as to enable the plaintiff to rely thereon, in any subsequent proceeding to enforce it, as *prima facie* evidence of the demand it establishes; and to repeal the statute of limitations, except so far as the statute may apply to judgments or decrees. *Rootes v. Tompkins*, 3 Gratt. 98.

**Foreign Judgment.**—See the titles **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 19; **FOREIGN JUDGMENTS**, vol. 6, p. 225.

**As between Coplaintiffs and Co-defendants.**—It must be borne in mind that the merger of the cause of action has no effect upon the liabilities of the coplaintiffs or the co-defendants, as between each other. These liabilities are not in issue in the case, and are not affected by the final determination of the action. In extinguishing a demand a judgment has no more effect than mere payment. It leaves the liability of other parties to the defendant unaffected. A recovery upon a note against the maker and the endorsers does not so merge the note as to prevent the endorsers from paying the judgment, receiving the note, and maintaining an action on it against the maker. *Beazley v. Sims*, 81 Va. 644, 650.

**Change in Form of Evidence of Debt.**—A bond is secured by trust deed. Later a judgment is rendered on the bond. The time prescribed by the statute of limitations for barring a judgment has elapsed. A bill is filed to enjoin the sale of the trust property, on the ground that the debt in the deed of trust was merged in the judgment, but there was no mention in the bill of the statute of limitations. Held, there was no merger of the debt, but only a change in the form of the evidence thereof. *Gibson v. Green*, 89 Va. 524, 16 S. E. 661.

**Personal Decree.**—A lien for owelty of partition is not released by taking a personal decree against the owner of

the more valuable piece of land for the difference in values, nor is it merged in such decree, but subsists until it is clearly shown to have been waived, released, or satisfied. *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861.

**Joint Contract.**—"According to the principles of the common law a judgment obtained by the creditor on the joint contract, against one or more of the parties bound by it, merges or extinguishes the joint contract, as well in respect to the other parties originally bound by it, as in respect to the parties against whom the judgment may have been rendered." *Ward v. Motter*, 2 Rob. 536.

**Under Bankrupt Act.**—Under the bankrupt act, the theory that the debt is merged in the judgment, has no applicability. *Blair v. Carter*, 78 Va. 621. See also, generally, the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 247.

## V. Of Civil by Criminal Liability.

The commission of a felony shall not stay or merge any civil remedy. Section 3884, Va. Code, 1904; § 4457, W. Va. Code, 1906.

The fact that one is guilty of a fel-

ony does not merge a civil remedy for the same act. *Allison v. Farmer's Bank*, 6 Rand. 204, per Green, J.

But in *Cook v. Darby*, 4 Munf. 444, 6 Am. Dec. 529, there is a quære as to whether larceny would merge the civil injury. But see Va. Code, § 3884. And see generally, the titles ACTIONS, vol. 1, p. 129; CRIMINAL LAW, vol. 4, p. 31.

## VI. Merger in Criminal Law.

It may be stated as a rule that a person charged with an atrocious offense may be convicted of any constituent offense of a lower degree, provided such minor offense is substantially included in the description in the indictment, and this without regard to the technical distinction between felonies and misdemeanors. *Stuart v. Com.*, 28 Gratt. 950, 964; *Canada v. Com.*, 22 Gratt. 899. And see generally, the title CRIMINAL LAW, vol. 4, p. 28.

## VII. Merger by Nonsuit.

Suffering a nonsuit does not have the effect of merging the cause of action. *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225. And see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 4, p. 717.

## Meritorious Consideration.

See the title CONTRACTS, vol. 3, p. 376.

## Merits.

As to judgment on merits, see the title FORMER ADJUDICATION OR RES ADJUDICATA, vol. 6, p. 276.

## Merits, Affidavit of.

See the title AFFIDAVITS, vol. 1, p. 232.

## Merry-Go-Rounds.

See the title NUISANCES.

## Mesne Process.

See the title SUMMONS AND PROCESS.

## **Mesne Profits.**

See the titles DOWER, vol. 4, p. 823; IMPROVEMENTS, vol. 7, p. 337.

## **Mesne Rents.**

See the title JUDICIAL SALES AND RENTINGS, vol. 8, p. 648.

**MESSUAGE.**—In *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299, 300, it is said: "Now, in legal acceptation, the word 'messuage' is defined as 'a dwelling house, with the adjacent buildings and curtilage.'"

## **Metes and Bounds.**

See the title BOUNDARIES, vol. 2, p. 579.

## **Military Bounty Lands.**

See, the titles BOUNTIES, vol. 2, p. 611; MILITIA.

## **Military Certificate.**

See the titles ASSIGNMENTS, vol. 1, p. 761; LOST INSTRUMENTS AND RECORDS, ante, p. 474; MILITIA

## **Military Law.**

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## **MILITIA.**

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## **CROSS REFERENCES.**

See the titles APPEAL AND ERROR, vol. 1, p. 418; BOUNTIES, vol. 2, p. 511; CONFEDERATE STATES, vol. 3, p. 54; COURTS, vol. 3, p. 696; INFANTS, vol. 7, p. 468; MANDAMUS, ante, p. 508; PAYMENT; TROVER AND CONVERSION

## I. Organization and Control.

### A. ENLISTMENT.

#### 1. Nature.

"The enlistment is an appointment by the government of an individual to the lowest grade of military service; differing only from the commission to an officer, by the inferior rank, emolument and duties, and the incapacity to retire by voluntary resignation. It is commonly founded in compact, but not necessarily so; for the government, as the administrative sovereign of the country, has an unquestionable right, in certain emergencies, to call the inhabitants capable of bearing arms into its military service, and, by some equitable rule, to select from the whole number those best adapted to the purpose; and this without regard to their consent." *United States v. Cottingham*, 1 Rob. 615, 630.

#### 2. Power of Minor to Enlist.

The act of congress of 13th of May, 1846, entitled, "An act for the prosecution of the existing war between the United States and Mexico," not forbidding the enlistment of infants under the age of twenty-one years in the corps of volunteers authorized by that act to be raised, an infant who enlisted in one of these corps, without the consent of his father, is bound by his contract, and will not be released, either on his own application, or on the application of his father, or if an apprentice, on the application of his master; or of all of them uniting in it. *Cabell, P., and Allen, J., dissenting. United States v. Blakeney*, 3 Gratt. 405.

#### 3. Effect of Enlistment.

"In *The King v. The Inhabitants of Roach*, 6 T. R. 247, 252, 254, a case of *Walpole St. Peter's v. Wisbeach St. Peter's*, upon a question of pauper settlement, was stated and commented upon, and the principle of the decision appears to have been, that an enlisted minor was emancipated, during his military engagement, from all parental control, by the new relation which he

contracted with the government." *United States v. Blakeney*, 3 Gratt. 405, 412. See also, the title PARENT AND CHILD.

#### 4. Enlistment of Alien.

A person of full age voluntarily enlisting in the army of the United States is not entitled to be discharged from the service upon the ground of his being an alien. *United States v. Cottingham*, 1 Rob. 615.

### B. PERSONS LIABLE TO SERVICE.

The nature and extent of the obligation to render military service, is clearly ascertained by the principles of the public law. "Every member of a society," says Vattel, "is obliged to serve and defend the state. Society can not otherwise be maintained; and this concurrence for the common defense is one of the principal intentions of every political association. Every man capable of carrying arms, should take them up, at the first order of him who has the power of making war." "As every citizen or subject is obliged to serve the state, the sovereign has a right, in case of necessity, to enlist whom he pleases. But he should choose only such as are proper for the occupation of war; and it is highly proper to take, as far as possible, only volunteers, who enlist cheerfully and without compulsion. No person is naturally exempt from taking up arms in defense of the state, the obligation of every member of society being the same. They only are excepted who are incapable of handling arms, or supporting the fatigues of war. This is the reason why old men, children, and women are exempted." *United States v. Blakeney*, 3 Gratt. 405, 408.

**Act of Confederate Congress.**—By act of congress approved April 16, 1862, entitled "an act to further provide for the public defense," and commonly called the conscript law, the president was "authorized to call out and place in the military service of the

confederate states for three years, unless the war shall have been sooner ended, all white men who are residents of the confederate states, between the ages of eighteen and thirty-five years, at the time the call or calls may be made, who are not legally exempted from military service." By the 9th section it was enacted, "that persons not liable for duty may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war." *Mann v. Parke*, 16 Gratt. 443, 446. See also, the title CONFEDERATE STATES, vol. 3, p. 59.

### C. EMPLOYMENT OF SUBSTITUTES.

See also, the title CONFEDERATE STATES, vol. 3, p. 59.

#### Pay of Substitute Who Deserted.—

"It appears by the case agreed, that the defendant being drafted to serve a tour in the militia, did contract to give the plaintiff the sum of money claimed by the declaration, for performing that tour for him, 'upon his return from performing the same.' The plaintiff was received, mustered, and enrolled as his substitute, marched, served part of the time, and then deserted; and then claims by this action his hire, insisting that as he exonerated the defendant, it was nothing to him whether he did, or did not perform his duty to the United States. But the court is of opinion that the defendant, when contracting with his substitute, had a right to make it a part of his contract, that such substitute should perform for him, the duty he owed to the United States, with good faith, and that in this case he did make that performance a condition precedent to the payment of the money, and do therefore adjudge, that the law upon the case agreed, is for the defendant." *Conrod v. Conrod*, 2 Va. Cas. 138.

**Recovery of Money Paid.**—If a militia man employ and pay a substitute to perform his tour of duty, and there-

upon be discharged by the commanding officer, he can not recover back the money paid, upon the ground that the defendant, after repairing to the place of rendezvous, and commencing the march, was discharged as a supernumerary, and therefore never performed the tour of duty. *Keys v. M'Fatridge*, 6 Munf. 18.

## II. Military Courts.

By the statute of 1804, ch. 36, § 43, it is enacted that, "Whenever any militia shall be called forth into actual service, they shall be governed by the articles of war, which govern the troops of the United States, and courts martial shall be held, as therein directed, to be composed of militia officers only." *Attorney General v. Fenton*, 5 Munf. 292, 293.

**Release of Persons Confined by Court Martial.**—The act of January 10th, 1815, on the subject of writs of habeas corpus, does not authorize the issuing of a writ of error by the court of appeals to a judgment discharging from custody a person confined, by sentence of a court martial, for failing to pay a fine, imposed upon him, for not appearing at the place of rendezvous, and not marching, in obedience to a requisition of militia; for in such case, there is no discharge, by the judgment, of a person from the service of this state or of the United States. *Attorney General v. Fenton*, 5 Munf. 292. See also, the title HABEAS CORPUS, vol. 7, p. 13.

**Perjury before Court of Inquiry.**—In an indictment for perjury, in taking a false oath before a regimental court of inquiry, the indictment ought to set forth, of what number of officers the said court of inquiry consisted, and what was their respective rank, so as to enable the court to discern whether the said court of inquiry was constituted according to law. *Conner v. Com.*, 2 Va. Cas. 30. See also, the title PERJURY.



In such case the indictment ought to aver and set forth distinctly and directly, what was the inquiry then and there making by the said court, so as to enable the court of law to know whether the matter deposed by the defendant was material or pertinent to the said inquiry. *Conner v. Com.*, 2 Va. Cas. 30.

**Expenses of Court Martial.**—As to the payment of expenses of a court martial, see post, "Expenses," IV.

### III. Privileges of Volunteer.

**Exemption from Jury Duty.**—Where, under § 16 of the act approved March 17th, 1884, to provide for the government of Virginia volunteers, acts, 1883-84, page 615, a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses. *Miller v. Com.*, 80 Va. 33.

**From Service of Process.**—There is a judgment in debt, by default, against four defendants in March, 1862. In August, 1872, one of the defendants moves the court to set it aside, on the ground that at the time of the judgment he was in the military service of the country. It appears, however, that at the time of the service of the process, and at the time the judgment became final he was at home on furlough. The exemption of the defendant was a personal privilege of which the court could not ex officio take notice; and the objection should have been taken during the pendency of the proceedings. *Turnbull v. Thompson*, 27 Gratt. 306.

### IV. Expenses.

**Payable by United States.**—Expenses of the militia in time of war, under requisition of the United States, are properly payable by them; and if the state of Virginia consents to advance any portion of these expenses, she is

under no legal or moral obligation to pay more. *Com. v. Pierce*, 4 Rand. 432.

**Toll for Troops.**—By the general law prescribing the duties of the auditor, he is not authorized to issue a warrant for any claim, not arising under some law or resolution of the general assembly; and, therefore, a claim under the act of January 8, 1814, for the passage of troops over a toll bridge, who were in the service of the commonwealth, but not taken into the service of the state by any law or resolution, can not be sanctioned by the auditor, but the redress of the claimant and by application to the legislature. *Com. v. Pierce*, 4 Rand. 432.

**Allowance to Soldiers and Families.**—Under an act of the legislature passed October 31, 1863, it was the duty of the county and corporation courts to make an allowance in money or supplies to soldiers and sailors and their families, of such liberal amount and in such proportions, as should be deemed just and sufficient; and it was declared that the allowance should be charged on the county, city or town, and that "provision should be made for its payment in the manner prescribed by law for sums legally chargeable on counties, cities and towns." The manner prescribed by existing laws was by county levy. The county court of R. county, in December, 1863, appointed R. G. H. county agent and treasurer of a fund to be created by loans obtained on county bonds, for the purpose of furnishing supplies as contemplated by the said act. The agent borrowed \$10,000 from B. & K., and executed to them five bonds of \$2,000 each, sealed with the seal of the county, and dated February 21, 1865. It was held, that the act neither in express terms, nor by necessary implication, empowered the county to borrow money and issue bonds for its payment, and consequently the bonds are void. *Bonsack v. Roanoke County*, 75 Va. 585.

The supplies were to be procured by purchase, and, if need be, by impressment, through agents appointed for the purpose, and the debts thus contracted were to be paid in the manner and by the means indicated. The express designation of a particular mode of raising the means, excludes every other, though the borrowing of money might be deemed by some a more appropriate mode than a levy in the ordinary way. *Bonsack v. Roanoke County*, 75 Va. 585.

**Pay of Band Leader.**—C. being a colonel in the United States army agreed to pay R. 100 dollars per month, in addition to government pay, as a leader of a band of music: R. brought with him eleven men who were all mustered into the United States army on the 3d of September, 1864, as privates. They were assigned to C.'s command, and were employed by him as a band and kept at his headquarters. R. and the men were mustered out of service about the 1st of June, 1865, and on C. refusing to pay R. the 100 dollars per month he brought suit for its recovery. It was held, that at the time R. and the men were mustered into the service, there was no law by which soldiers could be detailed for regimental bands; a law to that effect had been repealed. The effect of this contract was to place at headquarters a number of men not only unauthorized but forbidden by law, fed, clothed and paid at government expense, as the leader of whom R. was to receive 100 dollars in addition to government pay, from C., and it being contrary to the provisions of the act of congress, can not be sustained. *Capehart v. Rankin*, 3 W. Va. 571, 100 Am. Dec. 779.

**The act of January 3, 1814**, only provides for expenses necessary to place the militia under requisition for the service of the United States, at the appointed place of rendezvous. *Com. v. Pierce*, 4 Rand. 432.

If the payment of these expenses is

left by law to the discretion of the executive, a party can not claim, as a matter of legal right, more than the executive, in their discretion may choose to allow. *Com. v. Pierce*, 4 Rand. 432.

**Section 305, of the Virginia Code**, prescribes the character of the service for which compensation is made, and only contemplates payment of officers and enlisted men for services rendered pursuant to the call of the sheriff of any county, or the mayor of any city, "in cases of riot, tumult, breach of the peace, resistance to process, or whenever called out in aid of the civil authorities." *Simons v. Military Board of Virginia*, 99 Va. 390, 391, 39 S. E. 125.

**Expenses of Court Martial.**—Mandamus will not lie to compel the "military board" to pay a court martial pay roll, as it is a matter within the discretion of said board, under the provisions of § 377 of the Virginia Code, and mandamus does not lie to control the conduct of a functionary who is invested with any discretion in the premises. *Simons v. Military Board of Virginia*, 99 Va. 390, 39 S. E. 125.

## V. Bounties and Pensions.

See the titles BOUNTIES, vol. 2, p. 611; PENSIONS.

## VI. Action on Military Certificates.

**Debt.**—If the writ is covenant and the declaration in debt for military certificates, it is error, as debt does not lie for military certificates. *Gibbon v. Jameson*, 5 Call 294.

**Loss of Certificate.**—Where the owner of a military certificate left it in the auditor's office for the purpose of having a warrant for the interest made out; and it was lost, it was held, that it is doubtful whether the state, or the auditor, or either, was liable to make satisfaction for it. But if either was liable, the assignment of the cer-

tificate to the plaintiff ought to be proved. *Johnson v. Pendleton*, 5 Call 128.

## **VII. Military Governments under Reconstruction Act.**

See the title STATES.

The authority of the military commanders appointed under the reconstruction acts of congress, ceased upon the admission of the state's representatives into congress; and when his authority ceased that of his appointees ceased. The *Richmond Mayoralty Case*, 19 Gratt. 673.

**Termination of Office of Military Appointees.**—The act of congress of

January 26th, 1870, admitting the representative of the state into congress, does not entitle military appointees to office to hold over until their successors are appointed and qualify. The *Richmond Mayoralty Case*, 19 Gratt. 673.

Whatever power these military appointees to office may have had to discharge the duties of their offices until otherwise provided by law, they derived none from the constitution of the United States or of the state, and it was competent for the legislature to terminate their power derived from any other source. The *Richmond Mayoralty Case*, 19 Gratt. 673.

## **Milk.**

See the title ADULTERATION, vol. 1, p. 183.

**MILLHOUSE.**—See the title BURGLARY AND HOUSEBREAKING, vol. 2, p. 657.

## **MILLS AND MILLDAMS.**

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As to bailment of wheat to miller, see the title BAILMENTS, vol. 2, p. 223. As to damages for breach of mill lease, see the title DAMAGES, vol. 4, p. 181. As to mortgages on mill or machinery, see the titles CHATTEL MORTGAGES, vol. 2, p. 798; MORTGAGES AND DEEDS OF TRUST.

## I. Jurisdiction of Controversies Concerning Mills.

**Suit Brought Where Mill Is Located.**—An act of the assembly authorizing a canal company to sell its property and franchises to a railroad company, and providing that the circuit court of Richmond shall have exclusive jurisdiction over all suits in regard to the contract of sale, does not require that an action by a mill owner against a successor of the latter company, for the diversion of water by a canal required to be maintained by such act, be brought in the circuit court of Richmond, but it may be properly instituted in the county where the mill is situated. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320. See the title VENUE.

**Jurisdiction of Application Determined by Situation of Land.**—In *Martin v. Beverley*, 5 Call 444, 448, *Carrington, J.*, said, that to give a county court jurisdiction of a petition for a mill it must appear that petitioner's land lay therein.

**In Equity—To Settle Relative Water Rights.**—Where the owners of two mills have the use of the same stream of water, and become involved in a controversy as to their relative rights to the same, the case is one for the

equitable jurisdiction of a court, and it should proceed to ascertain, define and settle the rights of the parties to the use of the water power. *Hanna v. Clarke*, 31 Gratt. 36, 1 Va. Dec. 338, Va. Law Jr. 1879, p. 103. See post, "To Use of Water," III, C.

**To Enjoin Removal of Dam—Inadequacy of Damages.**—Where a suit is brought against a mill owner to abate his dam as a nuisance, the inadequacy of the damages, which the jury could give a mill owner for the loss and injury sustained by him in the removal of his dam, is a good ground for the interposition of equity. Thus where a milldam is attempted to be abated as a nuisance because it obstructs navigation, and such abatement would produce great loss to the owner of the mill, and great inconvenience to the public, equity has jurisdiction to prevent such abatement, and to preserve to the owner his establishment, until the question of his right to keep up his dam has been decided. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

**To Enjoin Rebuilding of Dam.**—A mill and milldam were erected according to the statute concerning mills. The stagnation of water injured the health of the neighborhood, and one of the parties injured brought an action and recovered damages. Subse-

quently the milldam was washed away. While the mill owners were proceeding to rebuild, proposing certain expedients to prevent a repetition of these injuries, it was proper for a court of equity at the suit of the previous plaintiff at law to enjoin the rebuilding of the dam, unless the expedients proposed appeared effectual, which should have been ascertained by a jury. *Miller v. Trueheart*, 4 Leigh 569.

**Necessary Allegations.**—Two verdicts were rendered in favor of a party, whose land was overflowed, against the owner of a mill, for keeping his dam too high. The dam being swept away, an injunction was asked to prevent the owner of the mill from rebuilding, alleging that he had not begun within the prescribed time, and that irreparable mischief would result. It appeared that the mill and dam had existed more than fifty years, but it did not appear that there was ever any order of court granting leave to build. It was held, that the verdicts showed that the owner had a prescriptive right to keep the dam to some height, that they did not warrant an injunction, unless it appeared that he was about to build it beyond the authorized height; and that if it was competent for a court of equity to enforce a forfeiture, because of the lapse of the prescribed time in which he might rebuild, it could not be done by way of injunction, in the absence of an allegation of some sufficient and distinct ground of irreparable mischief. *Talley v. Tyree*, 2 Rob. 500. See generally, the titles **INJUNCTIONS**, vol. 7, pp. 512, 534; **JURISDICTION**, vol. 8, p. 842.

**Of County and Corporation Courts at Quarterly and Monthly Terms.**—The county or corporation courts at quarterly terms may in their discretion decide upon controversies concerning mills; but at a monthly session they can not take jurisdiction of any case expressly and exclusively assigned to the quarterly term. *Wilkinson v. Mayo*, 3 Hen. & M. 565.

## II. Erection and Maintenance of Mills and Dams.

### A. GENERAL PRINCIPLES.

#### 1. Enabling Laws Liberally Construed.

Mills are of importance to the public, and laws authorizing their establishment should be liberally construed, so far as consistent with private rights. *Home v. Richards*, 4 Call 441, 448.

#### 2. Strict Compliance with Authority Necessary.

The owner of an island in the Appomattox river obtained leave of court to build a mill on his island, and to condemn an acre of land on the main for an abutment for his dam. He placed the abutment on the condemned land, but did not build his mill on the island, but on the main, lower down, with the consent of the owner. It was held, that the mill was not established according to law, and that the mill owner and those claiming under him had no right to the water power of the stream, as against the public right of navigation, and an incorporated company to improve the navigation. *Stokes v. Upper Appomattox Co.*, 3 Leigh 318. See post, "Right Dependent on Title to Contiguous Lands," II, C.

If the authority be not strictly complied with, by placing the mill in the place prescribed, it may be liable to abatement as a public nuisance. *Dimmett v. Eskridge*, 6 Munf. 308.

#### 3. Monopolies Discouraged.

In *Home v. Richards*, 4 Call 441, 447, it was said that, between two applications for the right to establish a mill at the same point upon a river, where the land of one applicant is of greater extent and situated on the main land, and the other already has two mills in the neighborhood and merely owns part of an island, the preference should be given to the former, if only one application can be granted.

For in questions concerning the grant of a mill privilege, diffusion into several hands, instead of a monopoly in one, is desirable, and an applicant

without any mill in the neighborhood is to be preferred to one who already has several. *Home v. Richards*, 4 Call 441, 449.

#### 4. Covenants Relating to Mills Constructed.

##### **Covenant to Maintain Dam as Lien.**

—Where a party to a deed agrees to pay to the other party the sum of \$75 per annum for keeping up a certain dam, necessary to the mill property of the obligor, and that the obligation to pay the same, in addition to being a personal one, "shall be a covenant running with the land, and binding upon the Ronceverte Flour Mills, race, and water power, into whosoever hands they may pass," he thereby creates a lien on such mill property, which, duly recorded, has priority over subsequent liens. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

**Covenant for Reimbursement Constructed.**—A and B covenanted that the parties should build merchant mills on a stream on A's land, A contributing one-third, and B two-thirds of the expenses, and then should work the mills on joint account, for a term of seventeen years; at the end of which term, if rebuilding of the mills should be necessary, they should be rebuilt at joint expense, contributed in the same proportion, and the mills should remain the sole property of A, the owner of the mill seat, or his heirs, and B's proportion of expenditures in the original building, as well as of any such rebuilding, should be reimbursed by A to B. A milldam and millhouse were accordingly built, but, within a year afterwards, the milldam was broken, and the millhouse entirely carried away, by a fresh; upon which the parties abandoned the enterprise, in consequence, it seemed, of B refusing to contribute to the expense of rebuilding, except on terms with which A was not bound to comply; and then, by another covenant, A bound himself to pay B the amount of his expenditures on the mill destroyed, when the

same should be ascertained, within ten years. It was held, on a bill by B's administrator against A, for an account to ascertain the amount of B's expenditures, that by the terms of the first covenant, notwithstanding the destruction of the mill and the abandonment of the work, A was bound to reimburse to B his expenditures on the mill which was destroyed by the fresh. *Dissentiente Brockenbrough, J. Tait v. Tait*, 6 Leigh 154.

And it was held, by the whole court, that whatever might have been the just construction of the first covenant, A's last covenant settled all controversy, and bound him to pay B the amount of his expenditure, when ascertained. *Tait v. Tait*, 6 Leigh 154.

The covenants in the first covenant were independent; and if B refused to rebuild, he was yet entitled to an action for the amount of his expenditures on the mill destroyed, without showing performance of his covenant to contribute to the expense of rebuilding. *Tait v. Tait*, 6 Leigh 154.

#### 5. No Obligation to Maintain Dam Adjudged Unlawful in Former Action.

Where an action was brought for damages for failure to maintain a dam for the benefit of the plaintiff's mill, a plea that in a former action by the grantors of the plaintiff against the defendant the dam was adjudged unlawful, states a good defense, since the right of the plaintiff can not be maintained, as the dam is unlawful. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

And parol evidence is inadmissible to show that the legality of the erection of a dam was not in issue in a former case, when the record of that case shows that its legality was in issue. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

### **B. SOURCE OF AUTHORITY.**

#### 1. Legislative and Judicial.

**Legislature May Confer Paramount Right on Individuals.**—Although the

public has a right to the use of streams and rivers for the purposes of navigation, yet the legislature by general law or particular grants may confer upon individual rights in opposition to this public right. The general law authorizing courts to establish mills has conferred such paramount rights on owners of mills. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

It was said in *Crenshaw v. Slate River Co.*, 6 Rand. 245, that mills are never established except on inquisition of a jury, which must inquire whether ordinary navigation will be obstructed, and if they report that it will not, then leave is given to erect the mill.

**Dam Erected by Authority of Court on Floatable Stream Is No Nuisance.**

—If a county court gives authority for the erection of a dam on a floatable stream for the purpose of furnishing water power for the operation of a mill for the use of the public, such dam is not a public nuisance, although it is without sluices and flood gates and obstructs navigation. So a railroad company which inflicts injury upon a mill by an unlawful act can not justify its wrong upon the plea that such dam is a public nuisance. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894. Compare *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848.

And he may erect a mill and dam on his own property by his right of dominion thereover without an order of court. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521. See post, "In Floatable Streams," III, B.

**Right of Condemnation.**—See the title EMINENT DOMAIN, vol. 5, pp. 81, 84, et seq.

"The court of appeals of Virginia, while acts of this character (authorizing and regulating establishment of water grist mills) were enforced, constantly recognized the constitutionality of such acts, and often as a matter of course where the acts were com-

plied with, recognized the right of the owners of such mill sites to condemn lands for the erection of such dams for such water grist mills, and also to condemn lands to be overflowed by the erection of such milldams. The following are some of the many cases wherein there was this silent recognition of the right to condemn lands for such purposes: *Bernard v. Brewer*, 2 Wash. 77; *Wroe v. Harris*, 2 Wash. 126; *Noel v. Sale*, 1 Call 495; *Wilkinson v. Mayo*, 3 Hen. & M. 565; *Coleman v. Moody*, 4 Hen. & M. 1; *Dawson v. Moons*, 4 Munf. 535; *Smith v. Waddill*, 11 Leigh 532; *Hunter v. Matthews*, 1 Rob. 468; *Mairs v. Gallahue*, 9 Gratt. 94." *Varner v. Martin*, 21 W. Va. 534, 546.

**2. Prescription or Grant.**

**In General.**—See post, "Rights of Mill Owner," III.

A mill right may be established by prescription. *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

And instructions asked by the plaintiff, based upon the assumption that there can be no legal dam across a watercourse unless established by legal proceedings under the act of assembly, ignoring entirely rights acquired by actual grant, by permission and by presumptive right derived from long use and enjoyment, where there is any evidence in respect to such rights, were properly refused. *Field v. Brown*, 24 Gratt 74.

**Public Rights Not Affected.**—A riparian proprietor is not given any prescriptive right to maintain his dam across a floatable stream by lapse of time, as against the public, though it might give him the right to maintain such dam as against another riparian owner. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848.

**Adverse Use for Twenty Years.**—The adverse use of the water of a stream, where such use is continued for a period of twenty years, is suffi-



cient ground for presuming a grant. *Cornett v. Rhudy*, 80 Va. 710, 714; *Stokes v. Upper Appomattox Co.*, 3 Leigh 318; *Field v. Brown*, 24 Gratt. 74; *Coalter v. Hunter*, 4 Rand. 58; *Fells v. Chesapeake, etc., R. Co.*, 49 W. Va. 65, 38 S. E. 479; *Nichols v. Aylor*, 7 Leigh 546. See the title ADVERSE POSSESSION, vol. 1, p. 199.

But where a party has, under claim of grant by deed, been using a greater supply of water than he was entitled to thereunder, he can not claim by prescription a right to the excess. Such use is not adverse. *Stearns v. Richmond, etc., Co.*, 86 Va. 1034, 11 S. E. 1957.

**Twenty Years' Use Not Conclusive—Rebuttal.**—The fact that a dam was built in 1824, and that from that time the owner and those claiming under him have claimed and held possession and use thereof, and of the water power afforded thereby, and use in working the mill for which it was built, adversely and uninterruptedly for twenty years, is not conclusive of the right of the defendant to continue said possession and use of said mill and dam; it is only presumptive and may be rebutted by circumstances. *Field v. Brown*, 24 Gratt. 74.

And to rebut the defendant's evidence of adversary possession for twenty years, under such circumstances as would give him a prescriptive right to a dam across a stream, the record of a suit by the plaintiff against the administrator of a former owner of the premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam, for the injury sustained by the same, and in which the plaintiff recovered damages, is competent evidence for the plaintiff. *Field v. Brown*, 24 Gratt. 74.

Again, in an action on the case by the owner of a mill against the defendant for causing the water in a stream to flow back and obstruct his mill, it

appeared that the defendant claimed under a person who had obtained leave to build a dam below, provided he did not dam the water higher than a particular log. The water was dammed higher than the log, and was backed upon the plaintiff. This state of affairs had existed for more than twenty years. It was held, that the twenty years' exclusive and adverse user was not conclusive evidence of the defendant's right, but only presumptive, and that evidence showing that this user was not acquiesced in, but contested, was proper evidence to rebut the presumption. *Nichols v. Aylor*, 7 Leigh 546.

So in an action for injury to land by continuing a dam erected across a stream by a previous owner, the defense is adversary possession by the defendant, and those under whom he claims for more than twenty years. This presumption may be rebutted by the plaintiff proving what passed between his agent and a former occupant of the premises, showing that the agent denied the right of the former occupant to raise the dam, and that the latter requested it as a privilege for a short time. *Field v. Brown*, 24 Gratt. 74.

### C. RIGHT DEPENDENT ON TITLE TO CONTIGUOUS LANDS.

See post, "Allegations as to Ownership of Land," IV, A, 3.

#### 1. On Ownership of Site.

See ante, "Strict Compliance with Authority Necessary," II, A, 2.

The fee simple owner of land upon the bank of a river, even when another party has a right of way along the river, is such owner of the contiguous land as to have the right to construct a mill thereon, whether the river be navigable or not. If navigable, the bed belongs to the commonwealth; if not navigable, he owns to the middle, in spite of the right of way. *Home v. Richards*. 4 Call 441.

The law expressly says that the party applying to build a mill must own the lands on which he means to build it. *Stokes v. Upper Appomattox Co.*, 3 Leigh 318, 335, citing *Wood v. Boughan*, 1 Call 329; *Wilkinson v. Mayo*, 3 Hen. & M. 565. See *Anthony v. Lawhorne*, 1 Leigh 1.

Where the applicant for mill privilege shows no title to anything but rocks upon an island, probably conveyed for a particular purpose and not as a site for a mill, it would seem that he had nothing to rest his application upon. *Home v. Richards*, 4 Call 441, 449.

But the necessary ownership is satisfied by the petitioner's being in possession as visible owner. *Pitzer v. Williams*, 2 Rob. 241, 251; *Wood v. Boughan*, 1 Call 329. See *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 488.

## 2. Right to Jury Trial on Question.

Whether the court can direct a jury to try the title to land upon which the right to a mill privilege depends, or not, it is not obliged to do so, hence it is no ground of exception. *Home v. Richards*, 4 Call 441, 449. And see *Wood v. Boughan*, 1 Call 329, approving this case, but saying that the direction of such an issue is not error.

In *Wood v. Boughan*, 1 Call 329, the question was raised whether the court, on a petition for a mill, can try the title of the parties to the lands, without the intervention of a jury. It seemed to the court that the intention of the legislature was not to authorize the court in this summary proceeding to enter into a contest about title. And in this case the directing of the issue in the district court was not considered error, as the case upon the merits was left open for discussion.

## 3. Property in Bed of Stream.

Every citizen has not a right to erect a mill, but only such as own lands adjacent to a stream, the property of the bed whereof is in himself or in the

commonwealth. *Martin v. Beverley*, 5 Call 444.

## 4. Evidence of Title Inadmissible When Applicant in Possession Claiming Title.

The widow being in possession of a mansion house and plantation, as dower had not been assigned to her, notice was given to her by an applicant, desiring to build a dam against her land, that he would apply for a writ of *ad quod damnum*. After the writ was awarded and the inquisition returned, one of the heirs, residing on the place with his mother, was made a defendant and asked the dismissal of the case because no notice was given him as one of the proprietors. This being overruled he offered evidence to show that the applicant was not the owner of the land; but it being proven that the applicant was in possession claiming title, and had built a house thereon, it was no error for the court to refuse to admit this evidence. *Pitzer v. Williams*, 2 Rob. 241. See *Coleman v. Moody*, 4 Hen. & M. 1.

## D. APPLICATION REFUSED WHEN IT WOULD DESTROY EXISTING MILL.

After a county court has granted leave to one applicant to build a mill, if application be made by another to build a mill lower down the stream, and the first applicant shows that the building of the second dam would destroy the privilege previously granted to him, the court in the exercise of a sound discretion ought to refuse the second application. *Humes v. Shugart*, 10 Leigh 332.

Although leave be given to build a mill, while a prior application to build lower down the stream is still pending, yet as long as the order is unreversed and not appealed from, and it appears that by granting the prior application the privilege would be destroyed, the prior application should be refused. *Humes v. Shugart*, 10 Leigh 332. See post, "To Use of Water," III, C.

### III. Rights of Mill Owner.

#### A. IN GENERAL.

**Not Entitled to Land Overflowed on Payment of Damages.**—The applicant for leave to build a mill is not entitled to the ownership of the land overflowed by the erection of a dam, upon paying the damages assessed by the jury. *Whitworth v. Puckett*, 2 Gratt. 528; *Hunter v. Matthews*, 1 Rob. 468.

**Failure to Erect Dam to Authorized Height—No Estoppel in Absence of Injury.**—Where an inquest in a mill case authorizes the applicant to build a dam to a certain height, the fact that he did not in the first instance raise it to the authorized height does not preclude him from raising it to the full height authorized, provided in doing so he does not injure others. *Calhoun v. Palmer*, 8 Gratt. 88.

**Estoppel of Subsequent Purchaser to Deny Title of Grantor.**—Where a subsequent purchaser of a mill and dam relies upon the inquest and judgment of the court in authorizing the dam, as a defense to an action for damages caused by increasing the height of the dam, it is not competent for him to deny the ownership of the prior owner at the time of the proceedings, or to assert the continued ownership of the land by the plaintiff. *Calhoun v. Palmer*, 8 Gratt. 88.

#### B. IN FLOATABLE STREAMS.

See ante, "Source of Authority," II, B.

**May Build on Own Property without Order of Court.**—Although a stream is floatable, a riparian proprietor may erect a mill and dam under his right of dominion over his own property without an order of court. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894.

**Subservient to Public Right to Float Logs, etc.**—A riparian proprietor of a floatable stream has the right to maintain and construct a dam, and to use the water for his mill, but in a way consistent with the public right to float

logs on it. Thus the maintenance of a dam across a floatable stream, so as to prejudice the right of the public to float logs therein, and without providing suitable sluices to allow logs to pass around the dam, is a public nuisance. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848. Compare *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894.

Thus there can be no recovery for the destruction of a dam across a floatable stream by logs placed therein, as the land owner has no right to interfere with the public in the floating of logs and other products down the stream. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848.

**Use Must Be Reasonable.**—"A navigable stream may be used for both milling and log purposes in a reasonable manner, notwithstanding such uses may mutually interfere with and injure each other. 4 Am. & Eng. Ency. Law (2d Ed.) 710, 711, 712. Such rule applies even to streams only floatable in damp weather. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60." *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 449, 41 S. E. 400. And see *Rogers v. Coal River, etc., Co.*, 41 W. Va. 593, 23 S. E. 919.

"A reasonable manner means in such manner as will not destroy or impair the common law or constitutional rights of a prior mill operator. It does not mean an illegal manner." *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

And a citizen or corporation lawfully using a floatable or navigable stream in a proper manner is not liable to a mill or other riparian owner for unavoidable damage or injury caused by such use. *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 41 S. E. 400; *Rogers v. Coal River, etc., Co.*, 41 W. Va. 593, 23 S. E. 919.

**Effect of "Boom Act."**—Section 28, p. 1071, Code ("Boom Act"), preserving to mill owners their right to dam-

ages, created no new right in mill owners, but only placed the existing constitutional and common-law rights of such riparian owners beyond judicial construction to the contrary. *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 41 S. E. 400. (Brannon, J., dissenting, and citing *Rogers v. Coal River, etc., Co.*, 41 W. Va. 593, 598, 23 S. E. 919, as holding that this section gives a right of action regardless of the question of negligence.)

"The defendant without authority from plaintiff had no lawful right to locate and construct its boom so as to materially affect or destroy plaintiff's water power. A dam does not usually alter or change the flow of the water below it. It may interfere with floatage or a dam above it." *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 41 S. E. 400. See generally, the title LOGS AND LOGGING, ante, p. 470.

**Rights of Public Unaffected by Prescription.**—See ante, "Prescription or Grant," II, B, 2.

## C. TO USE OF WATER.

See ante, "Jurisdiction of Controversies Concerning Mills," I.

### 1. Rights Vested in Grantee.

Mills are considered as great public conveniences and benefits, and are regulated by law. They are never established except on inquisition of a jury, which must inquire whether ordinary navigation will be obstructed, and if they report that it will not, then leave is given to erect the mill. Such grant under such proceedings is a perfect one, and vests in the grantee all the public rights to the stream, or so much thereof as is necessary to the full enjoyment of the mill. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

**Limited to Original Position and Height of Dam.**—Where a mill owner's easement in the water power of a stream was created and defined by the old report of the county commissioners, and by a subsequent conveyance

of the property under which he claimed, and as so defined he had the right to a dam at a certain point and the entire and exclusive use of the water which could be raised by the dam as it then stood, he had no right to erect other dams at other points on the stream, or a higher dam at same point. *Switzer v. McCulloch*, 76 Va. 777; *Nichols v. Aylor*, 7 Leigh 546.

### 2. Rights of Different Owners in Same Water Power—Preference in Use.

For a great many years a gristmill and a sawmill, owned by separate parties, were propelled by water power taken from the same dam. When the water was insufficient to run both, the gristmill had the preference in its use. The gristmill was subsequently sold, with all its privileges, and the owners changed it into a papermill, and changed the character of the wheels, which required that the water should be taken on a higher level. On a bill of injunction filed against the owner of the sawmill, it was held that the relative rights of the proprietors of the two mills, with respect to the water powers, continued the same after the sale of the gristmill as they were before; and that after the sale the owners were entitled to convert it into a papermill, and to the same priority in the use of the water for its operation, to the same extent to which they were previously entitled for the operation of the gristmill, but to no greater extent. *Hanna v. Clarke*, 31 Gratt. 36, 1 Va. Dec. 338, Va. Law Jr. 1879, p. 103.

Inconsistent easements can not co-exist, but if one man has the right to the uninterrupted flow of the water of a stream to his mill, another may have the right to divert the water when it is not required for the mill. *Stearns v. Richmond, etc., Co.*, 86 Va. 1034, 1043, 11 S. E. 1057.

### 3. Rights of Prior Owner.

Where the prior owner of a dam across a stream only backs the water to the extent which is necessary for

the operation of his mill, and does not pollute or divert the water, it is an error to perpetually enjoin him at the suit of a lower proprietor of a dam, from entirely cutting off or diminishing the natural flow of the stream, so that the plaintiff shall not at all times have a reasonable supply of water therefrom. *Mumpower v. Bristol*, 90 Va. 151, 17 S. E. 853.

**Construction of Grants below Established Mills.**—The grant of water privileges below established mills will be so construed as to preserve the water power of such mills undisturbed, unless a contrary intent plainly appears from a reasonable construction of the instrument conveying the grant. *Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558, 18 S. E. 740.

So when the privilege of turning the waters of a river down a canal has been given a mill owner, such privilege does not carry with it the right to dam the waters back by head gates or in any other manner, so as to destroy the water power of mills already established. *Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558, 18 S. E. 740. See *Humes v. Shugart*, 10 Leigh 332. See ante, "Application Refused When It Would Destroy Existing Mill," II, D.

#### 4. Measure of Damages for Interruption of Right.

See post, "Damages," V.

"The measure of damages for the interruption of the natural flow of a stream which prevents the running of a mill is what the mill would have been worth during such deprivation of its use if such deprivation had not taken place. That is rental or profitable value." *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 41 S. E. 400.

#### 5. Compromise of Rights.

See the title COMPROMISE, vol. 3, p. 44.

#### D. IMMATERIAL ISSUE IN ACTION FOR DESTRUCTION.

In an action of trespass for destroy-

ing a milldam, if the defendants plead that the said dam was unlawfully erected by the plaintiff, in a ford where a public road crossed the stream, whereby the said road and ford were obstructed, to the great damage and nuisance of the citizens of the commonwealth, and that the defendants in order to abate the nuisance peaceably cut down and removed a part of the dam; and the plaintiff replies that by erecting the dam, he did not entirely obstruct the public road and ford, and the citizens of the commonwealth were not altogether prevented from passing the same; whereupon issue be joined, such issue is immaterial, and after a verdict for the plaintiff, should be set aside, and a repleader directed. *Dimmett v. Eskridge*, 6 Munf. 308.

### IV. Procedure.

The statute now provides for commissioners. See W. Va. Code (1904), § 1349; W. Va. Code, ch. 44, § 29.

#### A. THE APPLICATION OR PETITION.

##### 1. May Be Made Ore Tenus.

A petition for leave to build a mill may be made to the court ore tenus. *Meade v. Haynes*, 3 Rand. 33. See *Mairs v. Gallahue*, 9 Gratt. 94; *Hunter v. Matthews*, 1 Rob. 468.

##### 2. Must Comply with Statute.

In his application for leave to erect a mill, the petitioner must show that he has proceeded in the mode prescribed by law. *Whitworth v. Puckett*, 2 Gratt. 528.

##### What Is a Sufficient Compliance.

The petition states that the applicant desired a writ of ad quod damnum to issue for the purpose of erecting a water gristmill, etc. This is a sufficient compliance with the statute, which says "when any person desiring to build a water gristmill," etc. The difference is merely verbal and not material, the intention of the parties to build a mill being sufficiently and plainly expressed. *Mairs v. Gallahue*, 9 Gratt. 94.

**What Proceeding Proper When Petitioner Owns One Side of Stream.**

—Where the petitioner for leave to build a mill owns land on only one side of the stream, the proceedings should be under §§ 1, 2, 3, of ch. 235, 2 Rev. Code, and if the petitioner proceeds under § 4, the writ and inquisition should be quashed. *Whitworth v. Puckett*, 2 Gratt. 528.

**3. Allegations as to Ownership of Land.**

See ante, "Right Dependent on Title to Contiguous Lands," II, C.

**Petitioner Owning One Side Only—**

**Must Allege Bed in Himself or Commonwealth.**—Where the person applying for leave to build a mill has land on one side only of the stream, it should be stated in the petition that the bed of the stream is in himself, or in the commonwealth. *Wroe v. Harris*, 2 Wash. 126. See *Richards v. Hoome*, 2 Wash. 36.

**Where Applicant Owns Both Sides of**

**Stream.**—A judgment, which gives leave to the proprietor of the land on both sides of a stream to erect a mill and dam thereon, is valid and sufficient, though the record does not show to whom the bed of the stream belongs. *Hunter v. Matthews*, 1 Rob. 468; *Wroe v. Harris*, 2 Wash. 126.

**Effect of Allegation That Applicant Owns Both Banks.**—In a petition for leave to build a dam, the petition, which was ore tenus, stated that the applicant was the owner of the banks on both sides of the stream. This was in effect a statement that he was the owner of the land, especially as it appeared from other parts of the proceedings that he owned the land on both sides of the stream. *Mairs v. Gallahue*, 9 Gratt. 91.

**Navigable Streams—Must Allege Bed in Commonwealth.**—It is necessary to state in petitions for mills on navigable rivers, that the bed is in the commonwealth. *Martin v. Beverley*, 5 Call 444. See *Richards v. Hoome*, 2 Wash. 36.

**Failure to Allege Bed in Petitioner—Sufficient When Otherwise Shown.**—A

petition for leave to build a mill, where the bed of the stream belongs in part to the petitioner, will be sufficient upon showing that fact, although the petition itself does not state it, but on the contrary states that the bed of the stream belongs to the commonwealth. *Meade v. Haynes*, 3 Rand. 33.

**4. Notice of Application.**

It was held, in *Hunter v. Matthews*, 1 Rob. 468, that the fact that the owner of land damaged by the building of a mill and dam had no notice of the time of making the application for the writ of the ad quod damnum, or the time of executing the same, did not invalidate the judgment giving leave to establish the mill. See post, "Record," IV, G, 4.

**B. WRIT OF AD QUOD DAMNUM.**

**1. Sued Out by Proprietor.**

"The case of *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, decided that the proprietor, whose lands were injured by the erection of a dam across the river, might sue out the writ of ad quod damnum, authorized by the 9th section of the act of February 23d, 1835, sess. acts, p. 82, although no previous writ to condemn land for the abutments and other purposes had been sued out by the company." *Upper Appomattox Co. v. Hardings*, 11 Gratt. 1.

**Variance between Petition and Writ.**

—The petition in a mill case requested permission to raise the dam "from its present height to fourteen feet and one-half." The court directed inquiry to be made as to what damages would accrue from raising the dam "six inches higher than the present height," without mentioning what the present height was. The writ was erroneous, and the inquisition taken on such writ erroneous. *Eppes v. Cralle*, 1 Munf. 258.

**2. Service and Return.**

See the title SERVICE OF PROCESS.

**Execution by Deputy Sheriff.**—The writ of ad quod damnum, which issues upon an application to a court for leave to build a mill, may be executed by the deputy sheriff. It may be executed by him in all cases, unless the high sheriff is expressly required to act in person. *Wroe v. Harris*, 2 Wash. 126; *Noel v. Sale*, 1 Call 495.

**Amendment before Judgment.**—The court ought to permit the sheriff to amend his return upon a writ of ad quod damnum at any time before judgment is given upon it. *Dawson v. Moons*, 4 Munf. 535. See *Baird v. Rice*, 1 Call 18; *Bullitt v. Winstons*, 1 Munf. 269.

### 3. Terms and Sufficiency.

**When It May Direct Jury to Ascertain Damages Generally.**—It was held, in *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, that where there had been no previous writ of ad quod damnum sued out by the company, to assess the damages sustained by the proprietor of land injured by the erection of a dam, it was proper that the writ sued out by the proprietor should direct the jury to inquire of, and assess the damages sustained by him generally, and not limit it to damages which had not been foreseen, estimated and satisfied.

If there had been an inquisition in the case of the lands, before the erection of the dam, it would have been proper, and perhaps necessary, so to frame the writ sued out at owner's instance, after the erection of the dam, as to show that the damages to be estimated had not been previously estimated; and also to specify the injuries, in order that the jury might be confined in their inquiry, to the subjects proper for their inquisition; and the company saved from the hazard of being subjected to the payment again, of damages already satisfied. *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, 343.

**Statement of Certain Height Where None in Order.**—The mentioning in the

writ of ad quod damnum of a certain height for the milldam, is no ground for setting aside the proceedings at the instance of the opposite party; notwithstanding no particular height was specified in the order directing the writ. *Coleman v. Moody*, 4 Hen. & M. 1.

**Defects Waived by Appearance.**—An inquisition on a writ of ad quod damnum in a mill case, having found that the lands of a deceased would be overflowed, and a summons having issued to the executor and trustee of the decedent, to show cause why leave should not be given to erect the mill; and the executor having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman v. Moody*, 4 Hen. & M. 1. See *Pitzer v. Williams*, 2 Rob. 241; *Bernard v. Brewer*, 2 Wash. 77.

## C. ISSUES.

### 1. Can Not Try Title to Land Damaged.

An applicant for leave to build a mill upon a stream, and a dam across it, owned the lands on both sides of the stream. The inquest found, on ad quod damnum, that lands in the possession of another of a certain value, would be overflowed. The court being of opinion that these lands belonged to the applicant, gave him leave to build his dam without paying the assessed damages. This was an error, as the title to the land could not be thus collaterally tried. *Anthony v. Lawhorne*, 1 Leigh 1.

**Proper Procedure.**—The proper procedure in a case where the owner of lands on both sides of a stream petitions for leave to build a mill upon, and a dam across the stream, and the inquest shows that lands, which in the opinion of the court belong to the applicant, in possession of another party will be damaged to a certain amount, is that leave should be given the peti-

tioner to build the mill and dam, only on condition that the applicant pay to the apparent owner the assessed damages. Then the dam might be built, without paying the damages, and the action for them could be defended on the ground that the overflowed land belonged to the owner of the mill, and thus the title would be directly put in issue in a regular way, without any embarrassment. *Anthony v. Lawhorne*, 1 Leigh 1.

## 2. Title to Land on Which Application Rests.

See ante, "Right Dependent on Title to Contiguous Lands," II, C.

## D. INQUISITION.

### 1. In General.

**Same Questions Arise on Application to Raise Dam as on Application to Construct.**—On an application to raise a milldam already erected, it is as necessary that an inquest should be had as to injuring the health of neighbors, obstructing navigation, etc., as on an application to construct a milldam originally. *Kownslar v. Ward*, Gilmer 127.

**When Date Immaterial.**—A date to the inquisition, upon a writ of ad quod damnum, is not essential, if it be stated under the hands and seals of the jurors that "in obedience to the annexed writ, they viewed the lands in question." *Dawson v. Moons*, 4 Munf. 535.

**Substantially Responsive to Statute.**—The inquisition in a mill case is sufficient, where upon a fair and reasonable construction, it is substantially responsive to the requirements of the statute. *Mairs v. Gallahue*, 9 Gratt. 94, cited, with approval, in *Charleston*, etc., *Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69.

**Scope of Inquiry.**—See ante, "Writ of Ad Quod Damnum," IV, B.

### 2. Evidence.

See post, "Damages," V.

### 3. Verdict.

#### a. Certainty and Specificness.

As to what degree of uncertainty and

inaccuracy of language is sufficient to set aside the finding of a jury in a mill case, see *Eppes v. Cralle*, 1 Munf. 258.

#### What Verdicts Sufficiently Special.

—If the verdict of a jury in a mill case finds that a certain number of acres of land will be overflowed, estimated at a certain price, and that all other damages which the owner will sustain for probable injury to other lands and inconveniences, are estimated by them at a further sum expressed in their inquest, the verdict is special enough. *Dawson v. Moons*, 4 Munf. 535. See *Coleman v. Moody*, 4 Hen. & M. 1.

Likewise in a proceeding for the erection of a mill, if the jury find that a certain number of acres of land will be overflowed, "together with all other damages to the value of a certain sum," the verdict is special enough, and will not be a bar to an action for any damages not foreseen and estimated by them. *Coleman v. Moody*, 4 Hen. & M. 1; *Dawson v. Moons*, 4 Munf. 535.

#### Need Not Set Out Land Injured by Metes and Bounds.

—It is not necessary in a mill case, either in the writ or inquest, that the land injured should be set out by metes and bounds, and the finding in the inquest that the proprietor's land had been injured by the overflowing of the waters produced by the erection of the dam, and that the damages assessed were on that account, is sufficiently specific. *Nash v. Upper Appomattox Co.*, 5 Gratt. 332.

#### Not Necessary to Set Out Injury to Land below Dam.

—It is not necessary that the inquisition should set forth the injury, which the land below the dam may sustain. *Wroe v. Harris*, 2 Wash. 126.

#### Proper for Jury to Name Height of Dam Where Order Omits It.

—Where the petition or the order of the court directing the writ of ad quod damnum to issue in a mill case, does not specify the height proposed to be erected, it is proper and correct for the jury to name that height in their inquisition. *Mairs v. Gallahue*, 9 Gratt. 94.



**Finding as to Effect on Health.**—In a proceeding before the county court, for leave to build a water gristmill and dam, the inquisition found was "that the health of the neighbors would be less or as little annoyed as it was possible it should be by the erection of any dam." On objection that this inquisition was insufficient and defective in regard to the effect upon health, it was held, that the inquisition was sufficient. *Smith v. Waddill*, 11 Leigh 532.

Objection to an inquisition upon the question of the establishment of a mill, because it was defective, in merely stating that the neighborhood would not be annoyed by the stagnation of the waters, but saying nothing as to their health or how the obstruction to fish of passage was to be prevented, was unsubstantial and not even formal. *Home v. Richards*, 4 Call 441, 447.

**Conclusiveness of Finding as to Health.**—A finding of a jury in a mill case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner. *Mayo v. Turner*, 1 Munf. 405.

#### b. When Set Aside.

**False Statements by Applicant.**—If the applicant for leave to build a mill states that he is the owner of the land on both sides of the watercourse, when in fact he is not, the writ of *ad quod damnum* and inquisition taken upon it, ought to be quashed. *Wilkinson v. Mayo*, 3 Hen. & M. 565.

**Implication of Other Damages Renders Inquisition Uncertain.**—Where the jury, in a mill case, make return of certain damages, which will be caused by raising the dam, and by the uncertain wording of their inquisition, imply that there may be other damages to the parties than those given, the inquisition is defective for uncertainty, and will be set aside. *Eppes v. Cralle*, 1 Munf. 258.

**Fatal Omissions.**—In a proceeding to

raise a milldam, the writ required the jury to say what damage would be caused to the neighboring proprietors, as to their mansion houses, offices, curtilages, gardens or orchards; and to inquire into what degree fish of passage and ordinary navigation would be obstructed, and whether the health of the neighborhood would be annoyed by the stagnation of the water. The inquisition of the jury was fatally defective in that it made no particular answer respecting the passage of fish, the obstruction of navigation, and the annoyance of the health of the neighborhood. *Eppes v. Cralle*, 1 Munf. 258.

Thus, on an application to raise a milldam already erected, the verdict only responds to the damage done a contiguous owner, by flooding his land, and not to the health of the neighborhood. This verdict is imperfect and the inquest will be quashed. *Kownslar v. Ward*, Gilmer 127.

**Omission of Land in Another County.**—In *Martin v. Beverley*, 5 Call 444, 448, it was said by Carrington, J., that the omission to pass upon the injury to lands in another county, which might have been injured by the dam, was a fatal error in the verdict.

**More Land Damaged than Is Estimated.**—If on the hearing of a mill case, it appears that a greater quantity of land of the adjoining proprietors will be overflowed than is estimated by the jury, the inquisition should be quashed, and a new writ directed. *Whitworth v. Puckett*, 2 Gratt. 528.

**Proceedings When Improperly Quashed.**—If the inquisition in proceedings for leave to build a mill be improperly quashed, the plaintiff should pray a new writ, or except to the opinion of the court. *Noel v. Sale*, 1 Call 495. See post, "Remand of Cause," IV, G, 5.

#### c. Evidence to Show Defect in Inquisition Should Be Admitted.

The inquisition of the jury in a mill case was that the health of the neigh-

borhood would not be affected, and it was opposed by a defendant on the ground of insufficiency, and that it was defective as to its effect on health, and intimated that if the objection was overruled he would offer testimony on that point. The court overruled the objection and refused to hear the evidence. This was held, on appeal, to be error, as the testimony should have been heard. *Smith v. Waddill*, 11 Leigh 532.

**d. Unnecessary Inquiries Regarded as Surplusage.**

In a proceeding to obtain leave to add to the height of a milldam, if the jury is directed to ascertain damages accruing from the dam already erected, the only proper subject of inquiry being, what damages will be occasioned by the addition, the error should be regarded as surplusage (the petition for the writ having only prayed for such inquiry as the law authorizes) if the jury assessed such erroneous damages separately, and the court did not direct the same to be paid, but only the damages properly assessed. *Eppes v. Cralle*, 1 Munf. 258.

**e. Attacking Verdict on Ground of Mistake.**

Where the inquest was taken after the erection of the dam; and the jury upon their own inspection, assessed the damages sustained by the landowner in consequence of injury to his lands by the overflowing of the waters of the stream; in an effort to set aside the inquest on the ground of a mistake in the jurors in a matter of fact, it would have been incumbent on the company to prove that such mistake was of a character at least likely to have had weight with the jury in making up their verdict. *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, 339.

**f. Former Service of Jurors in Same Case.**

On a petition for leave to build a mill upon, and place a dam across a watercourse, the writ of *ad quod dam-*

*num* was awarded, and the inquisition of the jury was returned. An interested party was made defendant, and attempted to quash the inquisition on the ground that two of the jurors had formerly served in the same case. Though it appeared the points now in controversy could not have been at issue on the first inquest, yet it was held, that the inquisition should be quashed for that cause. *Hunter v. Matthews*, 12 Leigh 228.

**g. Tampering with Jurors.**

**Jury Treated by Applicant—Inquisition Valid.**—An inquisition in a mill case ought not to be set aside on the ground that the jurors, before they were sworn and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the applicant, no corruption appearing, and the opposite party having consented. *Coleman v. Moody*, 4 Hen. & M. 1.

**Statements by Applicant to Jury at Inquisition.**—The jury impaneled under a writ of *ad quod damnum* awarded on an application for leave to build a mill, were apparently unable to agree upon a verdict, when the applicant announced that he would be willing to pay any damages they thought reasonable. A juror asked the applicant in the presence of the sheriff, the remaining jurors and the persons assembled, if he was willing to pay a certain amount. The applicant replied in the affirmative and the inquisition was completed. Although the owner of the land was not present, this was held not such an interference of the applicant with the jury, as would render it proper to set the inquisition aside. *Hunter v. Matthews*, 1 Rob. 468.

**Statement by Sheriff.**—On the trial of a writ of *ad quod damnum* to erect a milldam, one of the jurors, who signed the inquisition, gave evidence that the sheriff had declared in the presence of himself and another juror, that the defendant had consented to

the erection of the milldam, in consequence of which he had agreed to sign the inquisition, this will not be a sufficient reason for quashing the inquisition. *Harwell v. Bennett*, 1 Rand. 282.

### **E. REVIVAL, SURVIVAL AND REMOVAL.**

As to revival and survival, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, pp. 30, 33, 36, 39.

**Removal to Circuit Court under Code, 1849.**—An application for permission to build a mill is a civil action, which under the 4th section of the act of March 14, 1843, amended and reenacted in the Code of 1849, p. 657, §§ 1, 2, may be removed from the county to the circuit court, after it has been pending in the former court for twelve months. *Hale v. Burwell*, 2 Pat. & H. 608. See the title **REMOVAL OF CAUSES**.

### **F. JUDGMENT.**

#### **1. Conclusiveness.**

See the title **FORMER ADJUDICATION OR RES ADJUDICATA**, vol. 6, p. 261.

**Effect on Issues Raised.**—A judgment which determines the legality of a dam, when such issue has been raised by the pleadings, is conclusive between the parties or their privies in a subsequent action, as they are estopped from denying such fact. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

**Has No Effect on Issues Not Decided.**—It can not be contended that a judgment which only authorized the construction of a dam, and did not find that the dam actually constructed was lawful, will defeat an estoppel arising from a subsequent judgment finding the dam to be illegal. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

#### **2. Conditional Judgment.**

**Granting Application on Condition—Incident to Grant.**—Where the judgment of the court, granting leave to erect a dam, provides that the appli-

cant shall keep a ferry boat at the crossing of a public road over the stream, the duty of keeping up the boat is not merely personal to the grantee of the privilege of erecting the dam, but it is a condition and incident to the grant, and attaches to it into whosoever hands it may pass. *Mairs v. Gallahue*, 9 Gratt. 94.

#### **Right Granted on Conditions—Court May Allow Time for Compliance.**

By an act of assembly a county court was empowered to grant permission to an individual to make a dam across a public highway; but the privilege was conditional on his keeping in his dam a lock or slope in repair for the passage of boats and fish. The county court was to be the judge of its sufficiency, and was empowered to abate the dam as a nuisance, if after three months' notice the lock or slope be adjudged insufficient. On motion of two individuals the dam was abated as a nuisance, because raised higher than authorized, and because of no sufficient lock or slope. The court had power to give the proprietor reasonable time to reduce the dam to the proper height, and to construct a sufficient slope or lock. *White v. King*, 5 Leigh 726.

And in *Martin v. Beverley*, 5 Call 444, 448, Carrington, J., said that the omission of the court to lay the petitioner under the statutory restrictions as to fish of passage, etc., was a fatal error.

#### **3. Reversed for Uncertainty.**

When the jury, on an application proceeding for leave to build a mill, suggested three plans, in each of which the damages were different, and in one of which the health of the neighborhood would be injured, and the court established the mill generally, without confining the applicant to either plan, the order will be reversed for uncertainty. *Coalter v. Hunter*, 4 Rand. 58.

#### **4. Erroneous Giving of Land Injured to Applicant on Payment of Damages.**

Where, upon an application to the

county court for leave to erect a mill and dam, the inquisition finds that a certain quantity of land not belonging to the applicant will be overflowed, and assesses damages to the proprietor, it is erroneous for the judgment, granting leave to erect the mill and dam, to provide that upon payment of the assessed damages, the land overflowed shall become vested in the applicant in fee simple. Upon appeal by the proprietor to the circuit court, it must reverse the judgment with costs, though the appellee himself suggest the error and move that it be corrected. *Hunter v. Matthews*, 1 Rob. 468.

**5. Order Granting Mill Valid without Direction to Pay Damages.**

An order of court granting leave to erect a mill is valid, though no order be made directing payment of the damages found by the inquisition. *Coleman v. Moody*, 4 Hen. & M. 1.

**G. APPEALS.**

**1. Jurisdictional Amount.**

See the title APPEAL AND ERROR, vol. 1, pp. 430, 494.

**2. Supersedeas.**

See the title APPEAL AND ERROR.

**Lies Only for Interested Parties.**—A supersedeas to a judgment of a county court, granting leave to erect a mill, will not lie on behalf of a person who may be interested, but whose name does not appear in the record of the county court as a party. Such person should make himself a party to the contest before the final decision in the county court, and then it is competent for him to carry the case to a superior tribunal. *Wingfield v. Crenshaw*, 3 Hen. & M. 245.

**Appellate Court Not Confined to Errors Apparent in Record.**—If a supersedeas be granted to an order of an inferior court, giving leave to build a mill, the superior court is not confined to errors apparent on the face of the record. *Lee v. Turberville*, 2 Wash. 162.

**3. Weight of Judgment of Lower Court.**

**On Conflicting Evidence.**—Where the only question is, whether the mill would be injurious and the witnesses are divided, and the county court and district court, sitting in the neighborhood, have both decided that it would, and there is nothing before the court of appeals to contravene that opinion, therefore, the judgment of the district court must be affirmed. *Home v. Richards*, 4 Call 441, 450; *Coleman v. Moody*, 4 Hen. & M. 1, 18.

**In Absence of Contrary Evidence Action of Lower Court Presumed Correct.**—The judgment of the court

giving permission to erect a dam provides that the applicant shall keep a ferry boat at the crossing over the stream across which the dam is to be erected. This was authorized by 2 Rev. Code, ch. 227, § 5; and as the county and circuit courts held that this would remedy any impediment to the crossing of the stream, the court of appeals will presume that they acted rightly, nothing being shown to the contrary. *Mairs v. Gallahue*, 9 Gratt. 94.

**Evidence in Lower Court Presumed Sufficient When No Exception.**—The

judgment of the county court authorizing the erection of a dam was excepted to on the ground that the health of the neighborhood would be injured; and the evidence was embodied in the exception. With all the evidence before it, the circuit court passed upon the question, and no exception was taken to its opinion. As both county and circuit courts were satisfied upon the question, the court of appeals will presume that the evidence was sufficient to show that the health of the neighborhood would not be affected by the dam. *Mairs v. Gallahue*, 9 Gratt. 94.

**4. Record.**

**Should Show Notice or Waiver.**—

Upon an application for leave to build a mill, it should appear to the appel-

late court by the record, that the party whose property is sought to be condemned, had ten days' previous notice of the motion for a writ of *ad quod damnum*. This might be dispensed with, if the record shows that the proprietor appeared and contested the application upon the merits. A general appearance will not be sufficient. *Bernard v. Brewer*, 2 Wash. 77. See ante, "Notice of Application," IV, A, 4.

**Should State Bed of Stream in Applicant or Commonwealth.**—Upon an appeal from an order giving leave to build a mill, the record should state that it appeared to the court granting the order, that the bed of the water-course was in the applicant, or in the commonwealth. *Richards v. Hoome*, 2 Wash. 36.

**What Statements by Clerk Sufficient.**—It is sufficient for the clerk to state in the record of a mill case, that the writ of *ad quod damnum* with the inquisition annexed, was returned by the sheriff, without inserting a copy of the signature of the sheriff or his deputy to the return; a copy of the inquisition itself with the signatures of the jurors being inserted in the record. *Coleman v. Moody*, 4 Hen. & M. 1.

**Question Tried in Lower Court Proved by Record.**—Although in controversies concerning mills, the superior court of law, to which an appeal is taken from the county or corporation court, may hear new evidence upon questions submitted to its revisal by the record, it ought not to receive any evidence, but that of the record itself, to prove what questions were in fact tried in the court below. *Bohn v. Sheppard*, 4 Munf. 403.

#### 5. Remand of Cause.

See ante, "When Set Aside," IV, D, 3, b.

**Inquisition Erroneously Quashed and Relevant Testimony Excluded.**—When the order of the circuit superior court in a mill case was erroneous in quashing the inquisition found in the county

court, and it also erred in refusing to admit certain testimony as to it, the court of appeals should reverse the order with costs, and the cause should be remanded to that court, to be there heard upon the evidence and the merits. *Smith v. Waddill*, 11 Leigh 532.

**Judgment against Plaintiff without Prejudice to Future Application.**—On an appeal to the circuit superior court, from the county court giving the plaintiff leave to build a mill and dam in a mill case, the judgment was reversed, inquisition quashed, and judgment was given for the defendant without prejudice to a future application. The appellate court should have remanded the cause to the county court for further proceedings to be there had. *Hunter v. Matthews*, 12 Leigh 228.

#### 6. Error Suggested by Appellee.

Upon appeal by the proprietor to the circuit court, it must reverse the judgment with costs, though the appellee himself suggest the error and move that it be corrected. *Hunter v. Matthews*, 1 Rob. 468.

#### 7. Party Prevailing Entitled to Costs.

On an appeal in a mill case, the party prevailing ought to be allowed in the bill of costs, the mileage and attendance of his witnesses, summoned to the court of error, though the court determined on viewing the record, and therefore did not examine the witnesses. *Eppes v. Cralle*, 1 Munf. 258. See the title COSTS, vol. 3, p. 604.

### V. Damages.

#### A. LIABILITY THEREFOR.

**In General.**—See the title DAMAGES, vol. 4, p. 162.

"The owner of a dam, though erected on his own land, is answerable to a neighbor for injury to his land in times of ordinary freshet, occasioned or enhanced by the dam. In erecting his dam he is bound to regard his neighbor's rights and security; not only in ordinary stages of water, but in those stages occasioned by ordinary recur-

ring freshets. If, by his dam, he aggravates the injury of an ordinary freshet, he will be responsible. He ought to provide against this in erecting his dam. If he can not, then it is a case in which he must prove a license from his neighbor to suit the exigency, or not erect it at all." (Obiter.) *Taylor v. Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29, 33.*

**Effect of Uniting in Conveyance on Recovery of Damages.**—By uniting in the conveyance of mill property, the grantor can not recover any damages against the grantee for any injury done him by the reflow of water, to the extent that the injury existed at the time of the conveyance. *Calhoun v. Palmer, 8 Gratt. 88.*

**When Payment of Damages Presumed.**—Under some circumstances payment of the damages assessed in a mill case, ought to be presumed, as where a great length of time has elapsed, during which the owner of the land, to whom such damages were assessed, acquiesced in the building of the mill, without claim or objection on his part. *Young v. Price, 2 Munf. 534.*

**Contention Not Considered unless Pleaded.**—Where, in an action against a mill owner, the damage resulting from a dam, lawfully constructed, is in issue, the contention that certain rights of the plaintiff were not condemned, and could not be condemned, will not be considered, when such rights are not pleaded. *Chesapeake, etc., R. Co. v. Rison, 99 Va. 18, 37 S. E. 320.*

**Defense of Compliance with Statutory Authority.**—In an action brought by a mill owner for damages for the diversion of water from his mill, a plea that the defendant, by statutory authority, was empowered to construct a dam and operate a canal, and was required to keep the canal supplied with water for the purpose of navigation, and that it was necessary to withdraw water from the river at the mill, and

that no more was used than was necessary, states a sufficient defense. *Chesapeake, etc., R. Co. v. Rison, 99 Va. 18, 37 S. E. 320.*

**Rightful Use and Adverse Possession.**—See ante, "Source of Authority," II, B.

## B. SCOPE OF INQUIRY AS TO DAMAGES.

**Petition to Increase Height of Dam—Proper Inquiry of Damages.**—On a petition for leave to add to the height of a dam, the only proper subject of inquiry is what damages will be occasioned by the proposed addition. It is error therefore to direct a jury to assess such other damages, accruing from the dam already erected, as were not contemplated by the original jury. *Eppes v. Cralle, 1 Munf. 258.*

**Facts May Be Proved Prior to Period Stated in Declaration.**—In an action of covenant the breach of covenant charged in the declaration was, that during a specified period of time, the defendant deprived plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others. The plaintiff is not limited in proving acts committed by the defendant or other persons, to the period stated in the declaration; but he may prove previous acts, in consequence of which the injury was sustained during that time. *Hollingsworths v. Dunbar, 5 Munf. 199.*

## C. MEASURE OF DAMAGES.

See ante, "Measure of Damages for Interruption of Right," III, C, 4.

**For Injury to Real Property.**—In an action to recover for injuries to real property resulting from the construction and maintenance of a dam backing water thereon, the measure of damages is the difference between the value of the property at the time the damages were inflicted and its value before such was done. *Rowe v. Shenandoah Pulp Co., 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870.*

**Court Can Not Increase Damages Assessed by Jury.**—It is not within the power of the court in a mill case to increase or diminish the damages, which have been assessed by the jury, as resulting to the adjoining proprietors. *Whitworth v. Puckett*, 2 Gratt. 528.

#### D. SUBSEQUENT AND UNFORESEEN DAMAGES.

**Condemnation of Land for Abutment of Dams.**—It was held in *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, that the 9th section of the act of 1834-35, p. 82, which was in regard to the condemnation of land by the defendant company necessary for the abutments of dams, embraced the case of a proprietor, whose land was injured by the erection of a dam across the river, to condemn the abutments of which dam no writ of *ad quod damnum* had been sued out by the defendants, they having agreed with the proprietors of the land owning the abutment, and gave him the right to a writ of *ad quod damnum* to ascertain such damages to his property or health as had not been foreseen, estimated and satisfied.

And an inquest and judgment of the court thereon will be no bar to an action for damages sustained by a landowner, which were not actually foreseen and estimated by the inquest. *Calhoun v. Palmer*, 8 Gratt. 88; *Coleman v. Moody*, 4 Hen. & M. 1; *Com. v. Faris*, 5 Rand. 691; *Field v. Brown*, 24 Gratt. 74, 96. See *Southside R. Co. v. Daniel*, 20 Gratt. 344. But the presumption is that the former inquest assessed all the damage caused. *Ellis v. Harris*, 32 Gratt. 684.

**Estoppel by Conduct at Inquest.**—A father gave his son a tract of land on which there was a mill seat, and the latter applied to the county court, to build a mill and dam. At the inquisition the father stated that by erecting a dam twelve feet high, no damages would result to any body but himself, and he did not believe that it would

injure him. The jury acted upon these representations, and the son was permitted to build a dam of that height, but he only erected it ten feet high. The father and son united in a conveyance of the property to a third party, who as soon as he found out what the inquisition of the jury was added eight inches to the height of the dam. In a suit by the father to recover damages for the injury resulting from the increase of the height of the dam, it was held, that his right to recover was not defeated by his conduct at the inquisition. *Calhoun v. Palmer*, 8 Gratt. 88.

**Injuries from Negligence in Repairing Guard Bank.**—Though one condemn land for dam abutment and guard bank, and pay damages assessed therefor, damages can afterwards be had for injury to the part of the tract not condemned, resulting from negligence in not keeping the guard bank in proper repair. *Chesapeake, etc., R. Co. v. Chambers*, 95 Va. 503, 28 S. E. 872.

But only the injuries suffered after the plaintiff's purchase can be considered. *Chesapeake, etc., R. Co. v. Chambers*, 95 Va. 503, 28 S. E. 872.

**Insufficient Replication.**—To an action for damages for the diversion of water from a mill, it was pleaded that the defendant was required by statute to supply water from its dam for the navigation of a canal, causing the diversion complained of, and the replication stated that the act authorizing the dam had only provided that compensation be made for foreseen damages, and that the damages to the plaintiff could not be foreseen. This was insufficient, as the effect of the diversion of water from the dam could have been seen at the time of the inquest. *Chesapeake, etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

#### E. TO LAND SUBSEQUENTLY ACQUIRED.

Where the erection of a dam results in injury to land by overflows, the

owner may recover full damages for all the land owned by him at the time of the erection of the dam. But for injuries for land since acquired by him he can only recover such damage as was not actually foreseen and estimated by the jury when the dam was built. The jury must presume that the jury of the inquest did foresee and estimate all damages which were then practicable to foresee and estimate for. *Ellis v. Harris*, 32 Gratt. 684.

#### F. EVIDENCE OF DAMAGE.

**Competency as Expert.**—A person who all his life has been familiar with the effect of a dam upon the channel of a stream, and who has twice superintended the putting up of the dam, and who was familiar with the effect on the channel when the dam was washed away, but who was not a millwright, or mechanic of any sort, is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county. *Ellis v. Harris*, 32 Gratt. 684.

**When Plaintiff Competent, Defendant Owner Being Dead.**—In an action against a mill owner for injury caused by the erection of a dam, where the question is whether the acts of the deceased in building his dam across the stream, injured the land of the plaintiff, the latter is a competent witness to prove the condition of his land, the character of the stream, the effect of the dam on the stream and on adjacent land, and other independent facts, as to which his testimony, if untrue, could be rebutted by others as readily as by the deceased. *Field v. Brown*, 24 Gratt. 74. See the title WITNESSES.

**Evidence of Effect of Dams in One County Inadmissible in Another.**—In an action to recover damages for injury to land caused by the overflow of a dam, in the county of Louisa, evidence of the effect of a dam in raising the bottom of a stream, and overflowing lands in the county of Albemarle,

is inadmissible. *Ellis v. Harris*, 32 Gratt. 684.

**Recitals in Declaration—Evidence Admissible.**—In 1824, a dam was built across a river, and did the land above the dam no injury. But in 1845, the owner of the land raised the dam, which caused injury to the land. The owner sued the owner of the dam claiming under the prior owner for continuing the dam, to the injury of his land, and in his declaration recited that the dam was erected without authority of law. Under this declaration the plaintiff may prove that the dam was raised in 1845, and the injury to his land was caused by raising it. *Field v. Brown*, 24 Gratt. 74.

#### G. INDEMNITY AGAINST INJURY.

See the title INDEMNITY, vol. 7, p. 347.

**Contract for Indemnity Not within Statute of Frauds.**—A verbal promise to indemnify against injury caused by the erection of a milldam to property situated above, is not within the statute of frauds, either because it is an agreement touching real property or because it is not to be performed within a year. *Chapman v. Ross*, 12 Leigh 565.

**Covers Injury from Lawful Dam Alone.**—In order to recover upon a contract of indemnity against an injury sustained from the erection of a dam by a third person, so as to overflow the premises of the person to be indemnified, where, upon a fair construction of the evidence, it was only an indemnity against the lawful acts of such third person, it was necessary to show that the dam built by him causing injury, was erected in the exercise of a lawful right. The remedy for an unlawful building of a dam was against the builder only. *Chapman v. Ross*, 12 Leigh 565.

**Necessity for Notice of Damage.**—See the title INDEMNITY, vol. 7, p. 359.



**Consideration for Indemnity against Damage.**—See the title **CONTRACTS**, vol. 3, p. 342.

## H. RIGHT TO INJUNCTION ON GROUND OF DAMAGE.

See ante, "Jurisdiction of Controversies Concerning Mills," I. See the title **INJUNCTIONS**, vol. 7, pp. 534-536, 610.

## VI. Criminal Prosecutions.

**Obstruction of Navigation or Passage of Fish.**—A boom company may be proceeded against by indictment for erecting and maintaining a dam or other things, in any watercourse which is a public highway, which dam obstructs the navigation, or the passage of fish, under § 24, ch. 44, W. Va. Code, 1891. *State v. Elk, etc., Co.*, 41 W. Va. 796, 24 S. E. 590. See the title **LOGS AND LOGGING**, ante, p. 470.

**Leave of Court to Build No Bar to Prosecution.**—Although leave has been given by the county court to erect a mill according to the provisions of the statute, yet that is no bar to a public prosecution or private action for injuries, other than those actually foreseen, and estimated by the inquest. *Com. v. Faris*, 5 Rand. 691.

**Throwing Sawdust in Water No Offense.**—Casting sawdust into a brook from the operation of a sawmill does not constitute an offense under W. Va. Code, 1891, ch. 150, § 20b. *State v. Mitchell*, 47 W. Va. 789, 35 S. E. 845.

**Grinding at Mill Rebuilt—Construction of Penal Statute.**—A mill which

had been built and had gone down, prior to the statute of 1819, 2 Rev. Code, ch. 235, § 10, and which was rebuilt after the passage of that statute in 1819, is not a mill "thereafter built," within the meaning of the statute, declaring it an offense to grind for toll, etc., at a mill built after January 1st, 1820, unless such mill was established by order of court in a legal manner. Section 6 of this statute authorized the rebuilding of mills destroyed or unfit for public use. *Webb v. Com.*, 2 Leigh 721.

**Lack of Particularity in Indictment Cured by Verdict.**—An indictment for a nuisance caused by a certain mill and milldam, the property of the defendant, situated near a common highway, without particular specification or description of the mill, and without expressly alleging that it is in the county wherein the indictment is found, is good and sufficient after verdict. *Stephen v. Com.*, 2 Leigh 759. See the title **INDICTMENTS, INFORMATIONS AND PRESENTMENTS**, vol. 7, p. 406, et seq.

**Writ of Error from General Court.**—A motion to abate a dam as a nuisance, as provided in the act of assembly authorizing its construction, is a criminal prosecution, and a writ of error lies from the general court to the order of the circuit superior court, affirming an order of the county court. *White v. King*, 5 Leigh 726. See the title **APPEAL AND ERROR**, vol. 1, p. 418.

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# **MINES AND MINERALS.**

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**I. General Properties.****A. GENERALLY.**

Coal and other minerals in place are land. *Virginia Coal, etc., Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020. Although the term "minerals" does not always include coal. *White v. Sayers*, 101 Va. 821, 45 S. E. 747.

As to severance between surface and minerals, see post, "Conveyances," II.

**B. UNLAWFUL REMOVAL.**

A court of equity has jurisdiction to enjoin the removal of iron ore from land the title to which is not in dispute. The party injured is not confined to an action at law for the trespass. *Anderson v. Harvey*, 10 Gratt. 386. See the title **INJUNCTIONS**, vol. 7, p. 512.

Coal in place is a mineral and part of the very substance of the land, hence the extraction of coal by one tenant in common, without the consent of another, is waste, for which he must account to that other. *Cecil v. Clark*, 47 W. Va. 402, 35 S. E. 11. See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 8, p. 89.

**C. OIL AND NATURAL GAS.****1. Generally.**

Oil and natural gas are minerals in the view of the law, but, because of their peculiar attributes, they, as the

subject of property, differ from other minerals. Out of possession, there is no property in them. They are not capable of distinct ownership in place, owing to their liability to escape from the place where they may be temporarily confined, without necessarily any interference on the part of the owner of the soil or others claiming through him, under whose land they may be found. Like water they are not the subject of property, except in actual occupancy and a grant of them passes nothing for which ejectment will lie. Oil and gas can not, while in the ground, like solid minerals, be the subject of an estate distinct from that in the soil. *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764.

Hence, partition of oil and gas owned by co-owners separate from the surface, can not be decreed, except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void. *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764.

Natural or hydrocarbon gas, which issues by its own force from the earth, is not capable of absolute ownership, but is the subject of qualified property only. Hence, where a landlord leased to his tenant certain premises, for the purpose of mining and taking

carbon oil therefrom at a fixed royalty and for no other purpose; and the tenant opened a well which produced both oil and hydrocarbon gas, the former in small quantities pumped from the well for which the royalty was paid, and the latter in large quantities issuing by its own force from the well, and which was separated from the oil by the tenant and, by means of pipes, conducted beyond the leased premises, where it was either sold or appropriated by the tenant for his own use, without accounting to the landlord therefor; in a suit brought by the landlord for an accounting and the value of said gas, it was held, that the tenant was not accountable to the landlord for said gas or its value. *Wood County Petroleum Co. v. West Virginia Transportation Co.*, 28 W. Va. 210.

Neither is a mere trespasser liable for the value of such gas, as an element of the damage to the land or the possession thereof in an action of trespass. *Wood County Petroleum Co. v. West Virginia Transportation Co.*, 28 W. Va. 210.

## 2. Oil and Gas in Place a Part of the Realty.

But petroleum or mineral oil, as it is found in the cavities of the rocks, is a part of the realty and embraced in the comprehensive idea, which the law attaches to the word "land." *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781; *South Penn Oil Co. v. McIntire*, 44 W. Va. 296, 28 S. E. 922; *Williamson v. Jones*, 39 W. Va. 321, 19 S. E. 436; *S. C.*, 43 W. Va. 562, 27 S. E. 411; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533; *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764; *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216; *Rymer v. South Penn Oil Co.*, 54 W. Va. 530, 46 S. E. 559; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223.

This is equally true of natural or hy-

drocarbon gas. *Rymer v. South Penn Oil Co.*, 54 W. Va. 530, 46 S. E. 559; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one-eighth of the oil produced as royalty, the oil while it remains in situ must be regarded as realty, and as remaining the property of the lessor until brought to the surface. *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216, citing *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436.

## 3. Unlawful Removal.

See ante, "Unlawful Removal," I, B.

### a. Generally.

Petroleum or mineral oil is a part of the inheritance and an unlawful removal thereof is a disherison of him in remainder constituting waste, which a court of equity, in a proper case will restrain and enjoin. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436; *S. C.*, 43 W. Va. 562, 27 S. E. 411; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223.

This applies with equal force, for the same reason, to gas. *Rymer v. South Penn Oil Co.*, 54 W. Va. 530, 46 S. E. 559; *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664.

The unlawful extraction of oil and gas from land, they being part of the land, is an act of irreparable injury, and equity will enjoin it, especially where insolvency of defendants is alleged. *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793.

But insolvency is not a necessary allegation. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533; *Bettman v. Harness*, 42 W. Va. 833, 26 S. E. 271.

Having taken jurisdiction for one purpose, equity will go on and administer complete justice, even though, in so doing, it have to try title to land

and administer remedies which more properly belong to courts of law. *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793.

Where a person enters upon land without authority, under a void lease, and drills thereon, takes petroleum oil therefrom and removes the same from the premises and threatens to drill other wells, and to take the oil produced therefrom; a court of equity will perpetually enjoin him from all operations under said void lease, will cancel said lease and retain the cause for all purposes, and proceed to a final determination of all the matters at issue therein; although the plaintiffs may have a remedy at law against the wrongdoer for the trespass. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533, Dent, J., dissenting.

#### **b. Where Legal Title Is in Dispute.**

If the plaintiff's title is in dispute, a temporary injunction will be granted until the dispute as to title is settled at law, but such injunction should merely preserve the subject in controversy. If it goes further and attempts to change the possession or undo what has already been done, and, in effect, delivers possession, by enjoining the defendants from interfering with plaintiff's use of the land and from setting up any claim under their leases, it is erroneous and should be modified. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271. See contra, *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793.

Where a party seeks an injunction to prevent irreparable injury to real estate, such as the extraction of oil and gas, and also seeks to have the title and right of possession determined in the same proceeding, equity will decline jurisdiction to determine the question of title and right to possession, where the parties are claiming under hostile titles and the defendant is in possession, and the plaintiff having no equity against the adverse claimant, though the court inclined to the opinion that

in such case the court of equity should enjoin the trespass and preserve the property and rights of the parties pending the determination, in a court of law, of the question of title, although no action at law has been instituted, if it appears from the bill that the complainant intends immediately to put the question of title in course of judicial determination and prosecute it diligently. *Freer v. Davis*, 52 W. Va. 35, 43 S. E. 172.

But in such a case a receiver will not be appointed pending the decision as to the legal title, in the absence of any allegation of insolvency or other special reason. Still less is it proper to authorize such receiver to drill oil wells and borrow money wherewith to do so, making the same a charge upon the leasehold estate. *Freer v. Davis*, 52 W. Va. 35, 43 S. E. 172.

The court disapproved the syllabus in the case of *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; so far as in conflict with the principles expressed herein, on the ground that the contrary expressions in that case were merely dicta, the parties in that case being merely lessees from a common lessor, and the only question involved was the right to explore for oil, none having been found at the time the injunction was awarded. The court wholly failed to notice the case of *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793, which is flatly contra.

#### **Compensation for Improvements.—**

One who has made permanent improvements under a lease granted believing in the goodness of his title, taking petroleum oil unlawfully from the land, is to be allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See the title IMPROVEMENTS, vol. 7, p. 317.

#### **c. Necessary Parties.**

When the lessees of an oil and gas

lease bring their suit against the lessee of an adjoining tract to enjoin them from trespassing upon the plaintiffs' premises and from proceeding to drill a well for oil and gas, which defendants claim is on their own lease, but which plaintiffs claim is on their premises, the lessors of both leases, and all persons having an interest in the oil and gas which might be produced from the well, the drilling of which is sought to be enjoined, are necessary parties to the suit, to enable the court to settle the rights of all parties interested or affected by the subject matter in controversy. *Steelsmith v. Fisher Oil Co.*, 47 W. Va. 391, 35 S. E. 15.

When the lessors and lessees of one tract bring their suit against the lessees of an adjoining tract, to enjoin them from trespassing upon the plaintiff's premises and from continuing to drill a well for oil and gas, which defendants had commenced, as plaintiffs claim, on their premises and praying in their bill that the boundary line between the tracts claimed by the parties respectively be ascertained, fixed and determined; that plaintiffs be decreed to be the owners of the land on which said well had been located by the defendants and of all the oil and gas which could or might be obtained through said well; that the defendants be decreed to have no estate, right, title or interest whatsoever of, in or to said lands, or said oil or gas, nor any right whatsoever to the possession of said land or said well, it was held, that in such case all the owners of the fee of both tracts are necessary parties to the suit, to enable the court to settle the rights of all parties interested or affected by the subject matter in controversy; although, if the object of the suit was merely to enjoin the trespass, it was sufficient if the guardian of infants, to whom the oil and gas interests of said infants had been committed by order of court, were made a party. *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793.

## II. Conveyances.

See the title DEEDS, vol. 4, p. 364.

### A. SEVERANCE OF SURFACE AND MINERALS.

#### 1. Generally.

Separate and distinct estates may be created in the coal and minerals owned by different persons by separate and distinct titles. One may own the surface, another the coal and another some other mineral, all within the same parcel of land. Each may have a fee or less estate in his respective part. *Virginia Coal, etc., Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020; *Low v. County Court*, 27 W. Va. 785; *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3; *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. 214.

They are not joint tenants or tenants in common. *Virginia Coal, etc., Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020.

The ownership of the surface and or a seam or bed of other mineral may be separated; but the owners of both are owners of a corporeal hereditament or interest in land. *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3.

"Surface"—Definition.—The word "surface" where specifically used as a subject of conveyance has a definite, certain meaning, and means only that portion of the land which is or may be used for agricultural purposes. *Williams v. South Penn Oil Co.*, 52 W. Va. 181, 43 S. E. 214. See the title DEEDS, vol. 4, p. 429.

#### 2. Reservation of Part of Oil and Gas.

Where a conveyance of a tract of land in fee contained the following provisions: "The parties of the first part reserve unto themselves, and do not convey by this deed the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil, in and underlying the tract of land hereby conveyed;" this is an exception from the operation of said deed, reserved to the grantors of the title, in fee, to the one-sixteenth of the oil in place, in and underlying said tract of land, to be de-

livered to her when produced as royalty, without expense to her for production; and, if the vendee afterwards lease said tract for the production of oil and gas, reserving one-eighth of all the oil obtained from said premises, as produced in the crude state; this is a reservation to the lessor of one-eighth of the oil vested in her, and did not refer to or include the one-sixteenth outstanding in her vendor; i. e., one-eighth of fifteen-sixteenths. *Harris v. Cobb*, 49 W. Va. 350, 38 S. E. 559.

**3. Severance Must Be Complete—Vendor's Lien on Mineral Passes to Vendee of Entire Tract.**

Where the owner of land conveys one-half the coal in a tract of land, reserving a vendor's lien to secure a part of the purchase money, and subsequently conveys the said tract in trust to secure a debt, with general warranty with the exception of said deed for one-half the coal and also devises said tract upon condition of paying said trust debt, without mentioning said deed for one-half the coal, and said tract is subsequently sold to satisfy said deed of trust, the vendor's lien for the purchase price of said one-half interest in the coal and the right to enforce the same passes to the purchaser at such sale. *Morrison v. Clarksburg Coal, etc., Co.*, 52 W. Va. 331, 43 S. E. 102.

**4. Deed Must Follow Contract.**

Where a contract of sale contains the following provision: "The coal and coal privileges in the land west of Birch Run heretofore sold and deeded are reserved; all the coal on that side has been sold and conveyed. The coal and all the coal in the land east of Birch Run and all the necessary and desired coal privileges are also hereby reserved;" when the vendor executes the deed in pursuance of said contract, he can not insert in it a reservation of the "right to remove on or through this tract of land, the coal of coter-

minous tracts of land owned by the vendor. *Findley v. Armstrong*, 23 W. Va. 113.

**5. Reformation of Deed.**

When a deed conveys all the iron ore in a tract of land, and it is shown by a letter written by the vendor that the verbal contract of sale called for the entire mineral interest, reserving only the lead and zinc, which letter was written within a week after the making of the agreement, and it appears that such change was made by the vendor after the deed left the hands of the vendee, and was not discovered by the vendee until just before the bringing of the suit, such deed will be reformed so as to make it conform to the original agreement as shown by such letter. *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275. See post, "Generally," III, A.

**B. CONSTRUCTION OF GRANT.**

**1. Language Held to Convey Absolute Property.**

A deed, after conveying a parcel of land continues: "Also the right of digging for coal under the adjoining land, lying east, etc., together with all and singular the tenements, hereditaments and appurtenances to the said lot belonging, with the right of digging coal as aforesaid;" conveys a fee simple title and absolute property in the coal, not merely a license to dig for coal. *List v. Cotts*, 4 W. Va. 543.

A deed, whereby the owner of land conveyed to the grantee one-half of all the mineral, except the iron ore in and upon said tract, together with all the necessary mining privileges, including wood and water, upon the consideration that the grantee is to test said land for mineral, the grantee to control and carry on the work until \$2,000 was expended, if he so desired, one-third the expense to be paid by the grantor, the grantee to have entire control and management of the work, and to keep an account of expense of mining operations, of which grantee should



pay two-thirds and grantor one-third; conveys one-half of all the minerals except the iron ore to the grantee, it appearing that the required tests had been made. Such deed, duly recorded, is notice of the interests of the grantees thereunder to subsequent purchasers, and subsequent purchasers from the grantor acquire no title to such mineral interests. *Clayton v. Henley*, 32 Gratt. 65.

When a decree of partition expressly excepts the minerals under a tract of land from the partition, and provides that they are to be held as the undivided property of the parties to the partition, such reservation is a reservation of the entire ownership of the minerals from the partition, and a purchaser of one of the lots, subject to such reservation, acquires no interest in such minerals. Such a reservation creates separate estates in the surface and the minerals, not a mere easement in the minerals attached to the surface of the respective lots and passing therewith. *Barksdale v. Parker*, 87 Va. 141, 12 S. E. 344. See also, *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3.

**Defeasible Estate in Fee.**—A grant of all the oil and gas in and underlying a certain tract, on condition that the grantee, within ninety days after the completion of a well, pay to the grantors \$800, and in default thereof, the grant to become absolutely null and void, said grant to expire ten years from its date, if no well completed within that time, unless said \$800 be paid without drilling said well; conveys to the grantees a defeasible title in fee to said gas and oil, and should be placed on the land books in the name of the grantee. *State v. Low*, 46 W. Va. 451, 33 S. E. 271.

## 2. Language Held Insufficient to Pass Title to Minerals.

Where a deed conveys a tract of land, and, after the granting clause, contains the following clause: "Excepting always that the parties of the

first part hereby expressly reserve to themselves, their heirs and assigns forever, the use and occupancy of any one of the coal banks upon said land, that they may at any time hereafter, or that either of them, or their heirs or assigns may jointly or severally select, together with right of way for ingress and egress to and from same;" and there were six separate coal veins underlying the land; and the heirs of the grantors instituted their action of ejectment to recover one of said coal veins or seams, designating it, and claiming under said exception or reservation, from the defendants, who claimed title to all the coal under said deed; it was held, that such deed does not reserve the title to said coal, or to any part thereof; that said reservation or exception will not sustain an action of ejectment for said coal. *Chapman v. Mill Creek Coal, etc., Co.*, 54 W. Va. 193, 46 S. E. 262.

Where three parties enter into an agreement called a deed, wherein it is recited that the parties are owners of certain tracts of land and there is reason to suppose that upon some or all the lands of the contracting parties there are valuable minerals, and it is the intention of the parties to explore said lands and ascertain the presence of such minerals, if they exist, and to work them if found in sufficient quantities and of sufficient richness; and the parties, in consideration of the premises and the mutual covenants contained in the deed, mutually convey to each other such interests in all such minerals as might be found on said lands, together with all such privileges of access to and from said land, the use of wood, water and other material and privileges necessary to the proper working of minerals, should any be found, "as will make each of the parties hereto own in fee simple one undivided third of all the minerals and privileges above mentioned upon all said lands," and the parties further covenant at their joint and equal expense to explore for

minerals upon said lands, and work them if found in sufficient quantities, all clear profits and all losses to be equally borne, and neither party to sell, lease or otherwise dispose of his interest in said minerals without the consent in writing of both the others, and, in the event of the death of either, the work not to be suspended, but to be prosecuted by the survivors for their benefit and that of the estate of the decedent; in view of the fact that no consideration was mentioned except the mutual covenants and the contemplated profits, and that the contract was made at the time of a great excitement over gold, and the undertaking was abandoned, in a few years, after a fruitless search for "minerals," it was held, that such deed did not vest the parties thereto with a fee simple title respectively to one third of all the minerals on said lands including coal, but merely created a partnership between the parties and, on its abandonment, all rights under said contract ceased, it being held, that coal was not one of the minerals in the contemplation of the parties, as, at the time of the contract and for fifty years after, it was considered valueless. *White v. Sayers*, 101 Va. 821, 45 S. E. 747.

**Mere License.**—An agreement between partners, wherein it is provided that the partnership should have and possess the exclusive use and privilege of digging, hauling off and working any ore now found or which may hereafter be found anywhere on the land of one of the said partners, is a grant of a mere license to the partnership to dig ore on the said premises, not coupled with any estate or interest in the said lands, and did not create any easement on the land. No acts having been done under the license, it was executory and revocable at the pleasure of the grantor. Such license is not assignable and was revoked by the dissolution of the partnership. *Barksdale v. Hairston*, 81 Va. 764.

**Easement.**—Where a deed contains the following reservation: "The said Ross excepts the privilege of coal from his part of the farm at the bank now in use," such clause confers an easement annexed to the grantor's land, to mine coal at that open mine on the granted premises, which is only a privilege to take coal at a particular place for a particular purpose; it does not confer title to such coal. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608.

Where a tract has been divided up, and one tract sold to plaintiffs, with the following provision; "subject to the rights of the owners of Cotopaxi furnace to raise ore from a bank or banks on Lot No. 6;" such a conveyance does not vest the title to the ore in said lot No. 6 in the owners of the furnace property, but merely an incorporeal hereditament or right to take ore from such lot for the use of such furnace, hence they have no right to remove such ore except for the use of said furnace; but if, after suit brought, they acquire title to such ore from the original vendors, in whom such ore was reserved in the conveyance of said lot 6, it will be a good defense. Note, that, while not clearly stated, the court would seem to imply that the original conveyance of Lot No. 6 reserved the iron ore. *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3.

A grant of the iron ore in the lands of the vendor is a grant of the substance, is a corporeal hereditament, and is exclusive. *Lee v. Bumgardner*, 86 Va. 315, 316, 10 S. E. 3.

But the right to take ore from the lands of the vendor, being granted for a specific purpose, or in a limited quantity, is an incorporeal hereditament and is not exclusive. *Lee v. Bumgardner*, 86 Va. 315, 316, 10 S. E. 3.

Effect should be given to the intention of the parties in the determination of a question of this sort, and when this intent is to give the usufruct and power of disposal, the title must be held to pass, unopened mines may

be conveyed, and the grantee takes more than a right issuing out of the land or exercisable therein; he takes the mines themselves, carrying an unrestricted right to take and carry away all the ore therein—an exclusive corporeal right. *Lee v. Bumgardner*, 98 Va. 315, 10 S. E. 3.

### C. TAXATION.

Land has an indefinite extent upwards as well as downwards, but the law recognizes horizontal divisions of land. A severance of the surface from the underlying strata may be created, either by reservation or express grant. After severance, a mineral right is an independent interest in land; it forms a distinct possession, is held upon a distinct title and is as much the subject of sale, devise or inheritance and of separate taxation as the surface land. *Low v. County Court*, 27 W. Va. 785.

The prospective production of oil from oil well can not be properly charged to the lessee, on the personal property books of the county. *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216.

**Separate Assessment.**—When one party owns the surface of the land and another owns the minerals underlying the surface, the taxes may be assessed on the interests in said land to the owners thereof, respectively. Section 4 of chapter 32 of the acts of 1882 requiring such interests to be so taxed is constitutional. *Low v. County Court*, 27 W. Va. 785.

Where a stratum of coal underlies a tract of land and the owner thereof sells and conveys the coal underlying his land, it is the duty of the commissioner, in reassessing said land under chapter 36 of the acts of 1891, to assess the coal separately from the surface, charging the surface to the respective owners. *United States Coal, etc., Co. v. County Court*, 38 W. Va. 201, 18 S. E. 566.

**Failure—Effect.**—Where the oil and gas underlying a tract has been con-

veyed away, the oil and gas should be placed on the land books in the name of the grantee; but, if this is not done, and such tract is continued on the land books in the name of the grantor, at the same valuation, the payment of the taxes by the grantor will prevent a forfeiture of the grantee's estate in such oil and gas. *State v. Low*, 46 W. Va. 451, 33 S. E. 271. See the title TAXATION.

## III. Leases.

### A. GENERALLY.

A lease of land for the purpose of mining oil, coal, rock or carbon oil or gas passes a corporeal interest, which is the proper subject of an action of ejectment, and a proportionate share of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the statute of frauds. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781; *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

An executory oil and gas lease, given in expectation of prompt development, but so worded as to amount to a speculative lease for rent only, indefinite as to duration, is unfair and will not be forced in equity. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

### Lease or License.

**Privilege of Searching, Mining and Erecting Buildings.**—Where a grantor gives to the grantee the right and privilege of entering upon a tract of land for the purpose of searching for minerals and of mining to such an extent as he might desire, the lessee to have the right to erect and maintain sufficient buildings and machinery to work the mines, using the necessary timber and water for this purpose, the lessee agreeing to pay \$25 a year if the minerals were not actually mined, and to pay ten cents per ton for all ores mined and shipped during the time which the mine shall

be worked, the agreement was termed therein a "lease" and was to last for ninety-nine years. This was held to constitute a lease and not a mere license which was revocable. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

Thus, an indenture between landowner and certain skilled miners, giving them the privilege of digging for gold, etc., on the former's land and to hold the same for such purpose, and none other, so long as they may deem it worth while to search for gold, etc., creates no easement on the said land, but only an unassignable lease of a privilege or license. *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. 710; *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 238, 23 S. E. 303. See *Barksdale v. Hairston*, 81 Va. 764, where an agreement for a mining privilege was held to be a mere license. See ante, "Construction of Grant," II, B.

## B. OIL AND GAS LEASES.

### 1. Generally.

An ordinary oil lease, making the lessee pay a consideration, binding him to some obligation, vests only an inchoate right, that is, the right to explore for oil, but no actual other estate than the right to develop, and, if he gets no oil, he has no vested estate. Such a lease calls for the right, not to the oil in place, but to extract it. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433; *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344; *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 668; *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978.

So with a lease without rental or obligation. After the lessee has begun work or after he has obtained oil, he has a vested interest according to the lease. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

The expression in part 2 of the syllabus in *Parish Fork Oil Co. v. Bridge-*

*water Gas Co.*, 51 W. Va. 583, 42 S. E. 655, that "mere discovery of oil by exploration under it vests no title to it in the lessee" is inadvertent. Such discovery does vest title. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

A lease for the purpose of operating for oil and gas is a sale of the oil and gas in place, conditioned on the contingency of the lessee finding the same in a limited time and converting them into personalty, by reduction to actual possession and control. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344.

The proceeds represent the respective interests of the lessors in the premises. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781.

In *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764, the court said, however: A reservation or grant of oil and gas privileges is a mere incorporeal hereditament, not a grant or reservation of the oil or gas in the ground, but of the oil or gas the grantee may find and reduce to possession, with the exclusive right to search therefor. See ante, "Taxation," II, C.

As to right of widow to dower in oil, see the title DOWER, vol. 4, p. 782.

**Lease by Guardian.**—Hence the only mode in which a guardian can make a lease thereof is in the manner prescribed by statute, under a decree of court. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781; *South Penn Oil Co. v. McIntire*, 44 W. Va. 296, 28 S. E. 922; *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

Such a lease is void and can not be confirmed by the infants after coming of age. Nothing but a new agreement, made after full age, could deprive them of such oil or gas. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533. Where the infant's interest is in remainder however, such a decree of sale will be useless, in the absence of the consent of the life tenant, that the party to whom the oil is sold may enter upon

her possession for the purpose of putting down such wells as may be necessary. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781. See the title INFANTS, vol. 7, p. 461.

**Lease by Committee.**—So the committee of a lunatic can only sell or lease the interest of the lunatic in oil or gas by decree of court as provided by statute. *South Penn Oil Co. v. McIntire*, 44 W. Va. 296, 28 S. E. 922.

As to proceedings to sell oil belonging to lunatics, see the title INSANITY, vol. 7, p. 668.

### 2. Completion of "Dry Hole"—Effect.

A lease for the purpose of operating for oil and gas for the period of five years and so much longer as oil and gas are found in paying quantities, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee, except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate and contingent on the finding, under the explorations provided for in such lease, of oil and gas in paying quantities. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978.

The completion of a nonproductive well, though at great expense, vests no title to the lessee. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978.

### 3. Right of Lessee to Maintain Injunction.

A person holding a valid executory oil and gas lease, executed by several of a number of cotenants, has such an inchoate interest in the land subject to such lease, as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of such oil and gas. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

Even against the owner of the land. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344.

### C. MUST BE BY DEED.

**Oil and Gas Lease.**—A lease of land

for the purpose of mining coal or extracting oil or natural gas from the soil or rock, is in effect, a grant of a part of the corpus of the land, and must be by deed. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

The title thereto can not be passed by estoppel. *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533.

**Coal Lease.**—In *United States Coal, etc., Co. v. County Court*, 38 W. Va. 201, 18 S. E. 566, the court intimated that a coal lease not under seal, leasing all the coal till exhaustion, and providing that, in case no coal was mined for ten years, the lessee might surrender the lease, otherwise to pay the agreed royalty on 500 tons of coal, whether mined or not, was void under § 1 of chapter 71 of the Code, providing that "no estate of inheritance or of freehold or for a term of more than five years in lands, shall be conveyed unless by deed or will."

### D. CONSTRUCTION.

Oil and gas leases are to be construed most strongly against those who solicit and prepare them. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748.

Where the lessee writes the lease, however, it will be construed more strongly against him. Hence, if the lease provides that "a well shall be completed within — days from date, or unless the lessee shall pay at the rate of \$10 per month in advance for each additional month such completion is delayed, otherwise lease to be void" such lease will not be forfeited for failure to pay rental within thirty days as contended by the lessor, instead of ninety days, as contended by the lessee, the evidence as to time intended being conflicting. Especially where the other terms of the lease show that it is not strictly a lease to search for and produce oil, but to ob-

tain rent, the lease providing: "This lease shall remain in force for the term of five years from this date, and as much longer as the rent for failure to commence operations is paid." *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748.

**Covenant to Repair.**—Where a coal lease provides that the parties shall each pay one-half of all expenses for repairs needed on any part of the property "excepting the main entry," and, at the time of the contract, there was only one entry completed, which ran from the entrance clear through the mine, from which all cross entries had been driven, this is the main entry, and, in a suit by one party to recover back half of the expense of driving a cross entry which he had already paid, upon the ground that such cross entry was "the main entry" to the expense of driving which he was not bound to contribute; it is error not to exclude plaintiff's evidence relating to the driving and repairing of such entry. *Myers v. Marshall*, 34 W. Va. 42, 11 S. E. 730.

#### E. REVOCABILITY.

An executory gas and oil lease which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee. The fact that the lease is under seal, does not import consideration in equity. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

The same is true of a mining lease, which, by its terms, is terminable at the will of the lessee. *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120.

So a mere executory license to mine ore is revocable at the pleasure of the lessor. *Barksdale v. Hairston*, 81 Va. 764.

The case of *Eclipse Oil Co. v. South*

*Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, was distinguished from that of *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, on the ground that the lease in that case provided in the surrender clause that the lessee might "thereafter be discharged," and the lessor was entitled to demand rent until the lease was surrendered; while the surrender clause in this case provided that the lessee "shall have the right at any time to surrender up his lease, and be released from all moneys due and conditions unfulfilled."

But when once the lessee, even under such a lease, begins work, whilst he has yet no vested estate, still he has the right to go on in search of oil, and the lessor can not then, at mere will, destroy his right. *Louther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

Where a grant of oil and gas and oil and gas privileges, in consideration of one dollar, without limitation as to time, contains the following forfeiture clause: "In case no well is completed within two years from this date, then this grant shall immediately become null and void as to both parties, provided that second party may prevent such forfeiture from year to year by paying to the first party annually in advance, eighteen and seventy-five one-hundredth dollars at her residence, until such well is completed;" such lease is thereby converted into a lease from year to year, at the option of the lessee until a well is completed; it will then continue as long as oil or gas is produced in paying quantities. If the annual rental is duly paid, the lease can not be forfeited in the absence of fraudulent delay in development on the part of the lessee. *Louther Oil Co. v. Guffey*, 52 W. Va. 88, 42 S. E. 101.

This case was distinguished from that of the *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, on the ground of the consideration of one dollar.

When the owners of land execute an oil and gas lease thereon, in consideration of \$22.50 for the term of three years or so much longer as oil or gas should be produced, provided, however, that the lease should become null and void and all rights cease thereunder, unless a well was completed within three months, or, unless the lessee should pay at the rate of \$22.25 quarterly in advance, for each additional three months such completion is delayed, and also that the lessee should have the right to surrender the lease at any time, after which all payments and liabilities should cease and determine and the lease become void; it was held, that, where the quarterly rental money has been promptly paid, it is not competent for the lessor to cancel the lease, by the execution of a second lease during one of the quarterly periods, for which the rental had already been paid. The fact that the lease was not signed by the lessees is immaterial, as their acceptance is sufficient to bind them. *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

Where parties, by deed, in consideration of one dollar in hand paid and the covenants and agreements of the grantee, grant the right and privilege of entering upon the tract of land belonging to them for the purpose of examining, testing and searching for minerals and fossil substances of every nature and petroleum oil, or quarrying paving stone, to such extent as the grantee might desire, and to erect and maintain the necessary buildings, etc., and the necessary water and timber, the grantee agreeing to pay \$25 per year and also pay ten cents per ton for all ores mined and shipped, quarterly, and said \$25 rental to be credited on royalty whenever mining actually commenced; said lease to extend for 99 years, provided grantee paid the sums agreed, in default thereof the lease to be void; such an agreement is not a mere revocable license, revocable at the will of the lessor, but is a grant of

a right and privilege for valuable consideration, only voidable for the failure of the grantee to pay the annual rental. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480. Whether such a lease is voidable for failure to operate within a reasonable time was not decided.

**Death of Lessor.**—Such an executory lease as that in *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, is terminated by the death of the lessor and can not be revived by payment of rentals to the administrator. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933.

**Execution of New Lease.**—The execution of a new lease to other lessees, and possession thereunder, renders such prior executory lease invalid. Notice to quit is unnecessary in such case. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433; *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

**Subsequent Receipt of Rentals.**—The receipt of annual rental by the lessor, after the execution of subsequent leases, will not affect the rights of such subsequent lessees. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923; *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

## F. RECOVERY OF RENTS.

### 1. Oil and Gas Rental or Commutation Money.

A person who accepts an oil or gas lease with a stipulation therein contained to pay a monthly rental until a well is completed, or until the expiration of a certain fixed term, although by deed poll, is bound to pay such rental, although he does not within such term enter upon the land and complete such well, unless he was prevented from doing so by the plaintiffs, and not by mere personal default; and having raised no objection thereto, till after the expiration of the term. *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344. See also, *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

When an oil and gas lease contemplates that the lessee have two years in which to bore a well, and provides "that the party of the second part shall pay to the party of the first part \$100 per month in advance, until a well is completed from the date of this lease, and a failure to complete such well or to pay such rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained, \* \* \*. It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged;" the lessee bores no well, but holds the lease a number of months and then surrenders it. It was held, that the forfeiture provisions were for the lessor's benefit, and he can avail himself of them to declare a failure for nonpayment of rental or not, as he chooses, and if he does not, can recover rental until the surrender of the lease. The lessee's mere failure to pay does not release him from obligation to pay. There was tacit consent to renew. *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, English, J., dissenting.

But where a lease for the purpose of operating for oil and gas contains the following provision: "Provided, however, that this lease shall become null and void and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of three hundred and fifty dollars quarterly in advance for each additional three months, such completion is delayed from the time above mentioned for the completion of such well, until a well is completed;" it was held, that this provision did not bind the lessee to pay any rent for the land or for delay in commencing to operate for oil

and gas, and, in the absence of some other clause binding the lessee to pay for such rent or delay, there is no liability on the lessee to pay such rent or pay for such delay; the only consequence of a failure to do so being a forfeiture of the lease. The case of *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95, was distinguished on the ground that in the latter case there was an express promise to pay such rent. *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820.

## 2. Rental Dependent on Production.

See the title LANDLORD AND TENANT, ante, pp. 145, 152.

**Effect of Assignment of Lease.**—See the title LANDLORD AND TENANT, ante, pp. 194, 196.

Equity has jurisdiction of a suit involving mutual items of account, growing out of an agency and connected with a trust and complicated by conflicting pretensions under two consecutive leases of the same salt works, the first lease, for rent in kind, having been assigned and transferred by the lessees with lessor's consent and the assumption of all liabilities thereunder and then a new lease taken from the lessors, on a rent reserved in money, there having been no settlement or agreement as to the rights and liabilities of the parties, and a discovery and a production of books and papers and an adjustment by the commissioner being necessary, although there was no actual dispute as to the money rents reserved in the second lease. It was proper to adjust these matters in the same suit. *Prestons v. McCall*, 7 Gratt. 121.

## 3. Minimum Royalties in Lease at Will.

When a lease provides that it is to continue for ten years, the lessees to pay a royalty of twenty-five cents per ton for iron ore mined and to remove not less than an average of 12,000 tons per year, and also to pay \$3,000 in advance upon royalties, to be reimbursed from royalties on first 12,000



tons mined, and the lease is terminated by the lessor in less than sixteen months, both parties conceding the lease to be at will; it was held, that the lease did not require that the lessees remove 12,000 tons of ore the first year, but only an average of that amount during the ten years, and the lessees are entitled to recover from the lessor, the difference between the advanced royalties and the amount of the royalties on the ore actually removed. *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. 439.

#### 4. Jurisdiction of Equity.

If two adverse claimants make independent leases to the same company for the oil and gas under a certain tract of land, in consideration of oil royalties and gas rentals reserved in each of such leases, the subsequent lessor can not sue the prior lessor in equity, to recover from him the royalties and rentals received by him under his lease, the remedy at law being entirely adequate, the legal title to the oil and gas being wholly vested in the common lessee, and the only matter in controversy being the right to the rents and royalties. *Zinn v. Zinn*, 54 W. Va. 483, 46 S. E. 202.

**Accounting.**—If the rent or royalty reserved in a lease of mineral property is dependent upon the amount of mineral taken, a bill in equity will lie to compel an accounting by operators or lessees of the mine. *Swearingen v. Steers*, 49 W. Va. 312, 38 S. E. 510.

#### 5. Landlord's Lien.

See the title **LANDLORD AND TENANT**, ante, pp. 144, et seq.; 151, et seq.

When a lease for the purpose of mining coal provides that "whenever any part of said rent and royalties shall be in arrear for the period of thirty days after the same shall have been duly demanded, the lessor may enter and distrain upon said mines and premises and coal and dispose of same in due course of law as landlord;" the landlord has a lien upon all coal or

iron mined on said land to pay his royalty when due and demanded, and he has a first lien on the proceeds of such coal in the hands of the court in a suit to foreclose a mortgage on such leasehold for all royalties remaining unpaid. So where a lease for the purpose of mining iron ore provides that the lessee shall have no right to the ore until all royalties are paid, the right of all assignees or persons claiming under the lessee must yield to the claim of the lessor to satisfaction of all unpaid royalties. *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362.

**Extent.**—Where a coal lease provides for a royalty of ten cents per ton on screened coal and five cents per ton for the screenings and for a minimum royalty of \$3,000 per year, and a receiver is appointed and five months royalty is unpaid, amounting, on the coal actually mined, to \$500; the lessors, under their landlord's lien, are entitled to five-twelfths of \$3,000, the minimum royalty, not merely to the \$500 royalty on coal actually mined. *Coaldale Min., etc., Co. v. Clark*, 45 W. Va. 84, 27 S. E. 294.

### G. IMPLIED COVENANTS.

#### 1. Quiet Enjoyment.

In a lease for oil and gas, there is an implied covenant of right of entry and quiet enjoyment for the purpose of the lease. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

Such covenant is not broken by the mere fact alone that the lessor makes another lease during the term, of the same premises, whether the first lessee be in actual possession or not; the second lessee not entering. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

#### 2. Fitness for Purposes of Lease.

See the title **LANDLORD AND TENANT**, ante, p. 130.

### H. FORFEITURE.

#### 1. Express Covenants.

##### a. Commencement of Operations—Compliance—Sufficiency.

Where an oil lease provides that op-

erations for a test well shall be commenced within one year and completed within eighteen months, otherwise lease to be void, one covenant is as essential as the other and the lease will be subject to forfeiture for a breach of either; but the first covenant is complied with no matter how slight may have been the commencement of any portion of the work necessary and indispensable in putting down the test well, and the making of the preliminary surveys and location of the site of test well, and the making of a contract for the drilling of such well, the cutting and hewing of timbers for the derrick and ordering machinery in pursuance thereof within the year, is such a "commencement" as will prevent a forfeiture. It is not necessary that the well has actually commenced to pierce the earth. A subsequent lessee under such circumstances acquires no rights. *Fleming Oil, etc., Co. v. South Penn Oil Co.*, 37 W. Va. 645, 17 S. E. 203.

#### **b. Development of Tract.**

Where a deed of conveyance of seven-eighths of the oil and gas in a tract of land, contains the condition that the vendor is to "begin to operate, mine and bore for oil and gas within and under the said tract free of cost to the said infants or their guardian, within sixty days after the confirmation of the sale; \* \* \* and, if oil be found thereon in paying quantities, then, after said first well is completed thereon, the said purchaser shall immediately commence and drill other wells thereon as shall seem necessary to protect the oil and gas in and under the said tract of land;" the remedy for violation of such conditions is not forfeiture of the vendee's estate, in the absence of any provision for forfeiture, but by action for damages. *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004. For a discussion of the measure of damages, see the same case.

**Failure to Make Good Representations.**—Representations constituting the

only consideration for a mining lease, to the effect that lessees had the means, and intended, to operate the property so as to yield the lessors the minimum rent specified, and would begin operations within sixty days, are not matters of opinion, and failure to make them good is ground for canceling the lease. *Rorer Iron Co. v. Trout*, 83 Va. 297, 2 S. E. 713.

#### **c. Payment of Rental.**

##### **(1) Clause of Forfeiture Necessary.**

See the title **LANDLORD AND TENANT**, ante, p. 174.

##### **(2) Tender.**

A proper tender of the commutation money is sufficient to save an oil lease from forfeiture. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

##### **(3) Bad Faith of Lessor.**

Where the failure of the lessee to pay the annual rental provided for in a mining lease is due to the bad faith of the lessor, and his intentional evasion of attempts by the lessee to pay such rental, the lessor is estopped to set up such forfeitures, and it is not error to decree a reasonable extension of time to the lessee to make such payments, and provide that such payments may be made in bank to the credit of the lessor. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

##### **(4) Payment—Sufficiency.**

Where the lessor, in the lease, designates a certain bank as a proper depository for rental, all the lessee is required to do is to make the deposit, and he is not concerned with the manner of payment. The certificate of deposit is proper evidence thereof. *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748; *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

Where an oil and gas lease provides that rentals may be deposited to the credit of the lessor in a certain bank, this makes such bank the agent of the lessor to receive such payments, and it is immaterial whether such deposit is made in money, draft or otherwise, so

long as the lessors have the benefit of the credit and can receive the money upon it. *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114.

Nor is the lessee concerned with the manner in which the bank keeps its books. *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114; *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748.

## 2. Implied Covenants.

### a. Generally.

See the title LANDLORD AND TENANT, ante, p. 174.

### b. Failure to Develop.

Where, however, a lease is made on the 12th day of April, 1889, "For the sole and only purpose of drilling and operating for petroleum oil and gas for the term of twenty years or as long thereafter as oil or gas is found in paying quantities," and providing that the lessee shall commence on or before the 10th day of May, 1889, and prosecute the same to completion, unavoidable accidents excepted, and, on the 26th day of October, 1889, the time is extended for such commencement of work, by written indorsement on the lease, to the 28th day of November, 1889, and nothing is done under said lease for the period of seven years from said last-mentioned date, the lessee is presumed to have abandoned the lease, and a court of equity may entertain a suit to cancel the lease and quiet title. *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220.

A lease granting the privilege of searching and digging for gold and other minerals upon the lessor's land "to continue as long as they may deem it worthy of searching, etc." to parties who were skilled and experienced miners, is not assignable, and, all operations under it having been abandoned for fifty years, all rights thereunder will be held to have been abandoned and the lease of no effect. *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. 710. See also, *White v. Sayers*, 101 Va. 821, 45 S. E. 747.

Where a lease provides that the parties of the first part have sold to the parties of the second part all the ores, minerals, etc., under a certain tract of land; that said sale of the ores, etc., vested in the purchaser the usual mining rights and privileges; that the party of the second part, their representatives, etc., shall have the right and privilege of removing from the said tract of land at any time, any machinery, etc., or improvements, made or erected by that party upon it, and provides for the quarterly payment of a royalty of fifteen cents per ton, and, after removing a small amount of ore, the lessee abandons the enterprise and does nothing for three years up to the institution of the suit, but refuses to execute a release; it was held, that the lessee, having abandoned the work and failed to mine and make any quarterly payments, had terminated the lease, as it had a right to do under the terms of the contract, and the lease should be rescinded. Such a lease being terminable, at the will of the lessee, is equally so at that of the lessor. *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120. See also, *Young v. Ellis*, 91 Va. 297, 21 S. E. 480; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493.

In order that a party may have specific performance of such a contract, he must not be in default, but must show himself to have been ready, eager, prompt and desirous of maintaining his rights. The rule of laches is more strictly applied in cases of this kind than in ordinary suits for accounts, etc. *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493.

An agreement in the following terms: "For value received, I hereby assign all my right, title and interest for the term of 99 years, with privilege of renewal for a like term of years, to all minerals of whatsoever description that may be found on my lands in the county of Augusta, to A. Nicholas, his heirs and assigns, to farm. The said

Nicholas shall have the right of way on condition that he pay me one-fourth of all the profits that may be obtained from any mineral that may be mined from my land," is a "mining lease" and although there is no express covenant to mine, a covenant to mine within a reasonable time will be implied, and, where the lessee fails to mine within a reasonable time so as to give some revenue to the lessor, in this case forty years, the lease will be canceled at the suit of the lessor. *Shenandoah Land, etc., Co. v. Hise*, 92 Va. 238, 23 S. E. 303.

**c. Failure to Prosecute Development after Discovery and Production of Oil.**

When oil has been discovered and produced in paying quantities, estate and property in the oil and gas underlying the premises is vested in the lessee; and in the absence of express covenants as to the further development of the tract, such development will be in the judgment and discretion of the lessee, and, in the absence of fraud, a court of equity will not control such discretion. *Core v. New York Petroleum Co.*, 52 W. Va. 276, 43 S. E. 128.

In the absence of fraud, the lessor's remedy for failure on the part of the lessee to further develop the leased premises, or to properly protect the lines thereof from drainage through wells on adjacent property, is, ordinarily, by action at law for damages. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

As to the measure of damages in such cases, see *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

But, under some circumstances of delay or fraudulent evasion of duty of developments equity will cancel an oil lease, as development is regarded as the real intent of the lessor, even though there be no express clause of

forfeiture. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433. See also, *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 42 S. E. 101; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004.

Where the terms will permit it, under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655.

An oil lease may be lost by abandonment, but such abandonment is not easily shown or readily held by the courts. An abandonment may be more readily found in case of oil leases than in most other cases. Hence, where lessees bored a well, and, getting but little oil, abandoned it; then bored a second well, which yielded only a few barrels a day, though pumped for months, then moved their tools and appliances off the premises and subsequently removed everything of value, and the agent left the state and, subsequently, in reply to a letter proposing further operations, answered that they had decided not to operate in West Virginia for the time being; such facts are sufficient to establish abandonment on the part of the lessees. *Louther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

**d. After Completion of "Dry Hole."**

See ante, "Completion of 'Dry Hole'—Effect," III, B, 2.

An oil lease provided that the lessor, in consideration of one dollar, granted to the lessee all the oil and gas under a certain tract of land for the term of five years, or so much longer as oil and gas was found in paying quantities and providing for the usual oil and gas royalties; in case no well was completed within one month, the lease to be void, unless the lessee paid at the rate of \$50 per month, in advance, until a well was completed, the lessee to drill two more wells within one year

from completion of first, provided second well produces twenty barrels per day for first thirty days, otherwise drilling of third well to be optional with lessee. Lessee completed a well which was a "dry hole," and abandoned the premises. It was held, that the lease contemplated no further developments, after the first well turned out unproductive, and expired by its terms. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978.

Such a lease must be construed as a whole, and, if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid and of no binding force, as to any of its provisions. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978.

An agreement whereby certain lands, in consideration of \$50, are granted, demised, leased and let for the sole and only purpose of boring, mining and operating for oil and gas and laying pipes and building tanks, stations and houses thereon to take care of the products for a period of fifteen years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of fifty cents per acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed and understood that the \$50 paid in cash is to pay all rentals on this lease for the period of one year from the date hereof; it is further agreed that when the first well is completed on said premises, then all cash rentals shall cease;" does not bind the lessee to do anything further after completing one well on the premises, a dry hole or a productive well, and, upon his abandonment of further operations upon the premises for more than eighteen months, leaving the well unprotected, so that it caved in and partially

filled up, the lessor, after waiting a year or more from the date of abandonment, has the right to lease to another. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655.

The principal purpose and design of the parties to such lease, clearly discernable from its terms, being the production and marketing of the oil and gas in the land, for their mutual benefit, mere discovery of oil, by exploration, under it, vests no title to it in the lessee, but does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. In such right the lessee will be protected, but he must proceed to exercise it with reasonable diligence. The law recognizes a distinction between the abandonment of operations under an oil lease, and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease, without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655.

Whether, in such case, if the lessee vigorously prosecute the search for oil, after the completion of the unproductive well, he will be protected by a court of equity in the enjoyment of the lease, was not decided. *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583, 42 S. E. 655.

But where the owner of land leased the same for oil and gas purposes, said lease containing the following forfeiture clause: "This lease shall become null and void and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within six months from the date hereof, or unless the lessee shall pay at the rate of \$22.50 quarterly, in advance for each additional three months such completion is delayed from the time above mentioned for the completion of

such well, until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease;" the lessee assigned said lease to the South Penn Oil Co., which had leases for oil and gas purposes over a large area of territory, including all tracts adjoining said premises. Said lessee drilled a well to completion April 4th, 1900, paying the stipulated rental until its completion, but said well was "dry;" the lessee then removed its material and machinery from the premises and proceeded to drill other wells nearer to developments already made on the line towards the premises in question, and did not do any further work for about six months; it was held, that under the lease and the circumstances of the case, the lessee was entitled to a reasonable time in which to return and make further developments and that such facts did not constitute a forfeiture. *Henne v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147.

The court distinguished this case from that of *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, on the ground that the lease in that case expressly provided in what event further developments should be made, hence, if the conditions provided for did not arise, no further developments were to be made, and the lease died according to its own terms. This case was also decided on the further ground that the forfeiture, if such existed, had never been declared, the second lease expressly providing that it was subject to the former lease. The question of abandonment is a mixed question of intention and fact. *Henne v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147.

**e. Discovery of Either Oil or Gas Sufficient.**

A lease for oil and gas purposes being in the following terms: "In

consideration of the sum of \$1,250, the receipt of which is hereby acknowledged, \* \* \* parties of the first part do hereby grant unto \* \* \*, party of the second part, his heirs and assigns, all the oil and gas in and under the following premises, describing them, with the right to enter and drill and operate for oil, gas, etc., reserving to themselves one-eighth of all the oil produced, to be run into pipe line to their credit; term of lease two years and as much longer as oil or gas is found in paying quantities. If gas only is found, second party agrees to pay \$250 each year, quarterly in advance, for the product of each well while the same is being used off the premises. Gas free for dwelling house purposes;" the production in paying quantities of either oil or gas and the payment of gas rental or oil royalty, as stipulated, will perpetuate the lease during the time of such production. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

**f. Discovery of Oil and Gas on One of Two Tracts Jointly Leased.**

Where two parties lease together, in one lease, two tracts of land lying contiguous to each other, as one tract of the aggregate number of acres for oil and gas purposes, and a well is bored on one tract, the cash rental for gas paid to both lessors and receipted for by them jointly, and the royalty oil run into the pipe lines to their joint credit, such a lease is a joint lease of the two tracts as between the lessors and lessee and the discovery of oil on either tract in paying quantities will vest an estate in the lessees in both tracts. *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662.

**g. Phrase "In Paying Quantities" Construed.**

Where an oil and gas lease is for a given time "and as much longer as oil and gas can be produced in paying quantities" to the lessee, if a well pays a profit, even a small one over operating

expenses, it produces "in paying quantities," though it never repay its cost, and the operation, as a whole, may result in loss. The phrase "paying quantity" is to be construed with reference to the judgment of the operator, when exercised in good faith. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 44 S. E. 433.

### 3. Must Be Declared by Lessor.

See the title LANDLORD AND TENANT, ante, p. 175, et seq.

#### a. Generally.

The clause of forfeiture in an ordinary lease is for the benefit of the lessor and no act of the lessee can terminate the lease under the forfeiture clause, without the lessors concurrence. *Henne v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147; *Roberts v. Bettman*, 45 W. Va. 143, 30 S. E. 95.

In any event, such forfeiture must be asserted by the lessor, and a clause contained in a subsequent lease to the effect: "It is further agreed between the parties hereto, that this lease is made and this contract entered into, subject to a certain other lease and contract made for the same premises by the parties of the first part to M. bearing date, etc., and recorded, etc.; and that the existence of said former lease is made known to the party of the second part, who is fully informed and aware of its terms and conditions;" is not a declaration by the lessors of unequivocal forfeiture of the first lease; but rather an affirmation thereof. *Henne v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147.

Where a prior lease for years for oil purposes is subject to forfeiture for failure to develop and nonpayment of commutation money, and is returned to the lessor by mistake, who sends the lessee a writing under seal, accepting such return and agreeing that it might be canceled as of a certain day, and subsequently executes another lease of the same property to another party, which has indorsed upon it the follow-

ing words, "This lease is to be taken, subject to the E. M. Hukill lease (the prior lessee);" such subsequent lease is not a manifestation of intention on the part of the lessor to declare the former lease forfeited, but preserves unimpaired to the prior lessee his right to have his lease given back to him because returned by mistake and his right to some manifestation on the part of the lessor of an intention to treat the prior lease as forfeited; hence a writ of unlawful entry and detainer brought by the subsequent lessee should be dismissed. *Schaupp v. Hukill*, 34 W. Va. 375, 12 S. E. 501; *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

In *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522, the court inclined to the opinion that evidence was admissible to show that it was not the intention of the lessor, in executing a second lease to another party, to declare a prior lease forfeited, where the second lease is silent on the subject, and to show that the second lease was executed on condition that it was to be given back if the first lessee objected.

#### b. Demand and Re-Entry—Necessity.

##### (1) Lease for Life.

Where a lease provides "that for and in consideration of \$1 \* \* \* the said party of the first part doth lease unto the said party of the second part all the mineral, coal and iron ore underlying the lands of the first party \* \* \* in consideration of said lease, the second party agrees to proceed to operate for the mining of coal and agrees to pay for all coal mined, the sum of ten cents for each and every ton of 2,240 pounds and the same for every ton of iron ore, \* \* \* and the party of the second part agrees to mine or pay for the same, in the first year, the amount of 2,000 tons. Payment for the same, and for coal and iron mined, shall be made on the 1st day of May and November of each year, said payments to commence on November 1st, 1872. A failure to make such payment, within

sixty days after it is due shall be considered an abandonment of this lease;" it was held, that the words "shall be considered an abandonment of this lease" are equivalent to "shall be considered forfeited" or "shall be considered void," and such a lease being either a perpetual lease or at least a lease for life, a mere failure to pay rent does not ipso facto forfeit the lease. There must be a demand and re-entry by the landlord, since, in such cases, the lessor may waive the forfeiture. While the statute dispenses with such demand and re-entry, where there is not sufficient property liable to distress on the premises, if an action of ejectment is brought and the statutory requirements fulfilled, this does not extend to an action of unlawful detainer, to sustain which the lessor would have to show all the common-law requirements of demand and re-entry. *Bowyer v. Seymour*, 13 W. Va. 12.

## (2) Lease for Years.

Where a lease for years for oil and gas purposes contains the following provisions: "The parties of the second part covenant to commence operations for said purposes within nine months from and after the execution of this lease, or to thereafter pay to the party of the first part \$1.33⅓ per month until work is commenced, the money to be deposited in the hands of John Kennedy for each and every month, and a failure on the part of the said second parties to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease;" and the lessee fails either to commence work or pay the monthly commutation money for nearly three years; no re-entry is necessary by the landlord to avoid the lease, the landlord being already in possession, and the refusal of back commutation money and the execution of a lease to other parties, avoids the first lease. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

The court distinguished the case of

*Bowyer v. Seymour*, 13 W. Va. 12, on the ground that that was a lease for life. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

## c. Remedy by Ejectment Not Exclusive.

The remedy by ejectment prescribed by chapter 93 of the Code of 1887 for enforcing a forfeiture for nonpayment of rent on breach of condition is not exclusive and does not destroy the common-law mode by demand and re-entry. The action of unlawful detainer also lies. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

## 4. Waiver by Lessor.

Where, in an oil lease, there is a clause of forfeiture for nonpayment of rental, but the lessor consents that it need not be paid at the time when due, and indulges the lessee and acquiesces in his failure to pay, there is no forfeiture for nonpayment. In such case, if the lessor, by his conduct, clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and, because of this, he does not make payments when due, the lessor can not suddenly, without demand or notice, declare a forfeiture which equity would recognize, and, if there is in such case technically, a forfeiture at law, equity would relieve against it. If, after such rental has accrued and is not paid, whereby a forfeiture exists, the lessor, with knowledge thereof, receives the rentals accruing after forfeiture, he waives and can not enforce the forfeiture and a mere mutual mistake in amount due, which, on discovery, lessee offers to correct, will not affect this result. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 639.

Though a coal lease provides that "if the lessees fail to make the coal output annually as therein required, or to pay the rents and royalties, then their failure to do either of these things shall work a forfeiture of the lease without



any legal proceedings, but that the lessors may waive this forfeiture for nonpayments of rents and royalties and pursue the remedies provided therein for the collection of the same;" the lessors may waive a forfeiture, and a recognition of an assignment of such lease by the lessors, after the alleged forfeiture, will amount to such a waiver. The assignees of such lease can not set up a forfeiture occurring subsequent to such assignment and due to their own default, as a defense to a note given as consideration for such assignment. *Deaton v. Taylor*, 90 Va. 219, 17 S. E. 944.

**Acts Subsequent to Declaration of Forfeiture.**—The receipt of bank commutation money and consent by the lessor to the first lessees taking possession, after the execution of the second lease, can not waive the forfeiture so as to impair the rights of the subsequent lessee. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754; *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

#### **5. Forfeiture of Subsequent Lease—Effect.**

Forfeiture of subsequent lease can have no effect to revest title under prior forfeited lease. *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754.

#### **6. Right of Lessee in Forfeited Lease to Royalties of Subsequent Lease.**

Where a lessor executes, at different times two sets of oil leases, reserving the usual royalty, and, after the first leases have been rightfully avoided by the execution of the second, the first lessee pays two years' rental or commutation money to the lessor, with full knowledge of the execution of the second lease; such payment does not entitle the lessee to claim the royalty reserved in the second lease or any part thereof, either in law or equity. Whether he is entitled to recover such payments at law not decided. *Eclipse Oil Co. v. Garner*, 53 W. Va. 151, 44 S. E. 131.

#### **7. Relief in Equity.**

The forfeiture clause in an oil and gas lease, under which a valuable estate vested in the lessee, in so far as the rentals are concerned, made payable in gas, oil and money, is in the nature of a penalty to secure such rentals, against which a court of equity will grant relief, when compensation for such rentals can be fully made, and great loss, wholly disproportionate to the injury occasioned by the breach of the contract, would otherwise result to the lessee, negligently, but not fraudulently or knowingly in default. *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 37 S. E. 596.

In *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522, the court said that it did not understand the case of *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, to hold that a court of equity would be deprived of its power to relieve a prior lessee from a forfeiture by the execution of a second lease. See also, *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 639.

#### **I. EXPIRATION OF TIME.**

Where a lease for oil and gas contains the clause, "to have and to hold the premises unto said party of the second part during and until the full term of two years and as much longer as oil and gas is found in paying qualities thereon," and provides for a rent of one-eighth of the oil and \$250 per year for gas, and has a clause reading: "Operations shall be commenced and one well completed within one month, and in case of failure to complete one well within such time, the party of the second part agrees to pay to the parties of the first part, for such delay, fifteen dollars per month, in advance, after said time for completing such well as above specified," and the parties of the first part, agree to accept such sum as a full consideration and payment for such delay until one well shall be completed, and a failure to complete one well or to make such payment for

such delay is to render this lease null and void at the option of the lessor; the lessee, having failed to begin operation within the two years, has no right to continue the lease by payment of fifteen dollars per month, but the lease is ended. The word "or" in the clause "or the rental paid thereon" will be read "and" and the rental referred to will be construed as the one-eighth royalty. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271.

**Receipt of Subsequent Rental by Lessor.**—Even though the lessor, at the end of the two years extend the time to the lessee at his request and upon his promise to push the development and accept such monthly payments for thirteen months longer, insisting, however, that the lease was terminated, the lessor will not be held to have construed the lease as continuing after the two years, nor will there be any equitable estoppel resting upon him to assert the expiration of the lease, such extension being merely an indulgence to the lessees and having no effect to extend the life of the lease except from month to month. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271.

**Delay Caused by Lessor—Discovery of Oil by Others.**—Where the second lessee's term has expired by the limitation of his own lease at the time of the verdict, his action of unlawful entry and detainer should be dismissed. The fact that he has been hindered from complying with the terms of his lease by the lessor and his lessees, or that oil has been discovered and produced in the tract by others, will not extend the time of his lease, whatever remedy he may have in equity or right to damages at law for the breach of the implied covenant for possession and quiet enjoyment of lease. *Thomas v. Hukill*, 34 W. Va. 385, 12 S. E. 522.

### J. SPECIFIC PERFORMANCE.

An executory lease, that is unfair, unjust or unreasonable will not be enforced in equity. *Eclipse Oil Co. v.*

*South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923.

In order that a party may have specific performance of a mining lease, he must not have been in default, but must show himself to have been ready, eager, prompt and desirous of maintaining his rights. The rule of laches is more strictly applied in cases of this kind than in ordinary suits for accounts, etc. *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493.

### K. RESCISSION.

Where a lease of mineral lands is obtained upon representations that the lessees were about to engage in mining on a large scale and were prepared to ship from 100 to 500 tons per day, and would develop in sixty days and go to mining directly thereafter, and that the royalty of ten cents per ton would bring the lessor at least \$10 per day, which he could draw nightly, and such representations were false, they are grounds for rescinding the lease, and equity has jurisdiction of a suit for that purpose. *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713. See the title MISTAKE AND ACCIDENT.

### L. ASSIGNMENT OF LEASE.

#### 1. Generally.

A lease granting the privilege of searching and digging for gold and other minerals upon the lessor's land, "to continue as long as they may deem it worthy of searching," etc., to parties who were skilled and experienced miners, is not assignable. *Hodgson v. Perkins*, 84 Va. 706, 5 S. E. 710.

**Recourse on Assignor.**—Under a sale of the right, title and interest of vendor in a mining lease without warranty, the vendor is not responsible for any defects of title unless he has been guilty of fraud or concealment. *Johnson v. Mendenhall*, 9 W. Va. 112.

#### 2. What Passes—Oil in Tanks.

The word "lease" has a definite legal signification, and a contract in writing selling a "lease," does not carry with

it oil, that had been theretofore pumped from an oil well on the land so leased nor will parol evidence be admitted to show that such was the intent of the parties. *McGuire v. Wright*, 18 W. Va. 507.

A conveyance or assignment of oil wells and the leases upon which the same were situated, containing the following clause: "Also all our right, title and interest, of, in and to the engines, boilers, tanks, tubing, derricks and all other fixtures and personal property situate upon, and appertaining to, the above leasehold interest and well to us belonging" does not convey the oil in the tanks. *Dresser v. Transportation Co.*, 8 W. Va. 553.

## M. MUTUAL RIGHTS OF LESSORS.

### 1. Joint Lessors of Several Tracts.

Where several owners in fee of contiguous tracts of land lease the whole as one tract for oil and gas purposes, and the one-eighth royalty oil is to be paid by the lessee in the usual way, by running the same into the pipe lines to the credit of "the parties of the first part" (the lessors) and the lease is silent as to the division of the royalty between the lessors, and where the development is all on one tract, owned in severalty by one of the lessors, who claims to be entitled to all the royalty; upon interpleader of the lessee, for determination as to whom to pay the royalty as between the lessors, parol evidence is admissible to prove a contemporaneous agreement between the lessors that the royalty should be paid and delivered to the owner of the particular tract from which the oil is produced. *Rymer v. South Penn Oil Co.*, 54 W. Va. 530, 46 S. E. 559.

### 2. Life Tenant and Remaindermen.

The petroleum oil underlying a tract of land which has been devised to a life tenant, who is in possession, and which is to go to certain infant children after the decease of the life tenant, may be sold upon the petition of the guard-

ian of said infants, under the provisions of chapter 83 of the Code, or leased, and the life tenant will be entitled to the interest on the royalty during the continuance of the life estate, and then the residue or corpus of the royalty will be paid to the remaindermen. *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223.

Where the decree in a summary proceeding for the sale of infant remaindermen's interests in oil and gas, has violated the rule established in *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, the purchaser has a right to file his petition in the summary proceeding to have such error corrected, and an answer and cross bill filed in an independent suit, one of the purposes of which was to enforce the payment of the purchase money under the decree in the summary proceeding, should be treated as such a petition, the court having no power to dismiss such summary proceeding, as long as any of the parties entitled to the proceeds are not ascertained. *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490.

Where petroleum oil is extracted from land, conveyed to a person for life and remainder in fee to his heirs, under a lease from the life tenant, and a sale of the interest in remainder by order of a court of chancery, in a proper proceeding for the purpose, reserving in the lease and order of sale, one-eighth of the oil for the owners of the land, it is error to decree to the life tenant or his grantees, in another suit, the royalty oil or the proceeds thereof to hold until the expiration of the life tenancy and take the income thereof and then pay over the corpus of the fund to those entitled in remainder. The court should have provided, by proper orders, for the preservation of the fund for the benefit of those ultimately entitled thereto. *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211.

**Wrongful Removal by Life Tenant.**

—But a life tenant, who, by waste, has severed from the realty things that are part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest thereon during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

**Liability to Account.**—A tenant for life in sole possession claiming exclusive ownership, taking petroleum oil, and converting it to his exclusive use, is liable to account on the basis of rents and profits, not for annual rental. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411.

**Open Mines or Wells.**—The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when the life estate begins, or lawfully opened and worked during the continuance of such estate. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223.

A mine lawfully leased to be opened is an open mine, and when lawfully opened and worked during the continuance of the life estate, the profits therefrom belong to the life tenant. *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, approved in *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411. See the titles *ESTATES*, vol. 5, p. 160; *WASTE*.

**N. TAXATION.****1. Coal under Lease.**

Section 4 of chapter 36 of the acts of 1891, providing for the reassessment of lands, where it mentions coal privileges or interest held by a party, etc., exclusive of the surface, and providing for a separate assessment of the surface and the coal privilege or interest, in using the word "held" meant and intended

"owned" by such party, and does not contemplate the holding of a lessee who pays a royalty for the coal mined and removed to the landowner, the title remaining in the lessor. *United States Coal, etc., Co. v. County Court*, 38 W. Va. 201, 18 S. E. 566; *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 668.

**2. Oil and Gas under Lease.**

Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one-eighth of the oil produced as royalty, the oil, while it remains in situ must be regarded as realty, and as remaining the property of the lessor until brought to the surface. *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216.

The prospective production of oil from such well can not be properly charged to the lessee, on the personal property books of the county. *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216.

A privilege or license to search and explore land for oil or other minerals, coupled with a grant to dig and remove them and convert them to the grantees own use, if in fee or for life, creates an incorporeal freehold right in the real estate which may be assessed to the grantee separately from the land or its surface, and, if the minerals be found and produced, creates a freehold interest, which should be assessed separately on the land books under the act of February 27, 1891. *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 668.

But such privilege, liberty or license and such interest, if limited to a term of years, are not held and owned as the whole or a part of the freehold ownership, within the meaning of the act, and should not be separately assessed to the mining licensee or lessee on the land books. *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 668.

Nor does the addition to the term of years of the clause "and as long as oil or gas may be found in paying quantities" give such indefinite duration as makes the interest freehold in quantity. *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 668.

### 3. Fixtures Employed in Operating Oil Well.

The value of the engines, boilers, rigs, and appurtenances, such as casing, etc., belonging to oil wells and used in the production of oil therefrom, are properly charged to the lessee as personalty on the personal property books. *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216. See the title TAXATION.

## O. LIMITATION OF ACTION.

**Constitutionality.**—Chapter 61 of the acts of 1872-73, fixing three years as the limitation for suits to recover land leased for oil or minerals, is unconstitutional because of failure in the title to express the object of the act; further, said act is repealed by chapter 102 of the acts of 1882 re-enacting chapter 104 of the Code, without any saving clauses as to the act of 1873. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223.

**Requisites.**—In any event to take advantage of said act, the lessee must show that it entered upon and bored for oil, three years before suit. *McNeeley v. South Penn Oil Co.*, 52 W. Va. 616, 44 S. E. 508.

**Sufficiency of Plea.**—See the title LIMITATION OF ACTIONS, ante, pp. 367, 443.

## IV. Operation.

### A. WORKING WITHIN FIVE FEET OF PARTY LINE.

Section 7 of chapter 79 of the Code, providing that "no owner or tenant of any land containing coal shall open or sink or dig, excavate or work in any coal mine or shaft on such land within five feet of the line dividing said land

from that of another person or persons, without the consent in writing of every person interested in, or having title to, such adjoining lands, in possession, reversion or remainder or of the guardians of any such persons as may be infants. If any person shall violate this section, he shall forfeit \$500 to any person injured thereby, who may sue for the same;" is a constitutional exercise of the police power and the term "injury" means the wrong done the party by the violation of the statute. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608.

When the statute prescribes the penalty, but does not prescribe the form of action, debt will lie, but the action should be adopted to the nature of the case and modeled according to the distinctions of the common law; it may be an action of debt, assumpsit, trespass or case (as in this case) as the particular nature of the wrong or injury may require. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608.

Unless the penalty or forfeiture is expressly stated to be in lieu of damages, the person injured may recover such damages in a common-law action, as he may sustain by reason of the violation, but he can not join a count for the penalty with a common-law count for damages. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608.

### B. PAYMENT OF EMPLOYEES IN ORDERS OR SCRIP—CONSTITUTIONALITY.

See the title CONSTITUTIONAL LAW, vol. 3, pp. 202, 203.

### C. WEIGHING COAL BEFORE SCREENING.

The act of March 9, 1891, providing that coal shall be weighed before it is screened, is constitutional. *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 5 S. E. 1000.

### D. SELLING TO EMPLOYEES AT GREATER PERCENT. PROFIT THAN OTHER PERSONS.

So the fourth section of chapter 63

of the acts of 1887, which prohibits persons and corporations engaged in mining and manufacturing and interested in selling merchandise and supplies, from selling merchandise to their employees at a greater per cent. of profit than they sell to others, not employed by them, is unconstitutional and void, being class legislation and an unjust interference with private contracts and business. *State v. Fire Creek, etc., Co.*, 33 W. Va. 188, 10 S. E. 238.

#### **E. DUTY OF OPERATOR TO MINER.**

See the title MASTER AND SERVANT, ante, p. 657.

#### **V. Taxation.**

**"Improved and under Development"**  
—Construction.—The words "improved and under development" used in the act of May 13, 1903, providing for the separate assessment of mineral lands, include the entire body of land underlaid with coal, not merely so much of the land as would be deprived of its coal within the next two years and it is not erroneous to take, as an index to the amount of land under improvement, two acres for every coke oven in operation. At the end of two years, the lands which have been deprived of their coal should be deducted from the previous assessment. *Interstate Coal Co. v. Com.*, 103 Va. 586, 49 S. E. 974. See the title TAXATION.

#### **VI. Mining Partnerships.**

See generally, the title PARTNERSHIP.

##### **A. GENERALLY.**

Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828. See also, *White v. Sayers*, 101 Va. 821, 45 S. E. 747.

As to mining corporations, see the title CORPORATIONS, vol. 3, pp. 510, 557.

##### **B. ABSENCE OF DILECTUS PERSONARUM.**

The distinguishing feature of a mining partnership from ordinary trading partnerships is the absence of the feature called the "dilectus personarum;" that is, the right of the partners to choose their associates, with the necessary consequence that the transfer of his interest by one partner, ipso facto, works a dissolution of the partnership, while in a mining partnership, each member can transfer his interest to any other person and such person becomes, ipso facto, a member of the partnership, occupying the same relation thereto that the original member occupied. *Lamar v. Hale*, 79 Va. 147; *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

So neither will the bankruptcy nor death of one partner dissolve the firm. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

Of this distinguishing feature of mining partnerships, all persons dealing with the partnership are affected with notice. *Lamar v. Hale*, 79 Va. 147.

##### **C. AGENCY OF PARTNERS.**

Hence, also, the individual partners have a more limited authority to bind the partnership or its members, such authority being limited to expenditures necessary and usual in the particular business, such as necessary repairs. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

##### **D. MAJORITY CONTROL.**

When members of a mining partnership can not agree in management, those having a majority interest control its management in all things necessary and proper for its operation. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

##### **E. LIABILITY OF PARTNERS FOR NEGLIGENCE OR MISCONDUCT.**

If loss come to a firm by the culpable negligence or breach of duty or

wrongful conduct, or diversion of the social property from the firm's business to other business by one member, he is personally accountable therefor in an accounting between the members. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

#### F. LIEN OF PARTNERS FOR ADVANCES TO FIRM.

Partners have a lien on social property for advances or balances due them, but if they have divided the property or produce of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with "division orders" in oil mining. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

#### G. DISSOLUTION.

When cause is shown for dissolution of a mining partnership and the members are discordant and at ill will, and the partnership hopeless of prosperity, it should be dissolved, a receiver and manager appointed and the whole property sold and full account rendered; it is error to allow the partnership to continue business, making only a partial account and decreeing on its basis in favor of one against another member for a balance on such partial account, and leaving assets untouched by the account, and leaving the assets and business wholly in the possession and control of one partner, excluding the other. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

**MINING BOSS.**—See *Williams v. Thacker Coal, etc., Co.*, 44 W. Va. 599 30 S. E. 107, 108.

#### H. JURISDICTION OF EQUITY.

**Generally.**—Equity will take jurisdiction of a mining partnership, as of general partnerships. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

**Accounting.**—Where two members of a mining partnership, enter into a partnership between themselves to operate a mining lease, and pay a five per cent. royalty to the principal partnership, and the rent or royalty received in the leasing of the property is dependent upon the amount of mineral taken, a bill in equity will lie to compel an accounting by the operators or lessees of the mine. *Swearinger v. Steers*, 49 W. Va. 312, 38 S. E. 510. See also, as to general jurisdiction of equity over mining partnerships, *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

**Reimbursement for Repairs.**—A mining partner may claim reimbursement for proper repairs to partnership property, ordered by him, but not when he had caused the injury by an improper use thereof for his private ends. *Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828.

#### VII. Oil and Gas Wells as Nuisances.

Oil and gas wells are not, per se, nuisances. Whether they are nuisances to a dwelling house and its appurtenances depends on their location, capacity and management. *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936. See generally, the title NUISANCES

### Mining Partnership.

See the title MINES AND MINERALS, ante, p. 823.

**MINISTERIAL.**—See the titles MANDAMUS, ante, p. 508; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; STREETS AND HIGHWAYS. And see JUDICIAL, vol. 8, p. 629.

A duty is not less ministerial because an officer has to determine the existence of the facts which makes it necessary for him to act. *Lewis v. Christian*, 101 Va. 135, 43 S. E. 331.

A county court acting under the statute authorizing county courts to purchase salt, was held to be exercising a ministerial power. *Chesterfield v. Hall*, 80 Va. 321, 324; *Dinwiddie County v. Stewart*, 28 Gratt. 526; *Pulaski County v. Stewart*, 28 Gratt. 872.

**Ministerial Sale.**—In *Holly River Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214, 218, it is said: "The very object of these laws was to make the proceeding a judicial, as distinguished from a ministerial sale, made by a sheriff or marshal for taxes. These latter sales had already been made practically nugatory; for to them had constantly been applied the rule that, 'where a naked power is given by law to an officer or other person, that power must be strictly pursued, especially if, by the exercise of such power, the estates or rights of others may be forfeited or lost; and it will devolve on him who claims a right, under the exercise of such power, to show that it was in all respects exactly pursued.' *Nalle v. Fenwick*, 4 Rand. 585, 588 (1826)."

## Minister of the Gospel.

See the title RELIGIOUS SOCIETIES.

## Minors.

See the title INFANTS, vol. 7, p. 461.

## MINUTES OF COURT.

### CROSS REFERENCES.

See the titles CITIZENSHIP, vol. 2, p. 824; CLERKS OF COURT, vol. 2, p. 834; CONFESSION OF JUDGMENTS, vol. 3, p. 74; COSTS, vol. 3, p. 629; COURTS, vol. 3, p. 710; JUDGMENTS AND DECREES, vol. 8, p. 310; RECORDS.

**Time of Making Entry.**—If the entry of a judgment confessed in the office upon the order or minute book has not been made at the time of its confession, the clerk may make the entry at any time; and if he fails to do it, the court may at any time direct him to make the entry. *Shadrack v. Woolfolk*, 32 Gratt. 707. See also, the title JUDGMENTS AND DECREES, vol. 8, p. 310.

**Ministerial Duty.**—"Without, however, multiplying citations on this point, it will be sufficient to notice the case of *Digges v. Dunn*, 1 Munf. 56. In that case it was held, that although the statute required that all judgments of

the county court by default should be entered up by clerk as of the last day of the term, it was nevertheless a valid judgment, notwithstanding the failure of the clerk to make the entry. Whatsoever may be the functions of the clerk in recording a confession of judgment, his duty in entering up the judgment upon the minute book, under the statute, is purely ministerial; and if he fails to do so, it is simply a clerical misprision which may afterwards be corrected by the court or by the clerk himself." *Shadrack v. Woolfolk*, 32 Gratt. 707, 713.

**Effect of Failure to Note Confession on Minute Book.**—As to the effect of a



failure to enter a confession of judgment on the minute book of the court, see the title **CONFESSION OF JUDGMENTS**, vol. 3, p. 74.

**Effect of Failure to Note Fee of Commissioner on Minute Book.**—As to the effect of the failure to note the fee of a commissioner on the minute book, see the title **COSTS**, vol. 3, p. 629.

**Presentment Referred to in Minutes**

**of Court Part of the Record.**—A presentment of a grand jury in a county or corporation court, referred to in the minutes of the court, but without being spread at large upon them, is a part of the records of the court. *Myers v. Com.*, 2 Va. Cas. 160. See also, the titles **INDICTMENTS**, **INFORMATIONS AND PRESENTMENTS**, vol. 7, p. 384; **RECORDS**.

### **Misappropriation of Trust Funds.**

See the titles **CHARITIES**, vol. 2, p. 796; **EMBEZZLEMENT**, vol. 5, p. 63; **TRUSTS AND TRUSTEES**.

**MISCASTING.**—See *Morris v. Peyton*, 29 W. Va. 201, 11 S. E. 954, 961.

## **MISCEGENATION.**

**I. Provisions of the Statutes**, 854.

**II. Meaning of Term "Negro" in Statute**, 854.

**III. Indictment**, 855.

**IV. Evidence**, 855.

**V. Fine and Imprisonment**, 855.

**VI. Conflict of Laws**, 856.

**VII. Bastardy**, 856.

### **CROSS REFERENCES.**

See the titles **ADULTERY**, **FORNICATION AND LEWDNESS**, vol. 1, p. 184; **BASTARDY**, vol. 2, p. 334; **MARRIAGE**, ante, p. 570.

**I. Provisions of the Statutes.**

If any white and colored person shall go out of this state for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be as guilty, and be punished, as if the marriage had been in this state. Va. Code, 1904, § 3783.

If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be confined in the penitentiary not less than two nor more than five years. Va. Code, 1904, § 3788 (1877-78, p. 302).

**II. Meaning of Term "Negro" in Statute.**

**In General.**—Every person who has one-fourth part or more of negro blood shall be deemed a mulatto, and the word "negro" in any other section of this or any other statute shall be construed to mean mulatto as well as negro. Va. Code, 1860, ch. 103, § 9.

The term "negro" is identical in signification with the term "colored person," as defined by § 2, ch. 103, Va. Code, 1873; that is, "a person with one-fourth, or more, of negro blood." *Jones v. Com.*, 80 Va. 538.

**Specific Applications of Rule.**—A woman whose father was white and

whose mother's father was white, and whose greatgrandmother was of brown complexion, is not a negro in the sense of the statute. *McPherson v. Com.*, 28 Gratt. 939.

### III. Indictment.

See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 7, p. 371.

An indictment in the language of the act (acts, 1877-78, ch. 7, § 8), interdicting intermarriage between a negro and a white person, is sufficient. *Jones v. Com.*, 79 Va. 213.

To sustain an indictment under this statute, it is necessary to establish first, that the accused is a person with one-fourth or more of negro blood; that is, that he is a negro; unless this is proved, the offense is not proved, because this is a necessary and essential element of the crime, without which there is no crime committed. *Jones v. Com.*, 80 Va. 538.

**Form of the Indictment.**—The parties who violate the provisions of the act prohibiting the intermarriage of a white with a colored person are liable to indictment for lewd and lascivious cohabitation. *Kinney v. Com.*, 30 Gratt. 858, 32 Am. Rep. 690.

### IV. Evidence.

**Best Evidence Rule.**—See generally, the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

To sustain a charge under Virginia statute (Va. Code, 1877-78, ch. 7, § 8), the facts must be proved by the best evidence attainable. *Jones v. Com.*, 79 Va. 213.

**Proof of Actual Marriage.**—To sustain a charge under Virginia statute (Va. Code, 1877-78, ch. 7, § 8), the commonwealth must prove an actual marriage duly celebrated between the parties by a person duly authorized and qualified to celebrate it; or that the parties consummated the marriage

in the bona fide belief that the person celebrating it was legally authorized and qualified to celebrate it according to the law of Virginia. *Jones v. Com.*, 79 Va. 213.

**Proof of Color and Identity.**—To sustain a charge under Virginia statute (Va. Code, 1877-78, ch. 7, § 8), it is necessary to prove the color and the identity of the parties. *Jones v. Com.*, 79 Va. 213.

**Burden of Proof.**—See generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

In order to sustain an indictment under § 8, ch. 7, acts, 1877-78, making the intermarriage of a negro with a white person, a felony, it is necessary first to establish that the accused is a person with one-fourth, or more, of negro blood; id est, a negro; and the burden of proving this lies on the commonwealth. *Jones v. Com.*, 80 Va. 538.

To sustain an indictment under this statute, it is necessary to establish first, that the accused is a person with one-fourth or more of negro blood; that is, that he is a negro; unless this is proved, the offense is not proved, because this is a necessary and essential element of the crime, without which there is no crime committed. *Jones v. Com.*, 80 Va. 538.

### V. Fine and Imprisonment.

See generally, the titles FINES AND COSTS IN CRIMINAL CASES, vol. 6, p. 40; SENTENCE AND PUNISHMENT.

Any white person who shall intermarry with a negro, shall be confined in jail not more than one year, and fined not exceeding one hundred dollars. W. Va. Code, 1899, ch. 149, § 8.

If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be confined in the penitentiary not less than two nor more than five years. Va. Code, 1904, § 3788 (1877-78, p. 302).

## VI. Conflict of Laws.

See generally, the title **CONFLICT OF LAWS**, vol. 3, pp. 116, 117.

A marriage between a white person and a negro, although the marriage be celebrated in a state where such marriages are not prohibited, is void in the state of the domicile, and when they go to another state temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. *Kinney v. Com.*, 30 Gratt. 858.

The rule which requires that "a marriage valid where celebrated, is valid everywhere else," has no application to a marriage entered into in a foreign country, in contravention of the public policy and statutes of Virginia. Virginia Code, 1877-78, ch. 7, § 8, which pronounce marriage between them not

only absolutely void, but criminal. *Greenhow v. James*, 80 Va. 636.

The law of the domicile will govern in such case, and when they return they will be subject to all its penalties, as if such marriage had been celebrated within the state whose public law they have set at defiance. *Kinney v. Com.*, 30 Gratt. 858.

While the forms and ceremonies of marriage are governed by the laws of the place where the marriage is celebrated, the essentials of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. *Kinney v. Com.*, 30 Gratt. 858.

## VII. Bastardy.

See the title **BASTARDY**, vol. 2, p. 335.

## Misdemeanor.

See the titles **CRIMINAL LAW**, vol. 4, p. 9; **INDICTMENTS, INFORMATION AND PRESENTMENTS**, vol. 7, p. 371. See also, the specific offenses.

## Misfeasance

See references under **MALFEASANCE AND MISFEASANCE**, ante, p. 489.

## Misjoinder of Actions.

See the titles **ACTIONS**, vol. 1, p. 135; **AMENDMENTS**, vol. 1, p. 366.

## Misjoinder of Counts.

See the titles **AMENDMENTS**, vol. 1, p. 366; **INDICTMENTS, INFORMATION AND PRESENTMENTS**, vol. 7, p. 440.

## Misjoinder of Issue.

See the title **AMENDMENTS**, vol. 1, p. 366.

## Misjoinder of Parties.

See the title **PARTIES**.

## Misnomer.

See the titles **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 5; **AMENDMENTS**, vol. 1, p. 368; **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 4, p. 694; **INDICTMENTS, INFORMATION AND PRESENTMENTS**, vol. 7, p. 428; **NAMES; VARIANCE**.

## **Misrepresentation.**

See generally, the titles FRAUD AND DECEIT, vol. 6, p. 448; RESCISSION, CANCELLATION AND REFORMATION.

## **Missions.**

See the title CHARITIES, vol. 2, p. 794.

## **MISTAKE AND ACCIDENT.**

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As to liability of agent for mistake, see the title AGENCY, vol. 1, p. 259, et seq. As to mistake as excuse for failure to appeal in time, see the title APPEAL AND ERROR, vol. 1, p. 656, et seq. As to mistake in bail bond, see the title BAIL AND RECOGNIZANCE, vol. 2, pp. 201, 208. As to mistake in boundaries, see the title BOUNDARIES, vol. 2, pp. 584, 586, 603, et passim. As to mistake as ground for continuance, see the title CONTINUANCES, vol. 3, p. 289. As to effect of mistake in a deed, see the title DEEDS, vol. 4, p. 414. As to mistake in exchange of property, see the title EXCHANGE OF PROPERTY, vol. 5, p. 402. As to mistake as ground for disputing landlord's title, see the title LANDLORD AND TENANT, ante, p. 112. As to mistake as ground for new trial, see the title NEW TRIALS. As to mistake as obstacle to specific performance, see the title SPECIFIC PERFORMANCE. As to conversion of property by mistake, see the title TROVER AND CONVERSION. As to mistake of title, see the title VENDOR AND PURCHASER. As to mistake of jury as affecting verdict, see the title VERDICT. As to mistake in election to take legacy, see the title WILLS.

**I. Definitions and General Principles.**

**Mistake Defined.**—Mistake may be defined to be some unintentional act, omission or error arising from uncon-

sciousness, error, ignorance, forgetfulness, in position or misplaced confidence. *Ferrell v. Ferrell*, 53 W. Va. 515, 519, 44 S. E. 187.

**Error of Expression.**—"An error of expression occurs when the parties en-

ter into an agreement, and afterwards, in reducing its terms to writing, make a mistake, so that the instrument does not express the contract it was intended to evidence." *Ferrell v. Ferrell*, 53 W. Va. 515, 520, 44 S. E. 187.

**Compared to Fraud.**—The culpability and odiousness of fraud are not elements or concomitants of mere mistake. *Western Mining, etc., Co. v. Peytona, etc., Co.*, 8 W. Va. 406, 442.

But where an agent makes a mistake in the execution of his agency, and his principal, being informed thereof, refuses to correct it but tries to take advantage of it, he is as guilty in the eye of the law as if it were intentional fraud from the beginning. Being informed of his mistake it became his duty to correct it. *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661.

**Mistake May Be Equivalent to Fraud.**—A mistake may be so gross as to amount to, and in all respects be equivalent to, a fraud, so far as it affects the rights of those concerned. *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556; *Mills v. Norfolk, etc., R. Co.*, 90 Va. 523, 19 S. E. 171.

**Mistake Repelling Imputation of Fraud.**—A clear mistake or ignorance of his rights on the part of a person, repels the imputation of fraud, and gives an adverse party no equity against him. *McClung v. Hughes*, 5 Rand. 473; *Stuart v. Luddington*, 1 Rand. 403.

**Mistake Avoids Voluntary Waiver of Right.**—Where a dispute exists about the boundaries of land, and one of the parties yields his opinion, and acknowledges the right of his adversary, this acknowledgment shall not bind him, if at a future day he finds that he was mistaken, unless the acknowledgment was founded on some consideration. *Stuart v. Luddington*, 1 Rand. 403.

**Mistake of Agent.**—Where a principal refuses to correct a mistake made by his agent, after being informed

thereof, but tries to take advantage of it, he is responsible for it. It is his duty to correct it. *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661.

## II. Mistake and Accident as Grounds of Equity Jurisdiction.

### A. IN GENERAL.

Accident and mistake are among the familiar grounds of equitable jurisdiction. *Neff v. Baker*, 82 Va. 401, 4 S. E. 620; *Armstrong v. Hickman*, 6 Munf. 287, 297. See *Grafton v. Davisson*, 45 W. Va. 12, 29 S. E. 1028.

It is a court of equity's peculiar province to give relief according to justice, in cases of mistake and accident. *Price v. Fuqua*, 4 Munf. 68; *Byrne v. Edmonds*, 23 Gratt. 200. See *Galloway v. Dinsmore*, 83 Va. 309, 2 S. E. 517.

**Mistake Must Be Reasonable.**—Equity will not relieve against a mistake based on the belief of the party complaining, unless that belief is a fair and reasonable one justified by facts adequate to inspire it. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587. See post, "Diligence Required and Effect of Delay," II, H.

**Mistake of Scrivener.**—A mistake of the scrivener in drawing an instrument, whether of law or fact, will be corrected by a court of equity. *Alexander v. Newton*, 2 Gratt. 266; *Childers v. Deane*, 4 Rand. 406, 411; *Perkins v. Dickinson*, 3 Gratt. 335; *Troll v. Carter*, 15 W. Va. 567. See *Pennybacker v. Laidley*, 35 W. Va. 624, 11 S. E. 39; *Weidebusch v. Hartenstein*, 12 W. Va. 760; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181. See the title DEEDS, vol. 4, p. 414, et seq. But not to the prejudice of a lienor whose debt was contracted without notice thereof. *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181.

Even against the bona fide creditors of the grantor. *Alexander v. Newton*, 2 Gratt. 266.

No court of equity would hesitate to correct an error of the scrivener, clearly established, whether in a deed or parol contract. *Deitz v. Providence*, etc., Ins. Co., 33 W. Va. 526, 11 S. E. 50. See *Brown v. Bonner*, 8 Leigh 1.

Thus, where, by mistake of the scrivener in reducing to writing a contract, as clearly shown by the evidence, a material undertaking is accidentally omitted from the written agreement, equity will treat such undertaking as established and enforce it. *Booth v. Kesler*, 6 Gratt. 350.

**Must Be Distinct from Sense of Instrument.**—Equity will not relieve against a mistake in a written instrument unless the mistake be perfectly distinct from the sense of the instrument. *Jarrell v. Jarrell*, 27 W. Va. 743.

And a mistake in the execution of a writing will not in equity be corrected, unless it appears that the writing does not contain the intention of the parties thereto at the time it was made. *Jarrell v. Jarrell*, 27 W. Va. 743, 748.

**Mistakes in Legal Proceedings or Elsewhere.**—It is within the jurisdiction of chancery courts to correct mistakes, whether they occur in the course of legal proceedings or elsewhere. *Fore v. Foster*, 86 Va. 104, 9 S. E. 497; *Epes v. Williams*, 89 Va. 794, 17 S. E. 235; *Anderson v. Woodford*, 8 Leigh 316; *Halcomb v. Innis*, 4 Call 364; *Clark v. Sayers*, 48 W. Va. 33, 36, 35 S. E. 882; *Cushwa v. Improvement, etc., Co.*, 45 W. Va. 490, 32 S. E. 259.

"No court of record would hesitate to correct a clerical misprision in its own records, if the mistake was clearly established." *Deitz v. Providence*, etc., Ins. Co., 33 W. Va. 526, 11 S. E. 50. See the title RECORDS.

**Reformation and Rescission of Deeds, etc., for Mistake.**—Equity takes jurisdiction to reform deeds and other instruments, set aside compromises, and rescind contracts, on account of mutual mistake. *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647; *Epes v. Williams*, 89 Va. 794, 17 S. E. 235; *Fudge v.*

*Payne*, 86 Va. 303, 10 S. E. 7; *Ware v. Starkey*, 80 Va. 191; *Zollman v. Moore*, 21 Gratt. 313; *Leas v. Eidson*, 9 Gratt. 277; *Irick v. Fulton*, 3 Gratt. 193; *Alexander v. Newton*, 2 Gratt. 266; *Keyton v. Brawford*, 5 Leigh 39; *Glassell v. Thomas*, 3 Leigh 113, 125, 129; *Lamb v. Smith*, 6 Rand. 552; *Chamberlaine v. Marsh*, 6 Munf. 283; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Fearson, etc., Co. v. Wilson*, 51 W. Va. 30, 41 S. E. 137; *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661; *Sillman v. Gillespie*, 48 W. Va. 374, 37 S. E. 669; *Koen v. Kerns*, 47 W. Va. 575, 35 S. E. 902; *Smith v. O'Keeffe*, 43 W. Va. 172, 27 S. E. 353; *Croft v. Hanover, etc., Co.*, 40 W. Va. 508, 21 S. E. 854; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856; *Deitz v. Providence, etc., Ins. Co.*, 33 W. Va. 526, 11 S. E. 50; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39, 46; *Nichols v. Cooper*, 2 W. Va. 347; *Anderson v. Snyder*, 21 W. Va. 632; *Crislip v. Cain*, 19 W. Va. 438; *Allen v. Yeater*, 17 W. Va. 128; *Harner v. Price*, 17 W. Va. 523, 548; *Western Mining, etc., Co. v. Peytona, etc., Co.*, 8 W. Va. 406. See subject discussed under the title RESCISSION, CANCELLATION AND REFORMATION.

**Independently of Fraud.**—In case of mutual mistake going to the essence of the contract there need be no presumption of fraud. On the contrary, equity will often relieve, however innocent the parties may be. *Harner v. Price*, 17 W. Va. 523, 544; *Armstrong v. Hickman*, 6 Munf. 287, 297.

If a mutual innocent mistake in reference to the substance of a contract is made by the parties, though neither party be guilty of fraud, actual or constructive, a court of equity has jurisdiction to rescind the contract and should do so or refrain from doing so according to circumstances. The jurisdiction of a court of equity in such a

case is based on the fact, that the minds of the parties to the contract, because of such mistake, never in fact met; so there was really no mutual assent to the contract, and no contract is binding without such mutual assent. *Crislip v. Cain*, 19 W. Va. 438.

## B. MISTAKE OF FACT.

### 1. In General.

Equity relieves against a material mistake of facts, as well as against fraud, in a deed or contract in writing. *Moore v. Western Assur. Co.*, 103 Va. 391, 49 S. E. 499; *Throckmorton v. Throckmorton*, 91 Va. 42, 50, 22 S. E. 162; *Redd v. Dyer*, 83 Va. 331, 2 S. E. 283; *Ware v. Starkey*, 80 Va. 191; *Watson v. Hoy*, 28 Gratt. 698, 711; *Long v. Weller*, 28 Gratt. 347; *Zollman v. Moore*, 21 Gratt. 313; *McConaughy v. Camden*, 18 W. Va. 140; *French v. Townes*, 10 Gratt. 513; *Irick v. Fulton*, 3 Gratt. 193; *Shepherd v. Henderson*, 3 Gratt. 367; *Pullen v. Mullen*, 12 Leigh 434; *Long v. Israel*, 9 Leigh 556; *Brown v. Bonner*, 8 Leigh 1; *Chamberlaine v. Marsh*, 6 Munf. 283; *Blessing v. Beatty*, 1 Rob. 287; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Allen v. Yeater*, 17 W. Va. 128; *Harner v. Price*, 17 W. Va. 523, 544.

It is one of the original grounds of equity jurisdiction to amend an instrument made under a mutual mistake of fact, so as to do justice to all concerned, and place them as nearly as practicable in statu quo. And it matters not whether the mistake was as to the factors, the mode, or the result of the calculation. *Massie v. Heiskell*, 80 Va. 789.

And a mutual mistake of fact of the parties as to a material term in their contract is ground for relief in equity. *Boschen v. Jurgens*, 92 Va. 756, 761, 24 S. E. 390.

### 2. Makes Act or Contract Voidable.

An act done or contract made under a mistake or ignorance of a material fact, is voidable and relievable in

equity, and this rule applies not only to cases where there has been a studied suppression or concealment of facts by the other side, which would amount to a fraud, but also to many cases of innocent ignorance and mistake on both sides. *Fore v. Foster*, 86 Va. 104, 106, 9 S. E. 497. And see *French v. Townes*, 10 Gratt. 513; *Armstrong v. Hickman*, 6 Munf. 287; *Calloway v. Dinsmore*, 83 Va. 309, 2 S. E. 517.

### 3. True State of Facts Must Be Established.

Equity will not relieve against an alleged mutual mistake of fact when it is clear that there can be no true statement of the case established, and that any effort to reform the instrument alleged to have been executed in mutual mistake would in all probability, if not certainly, result in injustice to the estate of one of the parties. *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5; *Chapman v. Persinger*, 87 Va. 581, 13 S. E. 549, citing *Foster v. Rison*, 17 Gratt. 321, 340; *White v. Campbell*, 80 Va. 180.

### 4. Compared to Mistake of Law.

See post, "Compared to Mistake of Fact," II, C, 1.

"The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact than where it is in matter of law. The admission of ignorance of fact as a ground of relief is not attended with those inconveniences which seem to be the reason for rejecting ignorance of law as a valid excuse." *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493, 496. See *Harner v. Price*, 17 W. Va. 523, 544; *Childers v. Deane*, 4 Rand. 406, 411.

Mistake of fact is a mistake not caused by neglect of legal duty on the part of the person making it. But if there be actual ignorance of facts, neglect to ascertain them will not in every case preclude correction. *Simmons v. Looney*, 41 W. Va. 738, 24 S. E. 677.



## C. MISTAKE OF LAW.

### 1. Compared to Mistake of Fact.

See ante, "Compared to Mistake of Law," II, B, 4.

The distinction between mistakes of law and fact, as a foundation for equitable relief, is well established. A court of equity may grant relief where the mistake is one of fact, but it would be liable to the greatest abuse to permit one to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law affecting his title. The wisdom of the rule which forbids it is founded in sound wisdom and policy. *Throckmorton v. Throckmorton*, 91 Va. 42, 50, 22 S. E. 162; *Zollman v. Moore*, 21 Gratt. 313; *Wimbish v. Com.*, 75 Va. 839.

This distinction is said to be one of expediency and policy, rather than of principle. Upon reasons of natural justice, the claim to such relief would seem to be as strong in the one case as in the other. The courts, however, proceeded on the idea that, if parties were permitted to take advantage of mere mistakes of law, the grossest fraud and injustice might be perpetrated, and, in the language of Lord Ellenborough, there is no saying to what extent the excuse of ignorance might not be carried. *Zollman v. Moore*, 21 Gratt. 313, 320.

The ground of this distinction between ignorance of law and ignorance of fact seems to be, as every man of reasonable understanding is presumed to know the law, and to act upon the rights, which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act, or to make a contract, and then to set up his ignorance of law as a defense. *Harner v. Price*, 17 W. Va. 523, 544.

### 2. Rule Stated.

It is, therefore, an established rule of the courts that ignorance of the law will not affect the contracts of parties, or excuse from the legal con-

sequence of their acts. *Zollman v. Moore*, 21 Gratt. 313, 321; *Moore v. Luckess*, 23 Gratt. 160, 168; *Martin v. Lewis*, 30 Gratt. 672, 684.

And agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally valid and obligatory. *Harner v. Price*, 17 W. Va. 523; *Meem v. Rucker*, 10 Gratt. 506.

And this rule applies to married women with reference to their separate estates. *Throckmorton v. Throckmorton*, 91 Va. 42, 22 S. E. 162.

The case of *Irick v. Fulton*, 3 Gratt. 193, has been relied on as furnishing a contrary rule. A slight examination will show that this is a total misconception. *Irick* and wife sold and conveyed their interest in a tract of land to *Fulton*, both parties supposing that *Mrs. Irick* was entitled only to one undivided interest therein. It was afterwards ascertained that *Mrs. Irick* was the owner of the entire tract. This court set aside the sale and conveyance upon the ground that the parties only sold and purchased, and only intended to sell and purchase, such undivided interest. The vendee supposed he was merely purchasing a part, and in point of fact only paid for such part. It would therefore have been grossly unjust to permit him to retain the whole. *Zollman v. Moore*, 21 Gratt. 313, 324.

**No Relief to Mistake of Law.**—A court of equity will afford no relief to a mistake which was a mistake of law. *Zollman v. Moore*, 21 Gratt. 313; *Meem v. Rucker*, 10 Gratt. 506, 511; *Richmond, etc., R. Co. v. Shippen*, 2 Pat. & H. 327; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660; *Home Sewing Machine Co. v. Floding*, 27 W. Va. 540.

Wherever the question has turned upon a mere mistake of law, without the admixture of other elements, it is believed that few cases can be found, even in the English courts, in which relief has been afforded. *Zollman v.*

Moore, 21 Gratt. 313, 321; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660, 672; *Harner v. Price*, 17 W. Va. 523, 540.

In *Ferry v. Clark*, 77 Va. 397, 409, it is said: "A mistake in law, however, where there is neither fraud, concealment, nor mistake in fact, constitutes no ground for rescinding a contract." Citing *Brown v. Armistead*, 6 Rand. 594, 604; *Jennings v. Palmer*, 8 Gratt. 70. See *Martin v. Lewis*, 3 Gratt. 672, 684.

### 3. What Constitutes Mistake of Law.

**Erroneous Legal Deduction from Known Facts.**—A mistake, made with a knowledge of every fact necessary to be known to form a correct conclusion as to the question to be decided, is a mistake of law consisting in an erroneous legal deduction from existing facts, and can not, unless accompanied with imposition, misrepresentation, undue influence, misplaced confidence or surprise, furnish good grounds for the interposition of a court of equity. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660, 672; *Pusey v. Gardner*, 21 W. Va. 469, 477; *Ruffner v. Love*, 24 W. Va. 181, 185.

**Mistake as to Legal Rights.**—In March, 1863, M., the widow, and R. and others, adult children of S., deceased, file their bill against the infant heirs of S., for the sale of land. The bill says the land was conveyed by W., the father of M., to S. and M.; that M. is entitled to one-half the land, and the other plaintiffs and the defendants are entitled to the other half. There is a decree for the sale, a sale for Confederate money, to Z., the report confirmed, and a decree appointing a receiver to collect the money, and distribute it, and convey the land to Z. This is done and report confirmed. Afterwards M. files a bill of review, and claims that under the deed from W., she having survived her husband, S., is entitled to the whole of the land, and asks that the sale may be set aside,

and the land restored to her. Held, that the mistake of M. as to her right, was a mistake of law, and a court of equity will afford no relief in such case. *Zollman v. Moore*, 21 Gratt. 313.

**Mistake in Construing Confiscation Act.**—Mistake in regard to the interpretation and validity of the act of Congress confiscating private property during the war between the states, is not such a mistake of law as will bar a right to relief. *Webb v. Alexandria*, 33 Gratt. 168, 177.

And mistake as to whether jurisdiction attached by seizure under such confiscation act, dependent upon whether the stock was properly seized, is not a mere mistake of law. *Webb v. Alexandria*, 33 Gratt. 168, 177.

### 4. Exceptions to Rule.

#### a. General Statement.

While it is a general rule that mistake in matter of law can not be admitted as ground of relief, it is not a rule of universal application, especially in courts of equity. It is not an absolute and inflexible rule, but has its exceptions, though such exceptions, in the language of Judge Story, are few, and generally stand upon some very urgent pressure of circumstances. If the maxim is used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to its general application; but it is otherwise when the word "jus" is used in the sense of denoting a private right. *Webb v. Alexandria*, 33 Gratt. 168, 176; *Zollman v. Moore*, 21 Gratt. 313, 323; *Crislip v. Cain*, 19 W. Va. 438, 478.

A mistake of law, stripped of all other circumstances, was not relievable in a court of equity, and whatever exceptions there may be to this rule will be found few in number, and to have something peculiar in their character, and to involve other elements of decision. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660, 672; *Zollman v. Moore*, 21 Gratt. 313, 322; *Crislip v.*

Cain, 19 W. Va. 438, 478; Harner v. Price, 17 W. Va. 523, 541.

But exceptions to the general rule that mistake of law furnishes no ground of relief are fully recognized by this court in the cases of Zollman v. Moore, 21 Gratt. 313, and Brown v. Rice, 26 Gratt. 467. Webb v. Alexandria, 33 Gratt. 168, 176.

#### b. Question One of Doubt.

See post, "Mistake in Settlements," II, L, 4.

It has also been held, in numerous cases, that where the law is confessedly doubtful and about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law will not forfeit any of his legal rights by reason of such mistake. (See Kerr on Fraud and Mistake, 398, 401, and cases there cited.) Webb v. Alexandria, 33 Gratt. 168, 176. See Shriver v. Garrison, 30 W. Va. 456, 4 S. E. 660.

But see Harner v. Price, 17 W. Va. 523, where it is said, quoting from Story, that the distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of an unsettled and doubtful principle, is not very intelligible or practically very easy of application.

**Adjustment and Compromise of Doubtful Question.**—Within six months after the act for scaling debts was passed, S. recovered a judgment by default against P. Afterwards, P. being about to move the court to scale the debt, the parties, with the assistance of their counsel, agreed that the debts should be scaled as of the value at the date of the bond, which was one for three, and this is entered of record upon the judgment. Afterwards, P. files his bill to have the debt scaled as of the date the bond fell due. Held, the agreement between the parties is conclusive, and the debt is not to be further scaled. The only ground of equity alleged in the bill for disturbing the adjustment solemnly entered

into between the parties, aided by counsel on both sides, is that there was a mistake of law in scaling the debt as of the date of the contract, instead of the maturity thereof. Whether this be a mistake of law or not, may perhaps be considered a question of some doubt; but as this question does not necessarily arise in this case, no opinion thereon will be now expressed. Smith v. Penn, 22 Gratt. 402.

And even had they fallen into a mistake of law, it was not such a mistake as equity should have relieved against. The question involved in the adjustment were at the time, to say the least of them, doubtful questions; and it is well settled that if the question be a doubtful one, and the doubtfulness of that question is made the basis of an arrangement or agreement, the court will give no relief. Smith v. Penn, 22 Gratt. 402.

#### c. Mistake Brought about by Other Party.

Where there is a mutual mistake between the parties to a written contract or deed, even though such mistake be legal, a court of equity will grant relief against the same, especially when the party who is seeking advantage thereof brought about the same, either in person or by his agent. For to permit him to do so, is to allow him to take a fraudulent advantage of and convert into a wrong a mistake innocent in its inception, and which he is equitably bound to correct, as being the true cause thereof. Robinson v. Braiden, 44 W. Va. 183, 28 S. E. 798; Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. 581; Biggs v. Bailey, 49 W. Va. 188, 38 S. E. 499.

When such mistake is established by clear and convincing proof, the rights of innocent third parties do not interfere. Biggs v. Bailey, 49 W. Va. 188, 38 S. E. 499.

#### d. Fraud, Undue Advantage, Trust and Confidence, etc.

Mere mistake of law will not alone

be ground of relief against a conveyance or other act; but when accompanied by fraud in any form such as misrepresentation or concealment of facts, imposition, undue influence, or misplaced confidence, or if advantage has been in any way taken of one's ignorance of law to mislead him, or where there is a relation of trust and confidence, it will be ground of relief in equity. *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808.

Where the mistake is one of law, and there are other elements not in themselves sufficient to authorize a court of equity to interpose, but which, combined with such mistake, should entitle the party to relief, the court will afford it. *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808, 810.

And if a man through misapprehension or mistake of the law parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake can not in conscience retain the benefit or advantage so acquired. *Webb v. Alexandria*, 33 Gratt. 168, 176.

#### **e. Mistake of Arbitrators.**

See the title **ARBITRATION AND AWARD**, vol. 1, p. 704.

It is true, as a general rule, that mere mistakes of law afford no ground of relief in courts of law or equity. This rule, however, has no application to this case of mistake of arbitrators. *Moore v. Luckess*, 23 Gratt. 160, 168.

But a court of equity alone has jurisdiction to correct an error of law made by arbitrators with respect to the time when the statute of limitations will cease to run. *Moore v. Luckess*, 23 Gratt. 160.

#### **D. MATERIALITY.**

**In General.**—The fact concerning which the mistake is made must be

material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact, which, though connected with the transaction, is merely incidental, and not a part of the very subject matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief, affirmative or defensive. *Simmons v. Palmer*, 93 Va. 389, 393, 25 S. E. 6; *Armstrong v. Hickman*, 6 Munf. 287, 297; *Harner v. Price*, 17 W. Va. 523, 544; *Crislip v. Cain*, 19 W. Va. 438, 476.

#### **Executory and Executed Contracts Compared.**—See the title **RESCISSION, CANCELLATION AND REFORMATION**.

Where the contract is executory, it is now well settled in this state, that the mutual mistake of the parties in a matter which is part of the essence of the contract, and of the substance of the thing contracted for, will be relieved against in a court of equity, and may be good ground for rescinding the contract, or of specifically executing it upon equitable terms of compensation, according to circumstances. *Chamberlaine v. Marsh*, 6 Munf. 283; *Irick v. Fulton*, 3 Gratt. 193; *Zollman v. Moore*, 21 Gratt. 313, 324; *Lamb v. Smith*, 6 Rand. 552; *Harner v. Price*, 17 W. Va. 523, 548; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39, 46; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493, 497.

Even though the contract be in writing, and required to be so by the statute of frauds. *Leas v. Eidson*, 9 Gratt. 277, 278.

**But where the contract has been executed, and rescission is asked upon that ground, the mistake must be plain and palpable, and must affect the very**

substance of the thing contracted for. *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897; *Thompson v. Jackson*, 3 Rand. 504, 507; *Glassell v. Thomas*, 3 Leigh 113.

### E. MUTUALITY.

**In General.**—Where mistake alone is set up as a ground for relief, the mistake must be mutual and participated in by both parties. *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457; *French v. Chapman*, 88 Va. 317, 13 S. E. 479; *Redd v. Dyer*, 83 Va. 331, 2 S. E. 283; *Long v. Weller*, 29 Gratt. 347; *Blessing v. Beatty*, 1 Rob. 287, 298; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. 581; *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856, 858; *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660, 672; *Biggs v. Bailey*, 49 W. Va. 188, 38 S. E. 499; *Robinson v. Braiden*, 44 W. Va. 183, 24 S. E. 798; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187. See *Watkins v. Elliott*, 28 Gratt. 374.

"A mistake for which a court of equity can grant relief must generally be mutual with the parties. It is not enough to show the sense and intention of one of the parties to the contract. Though it be clearly established that the intention of one of the parties is mistaken and misrepresented by the written contract, that can not avail unless it be further shown that the other party agreed to it in the same way, and that the intention of both of them was by mistake misrepresented by the written contract." *Pusey v. Gardner*, 21 W. Va. 469, 476. See *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856.

If the parties act fairly, and it is not a case where one is bound to communicate the facts to the other upon the general ground of confidence, a court of equity will not interfere. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660, 672.

**In Case of Fraud or Surprise.**—Even a unilateral mistake will in some cases

afford a solid ground for relief, as, for instance, where it operates as a surprise or fraud upon the ignorant party. But in all such cases it is not the mistake or ignorance of material facts alone which is ground for relief, but the unconscientious advantage taken thereof by the other party. *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660, 672.

**Mistake Induced by Fraud.**—Mistake on one side, induced by fraud on the other, is ground for equitable interposition. *Jones v. Robertson*, 2 Munf. 187.

For the same relief is afforded where there has been a mistake on one side accompanied by fraud or other inequitable conduct on the other. *Shenandoah Valley, etc., R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457; *French v. Chapman*, 88 Va. 317, 13 S. E. 479; *Blessing v. Beatty*, 1 Rob. 287; *Watkins v. Elliott*, 28 Gratt. 374.

**Mistake of Scrivener.**—The demand of mutuality, however, does not apply to a mistake that is one purely that of a scrivener, who may properly be regarded as the agent of both parties and his mistake is the mistake of both. *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Alexander v. Newton*, 2 Gratt. 266. See ante, "In General," II, A.

**Mistake as to Size of City Lot.**—A representation that a city lot partially covered by buildings has a front of nineteen feet, seven inches, and a depth of one hundred and thirty-eight feet, is material, and, if untrue, but made in good faith by the vendor, and acquiesced in by the vendee, and the vendee has been guilty of no laches in discovering the error, a case of mutual mistake has been established, against which a court of equity will, at the instance of the purchaser, give relief by a decree for the value of the deficiency. *Boschen v. Jurgens*, 92 Va. 756, 24 S. E. 390.

**Mistake of Law.**—"Nor will misunderstandings as to the legal effect of

## **Money Counts.**

See the title ASSUMPSIT, vol. 2, p. 7.

## **Money Had and Received.**

See the title ASSUMPSIT, vol. 2, p. 10.

## **Money in Court.**

See the title PAYMENT INTO COURT.

## **Money Lent.**

See the title ASSUMPSIT, vol. 2, p. 18.

## **Money Paid.**

See the title ASSUMPSIT, vol. 2, p. 19.

## **Monomania.**

See the titles INSANITY, vol. 7, p. 668; TESTAMENTARY CAPACITY.

# **MONOPOLIES.**

### **CROSS REFERENCES.**

See the titles CARRIERS, vol. 2, p. 689; FERRIES, vol. 6, p. 32; GAS, vol. 6, p. 704; RAILROADS; RESTRAINT OF TRADE.

**Monopolies Not Favored.**—"Monopolies, and exclusive privileges in the nature of monopolies, are not favored by the common law, nor by the interests of society. A government is not to be presumed to design to relinquish or circumscribe its rightful power or control in promoting the advantage of the community, any further than it has plainly and clearly indicated, without the necessity of resorting to remote inferences and construction." *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650, 653.

**Trade Combinations.**—"The formation of trade combination, call it monopoly, is not actionable alone. How far the grant of exclusive privilege by the state (and this is the only monopoly, legally speaking) is valid when its right is contested, is one thing. We are not dealing with that. This monopoly is not that. It is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law. The lion has stretched out his paws and grabbed in prey more than others; but that is

the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say; but natural law accords the right, it is given him by the Maker for existence." *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 617, 40 S. E. 591.

**A monopoly can not be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits; to give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for revival and competing works. Therefore, where the legislature granted a charter to a company to construct a navigable canal along the valley of a stream, and in consideration of the work to take the profits, without any provision against the exercise of power to charter other and rival companies, the legislature was nowise restrained from chartering a company to construct a railroad along the same valley, though the railroad shall afford the same public accommodation as the canal, and may in effect impair or annihilate its profits.**

Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh 42.

A private cemetery company may fix the rate of "grave fees" to be charged by its superintendent, and give him a monopoly of such fees. The law against restraints of trade has no appli-

cation to a private cemetery company conducting its affairs in its own way, and by agents of its own selection for the bona fide purpose of effectuating the objects for which the company was organized. Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769.

### Monstrans De Droit.

See the title ESCHEAT, vol. 5, p. 143.

**MONTH.**—This was an application for a writ of error to a judgment of the superior court of Henrico. There was only one error assigned. The petitioner had been indicted, and found guilty of unlawful shooting, and the jury ascertained the term of his imprisonment in the penitentiary house to be twelve months. It was alleged, that as the act of assembly prescribed the imprisonment for a term "not less than one year, nor more than seven years" (and as the law, when it uses the term year, signifies a period of 365 days, or twelve calendar months, and that whenever the term month is used, it means a lunar month of twenty-eight days, unless expressly stated to be a calendar month), the judgment was not pursuant to the act of assembly, and therefore was erroneous. Per Curiam. The motion for a writ of error was overruled. Vandewall v. Com., 2 Va. Cas. 275. See also, the title TIME.

### Monuments.

See the title BOUNDARIES, vol. 2, p. 582.

### Moot Questions.

See the title ACTIONS, vol. 1, p. 129.

**MORALITY.**—See Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274, 277.

### Moral Insanity

See the title INSANITY, vol. 7, p. 672.

### Moral Obligations.

See the title CONTRACTS, vol. 3, p. 374.

### Moral Turpitude.

See the titles ILLEGAL CONTRACTS, vol. 7, p. 241; LIBEL AND SLANDER, ante, p. 248.

As to whether a crime involving moral turpitude is such an infamous offense as renders a witness incompetent, see the title WITNESSES.

### More or Less.

As to the construction of contracts for sale of land described as containing a certain number of acres "more or less," see the title VENDOR AND PURCHASER. See also, the title SALES.

### Mortality Tables.

See the titles DEATH BY WRONGFUL ACT, vol. 4, p. 264; JUDICIAL NOTICE, vol. 8, p. 632.

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